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DISTRICT OF DELAWARE'S AMENDMENTS TO THE LOCAL RULES OF CIVIL PRACTICE AND PROCEDURE

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The District of Delaware is recognized as a favorite forum for patent litigation and other high-stake commercial cases. A primary reason for this, other than the popularity of the individual judges, is the District of Delaware's Local Rules of Civil Practice and Procedure (the "Rules"), which provide uniformity and consistency across cases. Effective April 30, 2010, the Court amended the Rules in response to the latest amendments to the Federal Rules of Civil Procedure ("Federal Rules"), particularly the rules relating to the computation of time. This article provides an overview of the Rules and highlights the amendments that are most likely of interest to litigants.

I. SCOPE OF THE RULES

The Rules are construed consistent with 1 U.S.C. §§ 1-5 and shall be followed insofar as they are not inconsistent with the Federal Rules.[i] In the interest of justice, however, the Court may modify the Rules in any particular case.[ii] The Rules are available for viewing and downloading from the District's website, and paper copies are available from the Clerk of the Court (the "Clerk") for a fee.[iii] The Court may impose sanctions for a failure to follow the Rules, which might include costs, fines and attorneys' fees, and judgment against the defaulting party.[iv]

II. COMMENCEMENT, PROCESS, SERVICE, AND FILING OF AN ACTION

A civil action is initiated by completing and filing a civil coversheet with the Clerk.[v] The plaintiff must indicate on the coversheet whether the action is related to any other civil action previously decided or pending in this or any other federal district court.[vi] A civil action is related if it (1) arises from the same or substantially identical transactions; (2) involves the same or substantially the same parties or property; (3) involves the same patent or trademark; or (4) would otherwise entail substantial duplication if heard by different judges.[vii] In patent cases, plaintiff shall attach and file copies of the patents at issue to the complaint.[viii] The defendant has an obligation to review the coversheet and bring any missing or inaccurate information to the attention of the Clerk, all parties, and the Court.[ix]

Upon or after the filing of a complaint, plaintiff or its counsel must present a completed form of summons for each defendant to the Clerk for the Clerk's signature and seal, unless the case is brought under 28 U.S.C. § 1915(d).[x] An amendment to the Rules now provides that, if service is made pursuant to 10 Del. C. § 3104 and § 3113 (long-arm jurisdiction), plaintiff or its counsel shall, within 14 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.[xi] This amendment extends the time within which a plaintiff must file the affidavit of mailing from 10 days to 14 days.[xii]

Documents submitted for filing with the Court, including a document placed under seal, 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.[xiii] When computing time periods for filing pursuant to Fed. R. Civ. P. 6(a)(3), the amendments provide that the Clerk's Office shall be deemed inaccessible at any time when the Clerk's Office is closed due to inclement weather.[xiv]

The Court's Notice of Electronic Filing, which is automatically generated for each document filed, shall serve as the certificate of service and no

separate certificate shall be filed when all parties are registered recipients under the CM/ECF Procedures.[xv] A certificate of service is required, however, for the original of any pleading or other paper filed with the Court when all parties are not CM/ECF registered recipients or if the document is filed under seal or is too voluminous and must be filed in paper form.[xvi] The Rules 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 16.3(c) in addition to the electronically filed document.[xvii]

Discovery requests and responses, except in cases involving pro se parties, is served on all parties represented by counsel, but is not filed with the Court.[xviii] In lieu thereof, the requesting party and the party serving responses shall file with the Court a "Notice of Service." [xix]

Filing the notice of taking an oral deposition under Fed. R. Civ. P. 30(b)(1) and 30(b)(6) and filing the proof of service under Fed. R. Civ. P. 45(b)(3) satisfies this requirement.[xx] 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.[xxi] Discovery material shall be filed with the Court when used at trial or when necessary to a pretrial or post-trial motion.[xxii]

III. PLEADINGS AND MOTIONS

Requests for relief from the Court shall be presented by motion.[xxiii] The motion itself, or the brief or memorandum accompanying the motion must clearly articulate the relief requested from the Court and the grounds in support thereof.[xxiv] A response to a motion is due within 14 days of service, with a reply due 7 days thereafter.[xxv] The amendments changed these time requirements from 10 days and 5 days, respectively.[xxvi]

Nondispositive motions must be accompanied by an averment of counsel for the moving party that reasonable effort was made to reach agreement with the opposing party.[xxvii] Any party may apply for oral argument on any motion, or the Court may order it sua sponte.[xxviii] The amendments increase the time for filing the application from 3 days to 7 days after service of the reply.[xxix]

Rule 7.1.3 should be referred to for formatting specifics, as it governs the form and contents of briefs, memoranda of points and authorities, and appendices. As relevant here, the amendments alter the length of opening and answering briefs and replies. Opening and answering briefs are not to exceed 20 pages (formerly 40 pages), and replies are limited to 10 pages (formerly 20 pages).[xxx]

Opening and answering briefs shall have (a) a table of contents, (b) a table of citations, (c) a statement of the nature and stage of

proceedings, (d) a summary of the argument, (e) a concise statement of facts, (f) an argument section divided by appropriate section headings, and (g) a short conclusion stating the precise relief sought.[xxxii]

Citation form shall be made in accordance with "A Uniform System of Citation," published by the Harvard Law Review Association.[xxxii] Unreported opinions must be filed only if they are neither reported in the National Reporter System nor available to the Court on either WESTLAW or LEXIS.[xxxiii] An appendix may be filed with any brief.[xxxiv]

Motions for reargument are granted sparingly.[xxxv] The time for filing a motion for reargument has been increased from 10 days to 14 days in the amendments.[xxxvi] The amendments also add a new requirement limiting a motion for reargument to 10 pages, and for the first time provide, specifically, that "[n]o motion for reargument shall be filed by any party that has filed an objection to a Report and Recommendation issued by a Magistrate Judge pursuant to Fed. R. Civ. P. 72.[xxxvii]

The amendments do not alter the requirements and procedures applicable to the Fed. R. Civ. P. 16(b) scheduling conference, nor change exemptions under the Rules to the requirements and procedures of Fed. R. Civ. P. 16(b) and 26(f).[xxxviii] Parties are still required to confer prior to the conference to discuss pretrial management issues.[xxxix] Issues to be considered include, inter alia, (1) case scheduling, including a trial date, if appropriate; (2) the number of interrogatories, requests for admissions, and number of depositions and locations to be allowed; (3) the procedure for resolving discovery disputes; (4) briefing practice to be employed, including what matters are or are not to be briefed; and (5) the possibility of settlement.[xl]

A pretrial conference must be held in all civil actions for which a trial is scheduled.[xli] The procedure for the conference has remained largely unchanged and should be consulted well in advance of the hearing because of the detailed requirements imposed by the Rules.[xlii] For example, the Rules require the plaintiff to provide a draft pretrial order to all other parties at least 30 days before the pretrial order is scheduled to be filed.[xliii] This is also the time that the plaintiff is to provide its exhibits (or provide reasonable access to them) if the parties have not already exchanged exhibits.[xliv] Under the amendments, all other parties are required to make a similar exchange 14 days before the pretrial order is due and then plaintiff is required to file the pretrial order with the Court 7 days before the pretrial conference.[xlv]

IV. DEPOSITIONS AND DISCOVERY

Unless the Court orders otherwise or the parties agree, a deposition in a case pending in the District may only be attended by (a) the deponent, (b) counsel for any party and members and employees of their firms, (c) a party who is a natural person, (d) an individual who has been designated by counsel to represent a party that is not a natural person, (e) counsel for the deponent, and (f) any consultant or expert

designated by counsel for any party.[xlvi] If a protective order has been entered, a person not authorized under the order to have access to documents or information designated confidential may be excluded while a deponent is being examined about such confidential document or information.[xlvii] Reasonable notice for taking a deposition is increased from 7 days to 10 days under the amendments.[xlviii]

The Rules require that interrogatories and requests for production be sequentially numbered.[xlix] Amendments to the Rules in 2007 removed the 50 cap limit on the number of interrogatories and thus implicitly imposed the 25-interrogatory limit found in Fed. R. Civ. P. 33(a). No change is made to this limit in the April 30th amendments. Additional interrogatories, however, are allowed with leave of Court or upon written stipulation, as provided for under Fed. R. Civ. P. 33(a).

The Rules contain a default confidentiality provision. If any documents are deemed confidential by the producing party and the parties have not stipulated to a confidentiality agreement, then disclosure shall be limited to members and employees of the firm of trial counsel who have entered an appearance and, where appropriate, have been admitted pro hac vice, until such an agreement is in effect.[l] Such persons are under an obligation to keep such documents confidential and to use them only for purposes of litigating the case.[li]

Any discovery motion filed pursuant to Fed. R. Civ. P. 26 through 37 shall include, in the motion itself or in a memorandum, a verbatim recitation of each interrogatory, request, answer, response, or objection which is the subject of the motion or shall have attached a copy of the actual discovery document which is the subject of the motion.[lii]

V. TRIALS

Trial practice remains the same under the amendments. Jury trial demand, as permitted by Fed. R. Civ. P. 38(b), is made by placing a notation in the caption of the pleading stating "Demand For Jury Trial" or the equivalent.[liii] The amendments clarify that counsel for all parties must confer 3 business days before the pretrial conference about jury instructions and any party desiring a special verdict or interrogatories, as provided for in Fed. R. Civ. P. 49, must file a suggested form at least 3 business days before the pretrial conference.[liv]

Unless otherwise ordered, the Court will conduct voir dire.[lv] After all challenges for cause have been exercised and determined, members of the panel are announced.[lvi] The plaintiff and defendant may each exercise 3 peremptory challenges, unless ordered otherwise, with plaintiff having the first, third, and fifth opportunities and defendant having the second, fourth, and last opportunities.[lvii] Counsel that calls a witness for direct examination at trial may not consult or confer with the witness until after direct and cross-examination are concluded, except for the purpose of determining whether a privilege applies or

how to comply with a court order.[lviii]

The District of Delaware added a second magistrate judge to the bench since the Rules were last amended in 2007. The amendments do not alter the procedure for consenting to their respective jurisdiction. Following consent of the parties, the magistrate judges may conduct trials, jury and nonjury, in all civil actions and hear and determine all pre- and post-trial motions whether dispositive or non-dispositive.[lix] Litigants in the District regularly consent to the jurisdiction of the magistrate judges.

VI. MISCELLANEOUS PROVISIONS

There has been only one amendment to the Rules applicable to transfer or removed cases. The time within which the parties shall submit to the Clerk of the Court a statement identifying all pending matters that require judicial action, has been increased from within 20 days to within 21 days of the filing of a transferred or removed case.[lx]

The Rules regarding the filing of a bill of costs and the requirements and timing of an application to recover attorneys' fees remain unchanged, except as to some of the time requirements applicable to the taxation of costs.[lxi] Under the amendments, a party shall within 14 days after the time for appeal has expired or within 14 days after the issuance of the mandate of the appellate court, file a bill of costs.[lxii] Within 14 days after service by any party of a bill of costs, any other party may serve and file specific objections to any item.[lxiii] The Clerk has 28 days after receipt of a party's bill of costs, and review of any objection, to tax costs under the amendments.[lxiv] A party must oppose the decision within 7 days of service.[lxv]

The amendments do not alter the requirement that, unless otherwise ordered by the Court, attorneys that are not admitted to practice by the Supreme Court of the State of Delaware, may only be admitted pro hac vice to practice in the District if associated with local Delaware counsel. [lxvi] Unless otherwise ordered by the Court, local counsel shall file all papers with the Court, attend all proceedings, and be the CM/ECF registered user.[lxvii] The Model Rules of Professional Conduct of the American Bar Association apply to practice in the District.[lxviii]

The amendments to the Rules were recommended by the Lawyers Advisory Committee of the United States District Court for the District of Delaware with the approval of the Court and bring the Rules in conformity with the recent amendments to the Federal Rules.

[i] D. Del. LR 1.1(c).
[ii] D. Del. LR 1.1(d).
[iii] D. Del. LR 1.2(a).
[iv] D. Del. LR 1.3(a), (b).
[v] D. Del. LR 3.1(a).
[vi] D. Del. LR 3.1(b).
[vii] D. Del. LR 3.1(b)(1)-(4).
[viii] D. Del. LR 3.2.
[ix] Id.

[x] D. Del. LR 4.1(a).
[xi] D. Del. LR 4.1(b).
[xii] Id.
[xiii] D. Del. LR 5.1(a), 5.1.3.
[xiv] D. Del. LR 5.1(b).
[xv] D. Del. LR5.2(a).
[xvi] D. Del. LR5.2(b).
[xvii] D. Del. LR5.3.
[xviii] D. Del. LR5.4(a), (b).
[xix] D. Del. LR5.4(b).
[xx] D. Del. LR5.4(b)(1).
[xxi] D. Del. LR5.4(b)(2).
[xxii] D. Del. LR5.4(b)(3).
[xxiii] D. Del. LR7.1.2(a).
[xxiv] Id.
[xxv] D. Del. LR 7.1.2(b).
[xxvi] Id.
[xxvii] D. Del. LR7.1.1.
[xxviii] D. Del. LR Rule 7.1.4.
[xxix] Id.
[xxx] D. Del. LR 7.1.3(a)(4).
[xxxi] D. Del. LR 7.1.3(c)(1)(A)-(G).
[xxxii] D. Del. LR 7.1.3(a)(5).
[xxxiii] D. Del. LR 7.1.3(a)(7).
[xxxiv] D. Del. LR 7.1.2(a).
[xxxv] D. Del. LR 7.1.5.
[xxxvi] Id.
[xxxvii] D. Del. LR 7.1.5.(a)(b).
[xxxviii] See D. Del. LR 16.1 and 16.2.
[xxxix] D. Del. LR 16.1(a).
[xl] D. Del. LR 16.1(b)(1)-(5).
[xli] D. Del. LR 16.3(a).
[xlii] See D. Del. LR 16.3.
[xliii] D. Del. LR 16.3(d)(1).
[xliv] Id.
[xlv] D. Del. LR 16.3(d)(2), (4).
[xlvi] D. Del. LR 30.3.
[xlvii] Id.
[xlviii] D. Del. LR 30.1.
[xlix] D. Del. LR 26.1(a).
[l] D. Del. LR 26.2.
[li] Id.
[lii] D. Del. LR 37.1.
[liii] D. Del. LR 38.1
[liv] D. Del. LR 51.1(a), (c).
[lv] D. Del. LR 47.1(a).
[lvi] D. Del. LR 47.1(b).
[lvii] Id.
[lviii] D. Del. LR 43.1.
[lix] D. Del. LR 73.1.
[lx] D. Del. LR 81.2.
[lxi] See D. Del. LR 54.2 and 54.3.
[lxii] D. Del. LR 54.1(a)(1).
[lxiii] D. Del. LR 54.1(a)(3).
[lxiv] D. Del. LR 54.1(a)(4).
[lxv] D. Del. LR 54.1(d).
[lxvi] D. Del. LR 83.5(d).
[lxvii] Id.
[lxviii] D. Del. LR 83.6(d).

Thanks for your support.

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