General Order 18-10

UNITED STATES DISTRICT COURT
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 implementation subject to a reasonable period for public notice and comment to be determined by the clerk. [1] See 28 U.S.C. § 2071(b).

LOCAL RULE CV-3 Commencement of Action

(a) **Habeas Corpus and 28 U.S.C. § 2255 Motions.** The clerk may require that petitions for a writ of habeas corpus and motions filed pursuant to 28 U.S.C. § 2255 be filed on a set of standardized forms approved by this court and supplied, upon request, by the clerk without cost to the petitioner. Petitioners who are not proceeding *in forma pauperis* must pay a $5.00 filing fee. *See* 28 U.S.C. § 1914(a). There is no filing fee for Section 2255 motions filed by prisoners in federal custody.

(b) **Page Limitation for Petitions for a Writ of Habeas Corpus and 28 U.S.C. § 2255 Motions.** Absent leave of court, 28 U.S.C. §§ 2241 and 2254 habeas corpus petitions and 28 U.S.C. § 2255 motions and the initial responsive pleadings thereto, shall not exceed thirty pages in non-death penalty cases, and one hundred pages in death penalty cases, excluding attachments. Replies and sur-replies, along with all other motions and responses thereto, shall not exceed fifteen pages in length in non-death penalty cases and thirty pages in length in death penalty cases, excluding attachments. All documents that exceed ten pages in length shall include a table of contents and table of authorities, with page references. Such tables and certificates of service and conference of counsel shall not be counted against the indicated page limit.

(c) **Motions for Stay of Execution.** A motion for stay of execution filed on behalf of a petitioner challenging a sentence of death must be filed at least seven days before the petitioner's scheduled execution date or recite good cause for any late filing.

(~~c~~d) **Page Limitations in Civil Rights Lawsuits.** Absent leave of court, complaints and the initial responsive pleadings thereto filed in civil rights proceedings shall not exceed thirty pages, excluding attachments. All documents that exceed ten pages in length shall include a

[1] New language appears in underlined text, and deleted language appears in strikeout text.

table of contents and table of authorities, with page references. Such tables and certificates of service and conference of counsel shall not be counted against the indicated page limit.

COMMENT: A new section (c) is added to Local Rule CV-3 to include a time period for the filing of motions to stay executions in death penalty cases. This added language tracks similar language used in the local rules of the Western District of Texas and is intended to avoid the last minute presentation of issues when possible. Recognizing the need for flexibility, the rule allows late filings on a showing of good cause. This rule change was suggested to the Committee by court staff attorneys experienced with death penalty litigation.

LOCAL RULE CV-5 Service and Filing of Pleadings and Other Documents

(d) **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 lieu of service and notice by mail. Such service is deemed complete upon sending. Service after 5:00 p.m. Central Time shall be deemed served on the following day for purposes of calculating responsive deadlines.

COMMENT: Local Rule CV-5(d) is amended to resolve confusion that has arisen regarding its last sentence. Some parties have read its last sentence to deem documents served after 5:00 p.m. on the date due as untimely, construing the rule to deem those documents served the following day. Language is therefore added to clarify the intent of the rule – documents served after 5:00 p.m. shall be deemed served the following day only for purposes of calculating responsive deadlines, not for any other purposes, like determining due date compliance.

LOCAL RULE CV-7 Pleadings Allowed; Form of Motions and Other Documents

(l) **Emergency Motions.** Emergency motions are only those necessary to avoid imminent, irreparable harm such that a motion pursuant to LOCAL RULE CV-7(e) to shorten the period for a response is inadequate. Counsel filing an emergency motion should ensure that: (1) the caption of the motion begins with the word "emergency;" (2) the motion is electronically filed using the CM/ECF drop down menu option entitled "emergency;" (3) the motion clearly states the alleged imminent, irreparable harm and the circumstances making proceeding under LOCAL RULE CV-7(e) inadequate; and (~~3~~4) the chambers of the presiding judge is notified, either by telephone, e-mail, or fax, that an emergency motion has been filed.

COMMENT: Increasingly, the court has experienced parties filing “emergency” motions in situations that do not present imminent, irreparable harm and for which a separate motion

to shorten a response time under LR CV-7(e) and/or request a hearing are adequate. Accordingly, LR CV-7(l) is amended to define "emergency motions" as those necessary to avoid imminent, irreparable harm such that LR CV-7(e) inadequately addresses the circumstances. LR CV-7(l) is further amended to include a requirement that the movant clearly state in its motion the alleged imminent, irreparable harm and circumstances making LR CV-7(e) inadequate. This definition and added motion requirement are intended to aid the court in identifying and properly handling true emergency motions, while discouraging those for which other processes are more appropriate. Parties are also reminded that the certificate of conference requirements that accompany typical motion practice apply to motions under LR CV-7(e). While the court realizes that no definition can encompass every conceivable circumstance that might constitute an emergency the Court expects emergency motions to be rare, used very sparingly and filed only in true emergencies where all other remedies are wholly inadequate. Parties abusing this rule may be subject to sanctions.

LOCAL RULE CV-62 Stay of Proceedings to Enforce a Judgment

(a) ~~**Supersedeas**~~ **Bond or Other Security.** Unless otherwise ordered by the presiding judge, a ~~supersedeas~~ bond or other security staying execution of a money judgment shall be in the amount of the judgment, plus 20% of that amount to cover interest and any award of damages for delay, plus $250.00 to cover costs. The parties may waive the requirement of a ~~supersedeas~~ bond or other security by stipulation.
The bond or other security shall:

(1) confirm ~~that~~whether the ~~insurance company~~security provider is on the Treasury Department's list of certified ~~bond~~ companies, unless the Court orders otherwise (a link to this list may be found on the court's website); and

(2) confirm the underwriting limitation, if applicable for the type of security.

~~(b) **Power of Attorney.** If the insurance company is not incorporated and licensed in the State of Texas, a power of attorney must be filed. It is the responsibility of the filing attorney to confirm that the information on the power of attorney and bond is correct. The agent for the power of attorney shall reside in the Eastern District of Texas, unless the Court orders otherwise.~~

(~~c~~b) **Electronic Filing Requirement for Bonds.** When a bond or other security is posted for any reason, it must be electronically filed in the case by the posting party. The paper original of the ~~bond~~security shall be retained by the posting party unless otherwise directed by the court.

COMMENT: Local Rule 62 is amended to reflect changes to Fed. R. Civ. P. 62 and 65.1 that become effective Dec. 1, 2018. In particular, these federal rules have been amended to make clear that a party may obtain a stay by posting a bond or other security. The reference to "supersedeas bond" is eliminated, reflecting an expansion of Rule 62 to include forms of security other than a bond if approved by the court. Additionally, because Fed. R. Civ. P. 65.1 designates the clerk of the court as the agent for service for any security provider, Local Rule CV-62(b) is deleted as unnecessary and potentially in conflict with the federal rule.

LOCAL RULE AT-2 Attorney Discipline

(a) **Generally.** The standards of professional conduct adopted as part of the Rules Governing the State Bar of Texas shall serve as a guide governing the obligations and responsibilities of all attorneys appearing in this court. It is recognized, however, that no set of rules may be framed which will particularize all the duties of the attorney in the varying phases of litigation or in all the relations of professional life. Therefore, the attorney practicing in this court should be familiar with the duties and obligations imposed upon members of this bar by the Texas Disciplinary Rules of Professional Conduct, court decisions, statutes, and the usages customs and practices of this bar.

(b) **Disciplinary Action Initiated in Other Courts.**

(1) Except as otherwise provided in this subsection, a member of the bar of this court shall automatically lose his or her membership if he or she loses, either temporarily or permanently, the right to practice law before any state or federal court for any reason other than nonpayment of dues, failure to meet continuing legal education requirements, or voluntary resignation unrelated to a disciplinary proceeding or problem.

(2) When it is shown to the court that a member of its bar has lost his or her right to practice as described in subsection (1) above, the ~~clerk~~court shall issue an order directing the attorney to show cause within thirty days why the imposition of the identical discipline in this district should not be imposed, and imposing that identical discipline if no response is filed. ~~If the attorney fails to comply by filing a response, then the court shall enter an order imposing discipline identical to that of the other entity to the extent practicable.~~ If the attorney files a response, the court will consider the following defenses in determining whether the identical discipline is warranted in this court: that the procedure followed in the other jurisdiction deprived the attorney of due process; that the proof was so clearly lacking that the court determines it cannot

accept the final conclusion of the other jurisdiction; that the imposition of the identical discipline would result in a grave injustice; that the misconduct established by the other jurisdiction warrants substantially different discipline in this court; that the misconduct for which the attorney was disciplined in the other jurisdiction does not constitute professional misconduct in this State or in this court. If the attorney fails to establish one or more of the defenses listed above, the court shall enter the identical discipline to the extent practicable. If the attorney establishes one or more of these defenses, the court may impose whatever discipline it deems necessary and just.

(3) A member of this bar who has lost the right to practice law before any state or federal court, either permanently or temporarily, must advise the clerk of that fact within thirty days of the effective date of the disciplinary action. The clerk will thereafter proceed in accordance with this rule.

COMMENT: Local Rule AT-2(b) was amended last year to revise the reciprocal discipline process for attorneys. Experience from the past year suggests that the rule should be revised to make the order to show cause why reciprocal discipline should not be imposed self-executing if the attorney fails to respond.

LOCAL PATENT RULES

4. CLAIM CONSTRUCTION PROCEEDINGS

4-1. Exchange of Proposed Terms and Claim Elements for Construction.

(a) Not later than 10 days after service of the "Invalidity Contentions" pursuant to P. R. 3-3, each party shall simultaneously exchange a list of claim terms, phrases, or clauses which that party contends should be construed or found indefinite by the Court, and identify any claim element which that party contends should be governed by 35 U.S.C. ' 112(~~6~~f).

(b) The parties shall thereafter meet and confer for the purposes of finalizing this list, narrowing or resolving differences, and facilitating the ultimate preparation of a Joint Claim Construction and Prehearing Statement.

4-2. Exchange of Preliminary Claim Constructions and Extrinsic Evidence.

(a) Not later than 20 days after the exchange of "Proposed Terms and Claim Elements for Construction" pursuant to P. R. 4-1, the parties shall simultaneously exchange a preliminary proposed construction of each claim term, phrase, or clause which the parties collectively have identified for claim construction purposes. Each such "Preliminary Claim

Construction" shall also, for each element which any party contends is governed by 35 U.S.C. §112(~~6~~f), identify the structure(s), act(s), or material(s) corresponding to that element.

(b) At the same time the parties exchange their respective "Preliminary Claim Constructions," they shall each also provide a preliminary identification of extrinsic evidence, including without limitation, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses they contend support their respective claim constructions or indefiniteness positions. The parties shall identify each such item of extrinsic evidence by production number or produce a copy of any such item not previously produced. With respect to any such witness, percipient or expert, the parties shall also provide the identity and a brief description of the substance of that witness' proposed testimony.

(c) The parties shall thereafter meet and confer for the purposes of narrowing the issues and finalizing preparation of a Joint Claim Construction and Prehearing Statement.

4-3. Joint Claim Construction and Prehearing Statement.

~~Not later than 60 days after service of the "Invalidity Contentions," the parties shall complete and file a Joint Claim Construction and Prehearing Statement, which shall contain the following information:~~

(a) Not later than 60 days after service of the "Invalidity Contentions," the parties shall complete and file a Joint Claim Construction and Prehearing Statement, which shall contain the following information:

(1) The construction of those claim terms, phrases, or clauses on which the parties agree;

(~~b~~2) Each party's proposed claim construction or indefiniteness position for each disputed claim term, phrase, or clause, together with an identification of all references from the specification or prosecution history that support that ~~construction~~ position, and an identification of any extrinsic evidence known to the party on which it intends to rely either to support its ~~proposed construction of the claim~~ position or to oppose any other party's ~~proposed construction of the claim~~ position, including, but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses;

(~~c~~3) The anticipated length of time necessary for the Claim Construction Hearing;

(~~d~~4) Whether any party proposes to call one or more witnesses, including experts, at the Claim Construction Hearing~~,~~ and the identity of each such witness~~, and for each expert, a~~

~~summary of each opinion to be offered in sufficient detail to permit a meaningful deposition of that expert~~; and

(~~e~~5) A list of any other issues which might appropriately be taken up at a prehearing conference prior to the Claim Construction Hearing, and proposed dates, if not previously set, for any such prehearing conference.

(b) Each party shall also simultaneously serve a disclosure of expert testimony consistent with Fed. R. Civ. P. 26(a)(2)(B(i)-(ii) or 26(a)(2)(C) for any expert on which it intends to rely to support its proposed claim construction or indefiniteness position or to oppose any other party's proposed claim construction or indefiniteness position.

COMMENT: P.R. 4 is amended to address two disclosure issues: (1) the clear inclusion of indefiniteness within the disclosure requirements and (2) the disclosures required for witnesses on which a party intends to rely.

The first change regarding indefiniteness recognizes the interrelationship between claim construction and indefiniteness positions and the efficiencies that arise from early disclosures regarding both. The inclusion of indefiniteness positions in P.R. 4 should support many judges' current practices of requiring either that indefiniteness issues be briefed in claim construction briefing under P.R. 4-5 or in parallel summary judgment practice.

The second change addresses a perceived lack of clarity among some practitioners as to the disclosure requirements and procedures for witnesses, particularly expert witnesses, during the claim construction process, and the disclosure required under P.R. 4-3 to support the later use of a witness's declaration with a party's briefing or testimony at a hearing. *See, e.g.*, *Lodsys, LLC v. Brother Int'l Corp.*, No. 2:11-cv-90-JRG, ECF No. 573 (E.D. Tex. Mar. 12, 2013); *Innovative Display Techs., LLC v. Acer Inc.*, No. 2:13-cv-522-JRG, ECF No. 85 (E.D. Tex. July 11, 2014)); *Uniloc USA, Inc. v. Autodesk, Inc.*, No. 2:15-cv-1187-JRG-RSP, ECF No. 60 (E.D. Tex. May 25, 2016). To clarify the disclosure requirements and reduce motions to strike later-used witness declarations, P.R. 4-2 and 4-3 are amended to require that witnesses be identified and that expert witnesses provide a disclosure consistent with Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii) on or before respective rule deadlines. Thus, this amendment clarifies that P.R. 4-3 requires a complete statement of all opinions the witness will express and the basis and reasons for them, as well as the facts or data considered by the witness in forming them. *See* Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii). Having made this disclosure, parties may then confidently and flexibly use expert witness testimony in the form of a witness declaration or live testimony (when permitted) to support later claim construction briefing or hearing presentations, provided the testimony is within the scope of the earlier disclosure.

LOCAL ADMIRALTY RULES

LAR (e)(13) Sale of Property.

(A) Notice. Unless otherwise ordered upon good cause shown or as provided by law, notice of sale of property in an action in rem shall be published on at least four days, between three and thirty-one days prior to the day of the sale.

(B) Payment of Bid. These provisions apply unless otherwise ordered in the order of sale:

(i) The person whose bid is accepted shall immediately pay the Marshal the full purchase price if the bid is $1000 or less.

(ii) If the bid exceeds $1,000, the bidder shall immediately pay a deposit of at least $1,000 or 10% of the bid, whichever is greater, and shall pay the balance within three days.

(iii) If an objection to the sale is filed within the period in LAR (e)(13)(~~H)(ii~~F), the bidder is excused from paying the balance of the purchase price until three days after the sale is confirmed.

(iv) Payment shall be made by certified check or by cashier's check.

COMMENT: LAR (e)(13)(B)(iii) is amended to correct an incorrect cross-reference for its incorporated time requirement.

Formatting and Stylistic Updates to Our Entire Local Rules Set

This recently completed multi-year project involved a complete review and update of our current rules for non-substantive stylistic improvement and structural consistency. Upon completion of the review, the Committee and clerk's office specifically reviewed the edits to ensure no substantive changes are included.

So ORDERED and SIGNED this 25th day of October, 2018.

RODNEY GILSTRAP
Chief Judge