HISTORY, BACKGROUND AND COMMENTARY
LOCAL RULES OF
PRACTICE AND PROCEDURE
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

[FIRST EDITION – 2002]
[*Updated – April, 2004*]

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ADMIRALTY – CIVIL – CRIMINAL – HABEAS CORPUS – MAGISTRATE JUDGE

Introductory Note: This compilation was prepared from notes and various sources to provide a history of the development of the local rules in the District of Alaska intended to aid in their interpretation and application and, perhaps more importantly, provide future revisers with background so that it is not necessary to reinvent the wheel. Unfortunately, at the time it was prepared, which in some cases was some substantial length of time after their adoption, the history and comments of the Committees in drafting the rules is, at best, spotty.

The materials on the rules prior to 2002 were derived primarily from information retained in the Federal Court Library. In some instances, in particular with relation to the Admiralty Rules prior to 2002, background materials, other than the rules, have apparently vanished into the proverbial circular file (or, as this writer is wont to do, have been put somewhere where they will not get lost — never to be seen again). With respect to the 1995 edition of the Local (Civil) Rules and the work of the committees on the Criminal and Magistrate Judge Rules in 1994–95, the comments of the committee were available. However, materials related to the 1981/82 edition of the rules are not to be found.

Various drafts, memos and other source documents, to the extent they are known to exist, are retained by the Librarian of the Federal Courts, District of Alaska.

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OVERVIEW OF 2002 REVISION

In November 2001 the compiler, as Court Rules Attorney, was directed by the District Court judges to review all local rules and, as necessary or appropriate, recommend amendments to the rules. The charge given was that the rules must be: (1) consistent with the requirements of the national rules; (2) consistent with actual practice and procedure; (3) written in plain English; (4) current; and (5) "user friendly."

All local rules, Admiralty, Bankruptcy, Civil, Criminal, *Habeas Corpus*, and Magistrate Judge were completely revised. For the most part the amendments were stylistic, not substantive. One major restructuring involved "spinning off" the *Habeas Corpus* Rules as a separate set of rules to coincide with the structuring and numbering of the national rules.

Style followed Garner, *Guidelines for Drafting and Editing Court Rules* as suggested by the Judicial Conference of the United States. The changes consisted principally of a restructuring of the rules: breaking subsections into paragraphs, subparagraphs, and items to improve readability and ensure that elements of a rule were more clearly delineated. The archaic "shall" was eliminated, replaced with "must," "will," "may," or "should" as appropriate. To the extent possible, plain English was used, *i.e.*, "legalese" and Latin phrases eliminated. All subsections were given appropriate titles and, where necessary to assist understanding, paragraphs were also titled.

In addition, the rules were carefully examined to ensure that the federal rules of practice and procedure promulgated by the Supreme Court and the provisions of the various governing code sections were not replicated or paraphrased. This resulted in some rules being deleted or revised as replicating, inconsistent or in conflict with national rules. [However, one must note that these changes did not result in any change to the rules of practice and procedure.] Some changes resulted from amendments to the national rules or governing statutes after the existing rules were adopted or, in the case of those rules that had been forwarded to the court recommending adoption but not yet adopted, since the date they were forwarded to the court.

Finally, as part of the overall revision process, "Related Provisions" were added to the rules cross-referencing local or national rules and, in some instances, statutes that related to the subject matter of the rule. Local rules supplement national rules; thus, it is frequently impossible to ascertain from the local rule alone all the procedural steps that must be followed. In addition, the process itself may encompass more than one rule: *e.g.*, motion practice includes not just the motion itself, but format, hearings and service as well, which are in separate rules. The intent of this addition was to direct the attention of the user to those related rules (or statutes) that would assist in understanding and applying the rules, or to complete the procedure.

ADMIRALTY RULES

BACKGROUND

The admiralty rules were completely revised and adopted effective November 15, 1999, replacing the rules adopted in 1960, as subsequently amended. Those rules resulted from the work of a committee chaired by (now Judge) Morgan Christen and comprised of Magistrate Judge John D. Roberts, (now Judge) Suzanne H. Lombardi, Steven J. Shamburek, Esq., Mark C. Manning Esq., Neil T. O'Donnell, Esq., Lanning M. Trueb, Esq., Marc C. Wilhelm, Esq., and U.S. Marshall Randy M. Johnson. Unfortunately, the notes or comments of that committee have been misplaced; accordingly, at this time it is impossible to provide a definitive analysis of the reasoning or intent of the committee in drafting those rules.

2002 REVISION

The 2002 revision process consisted mostly of some fine tuning, but did result in some substantive changes. One stylistic change made was to change the numbering system by adding a dash (-) between the letter and the number of the rule; this will, hopefully alleviate some of the problems with citing the rules when the rule includes subparagraphs or items, *e.g.*, Rule (e)-14(d)(2)[B](i). Among the changes were the deletion of certain rules, the deletion of which did not change current practice or procedure.

LAR (a)(1) Authority — unnecessary; no other local rule refers to the authority to issue local rules.

LAR (b)(2) Order Authorizing Clerk to Issue Process — paraphrased the requirements of Supplemental Rule B.

LAR (g)(1) Newspapers for Publishing Notices — the specific language of the particular rules under which publication is required made this rule superfluous.

RULE BY RULE HISTORY / COMMENTS

RULE (a)-1 TITLE AND SCOPE OF RULES FOR ADMIRALTY AND MARITIME CLAIMS

Former Rule: LAR (a)(2)

2002 Revision. Paragraphs (a)(2) and (3) added to this rule are intended to make explicit that which has been implicit. No substantive change to the rules intended.

RULE (a)-2 DEFINITIONS

Former Rule: LAR (a)(3)

2002 Revision: Stylistic.

RULE (b)-1 AFFIDAVIT SHOWING DEFENDANT'S ABSENCE

Former Rule: LAR (b)(1)

2002 Revision. Stylistic.

RULE (b)-2 USE OF STATE PROCEDURES

Former Rule: LAR (g)(3)

2002 Revision. Renumbered rule; the process and procedures for garnishment are part of Supplemental Rule B.

RULE (c)-1 FUNDS OR INTANGIBLE PROPERTY

Former Rule: LAR (c)(1).

2002 Revision. As revised, ¶ (a)(1) modifies the language to eliminate an apparent internal inconsistency between the provision in the first sentence of the former rule that the person served must show cause and remainder of the rule that provides for an option: turn over or show cause. The third sentence of the former rule dealing with the effect of service simply restated existing law and was eliminated as required by F.R.Civ.P. 83 (also is questionable whether it is permissible to "create" that effect by a local rule of practice and procedure if it is not existing law). The last sentence of former LAR (c)(1) referred to an incorrect Supplemental Rule; this was corrected in revised ¶ (b)(2).

RULE (c)-2 PUBLICATION OF NOTICE OF ACTION AND ARREST

Former Rule: LAR (c)(2)

2002 Revision. The time within which to file an answer [former subsection [G], revised ¶ (b)(7(A)] was changed to 20 days to coincide with Supplemental Rule C(6) as amended in the 2000 class amendments.

RULE (c)-3 NOTICE REQUIRED FOR DEFAULT AND DEFAULT JUDGMENT IN ACTION IN REM

Former Rule: LAR (c)(3)

2002 Revision. The former rule was ambiguous as to the identity of "such other person." The revised rule substitutes "persons known to have an interest who have not appeared" for the term "such persons." The former rule did not specify how notice to persons having a known interest in the vessel is to be made, nor did it specify the time required for the notices to parties who have appeared. The revised rule provides for service under F.R.Civ.P. 5(b) to those identified parties and specifies at least 3 days notice be given [coincides with F.R.Civ.P. 55(b)(2)]. Added a presumption that effective notice has been given to persons having recorded interests if sent to the address shown on the official records of the documenting agency. 46 CFR Part 67, Subparts Q [§ 67.231 *et seq*] and R (§ 67.250 *et seq*] require that the documents include the address of the mortgagee/lienor. A check of the UCC filings should reveal any claimants, including addresses on undocumented vessels. In the absence of information that it is incorrect, parties ought to be entitled to rely on the addresses provided by the claimants in these records.

RULE (c)-4 ENTRY OF DEFAULT AND DEFAULT JUDGMENT IN ACTIONS IN REM

Former Rule: LAR (c)(4)

2002 Revision. In redrafting, former subsection (a), ¶ (1) was revised to encompass Rule (c)-3 in its entirety. This made the provision of former ¶ (a)(2) superfluous and it was eliminated from the revised rule. As revised, any possible ambiguity is removed: either a person has complied with the requirements of Rule (c)-3 or has not.

RULE (d)-1 RETURN DATE

Former Rule: LAR (d)(1)

2002 Revision. Stylistic.

RULE (e)-1 ITEMIZED DEMAND FOR JUDGMENT

Former Rule: LAR (c)(1)

2002 Revision. Stylistic.

RULE (e)-2 SALVAGE ACTION COMPLAINTS

Former Rule: LAR (e)(2)

2002 Revision. Stylistic.

RULE (e)-3 VERIFICATION OF PLEADINGS

Former Rule: LAR (e)(3).

2002 Revision. Amended to (1) encompass all documents that may require verification under the Supplemental Rules and (2) add a provision for partnerships and LLCs. This change filled the gaps in the former rule.

RULE (e)-4 REVIEW BY JUDICIAL OFFICER

Former Rule: LAR (e)(4)

2002 Revision. Stylistic.

RULE (e)-5 PROCESS HELD IN ABEYANCE.

Former Rule: LAR (e)(5)

2002 Revision. The first sentence of the former rule appeared to indicate that F.R.Civ.P. 4(m) authorizes process to be held in abeyance. However, Rule 4(m) does not contain such an authorization; authorization to hold issuance of process in abeyance is found in Supplemental Rule E(3)(c). The revised rule is consistent with that authorization, which extends to maritime garnishment and attachment as well as *in rem* actions.

RULE (e)-6 INSTRUCTIONS TO MARSHAL

Former Rule: LAR (e)(6)

2002 Revision. Stylistic.

RULE (e)-7 PROPERTY IN POSSESSION OF UNITED STATES OFFICER

Former Rule: LAR (e)(7)

2002 Revision. Stylistic.

RULE (e)-8 SECURITY FOR COSTS.

Former Rule: LAR (e)(8)

2002 Revision. Stylistic.

RULE (e)-9 ADVERSARY HEARING

Former Rule: LAR (e)(9)

2002 Revision. Stylistic.

RULE (e)-10 APPRAISAL

Former Rule: LAR (e)(10)

2002 Revision. Stylistic.

RULE (e)-11 SECURITY DEPOSIT FOR SEIZURE OF VESSELS

Former Rule: LAR (e)(11)

2002 Revision. Stylistic.

RULE (e)-12 INTERVENORS' CLAIMS

Former Rule: LAR (e)(12)

2002 Revision. Stylistic.

RULE (e)-13 CUSTODY OF PROPERTY

Former Rule: LAR (e)(13)

2002 Revision. Stylistic.

RULE (e)-14 SALE OF PROPERTY

Former Rule: LAR (e)(14)

2002 Revision. Stylistic.

RULE (f)-1 SECURITY FOR COSTS

Former Rule: LAR (f)(1)

2002 Revision. Stylistic.

CIVIL RULES

1995 REVISION

The 1995 revisions were the result of five years' work by an advisory committee of Alaska lawyers chaired by R. Colin Middleton, Esq. [The Committee was chaired by Judge Andrew Kleinfeld until his elevation to sit on the Ninth Circuit Court of Appeals.] The Committee included (now Judge) Harold M. Brown, Gary Zipkin, Esq., and U.S. District Court Judge James K. Singleton, Jr. Judge Ralph R. Beistline, Robert C. Bundy, Esq. (then U.S. Attorney), Sue Ellen Tatter, Esq., and Millard Ingraham, Esq. also contributed to this committee.

As stated by the Committee, the goal was to make the local federal rules as similar to the local state rules as possible in order to avoid confusion for those who litigate in both court systems. The Local Rules, when adopted, will govern practice and procedure in the United States District Court for the District of Alaska and supplement the Federal Rules of Civil Procedure which govern civil litigation in federal courts throughout the United States. The Local Rules were last substantially revised in 1981. These proposed Local Rules include major changes in local practice which includes new discovery rules patterned on those recently adopted by the Alaska Supreme Court, which in turn are patterned on Federal Rules of Civil Procedure 26, *et seq*., which went into effect in December of 1993. The discovery rules require parties to make significant disclosures regarding their claims and defenses without court intervention. A rule adopting The Alaska Rules of Professional Conduct is also proposed. Other proposed changes include a rule permitting participation in civil proceedings by telephone with the permission of the court; a rule permitting videotaping of depositions; a rule providing for supervision of minor settlements; and a rule based on the state rule regarding alternative dispute resolution and mediation.

2002 REVISIONS

In addition to the substantial stylistic changes to the rules, the 2002 revision project also produced several substantive changes. Several rules were deleted as obsolete or duplicative; while others were superceded. Another major change involved the discovery rules, which were for the most part deleted.

RULES DELETED

1.1(b) [Effective Date] Obsolete. Effective date of amendments is covered in Rule 86.1(a)

1.1(e) [[Relationship to Prior Rules and Orders, *etc*.] Obsolete. Effect of amendments is covered in Rule 86.1(b).

5.3 [3-Judge Court Copies]: Superfluous; subject of this rule is also covered in 9.2(b).

9.3 [*Habeas Corpus*]: Superceded by new *Habeas* rules.

53.2 [Mediation]: Superceded when 16.2 was adopted.

65.1 [Security; Proceedings Against Sureties]: Deleted entire rule; did nothing more than paraphrase the requirements of F.R.Civ.P. 65.1.

74.1 [Appeals]: 74.1(a) was effectively abrogated upon elimination of the optional appeal to the District Court in consent cases and abrogation of F.R.Civ.P. 74; all appeals in consent matters now go directly to Court of Appeals. 74.1(b) is part of Magistrate Judge Rules and 74.1(c) was superceded by Bankruptcy Appeals Rules (Part VIII, Local Bankruptcy Rules).

DISCOVERY RULES

The "2000 Class" Amendments to the Federal Rules of Civil Procedure eliminated the "local rule option" permitting District Courts to modify the discovery rules. This coupled with the proscription on duplicating the Federal Rules of Civil Procedure provided in F.R.Civ.P. 83(a), effectively eliminates most of the discovery rules adopted by the District Court in 1995. The discovery rules adopted in 1995 were designed, in part, to coincide with State discovery rules, *e.g.*, limitations on number and length of depositions. Unfortunately, laudable as the goal was to make practice as similar in the U.S. District Court as in State courts, after December 1, 2000, it ran afoul of the Federal Rules of Civil Procedure. While the court may deviate from the requirements of the F.R.Civ.P., it is on a case specific basis and may not be accomplished through a court rule. In the summer of 2001, Magistrate Judge Matthew D. Jamin, at the request of the Chief Judge, undertook a study and analysis of the impact on the local rules of the 2000 change to the national rules. The recommendations made by Judge Jamin became the basis for the 2002 substantial revision eliminating any potential conflicts with the Federal Rules of Civil Procedure.

Rule 26.1[(General Discovery Rules]: Deleted; authorization was revoked in 2000.

Rule 26.2 [General Provisions Governing Discovery; Duty of Disclosure]: Deleted; modifications of Rule 26 by local rule no longer authorized.

26.4 [Filing of Discovery Documents]: Deleted; subject covered by 2000 amendment to F.R.Civ.P. 5(d).

30.1 [Depositions Upon Oral Examination]: Except for paragraph (f)(4), which dealt with the disposition of depositions in the possession of a dismissed party, this rule did nothing more than replicate Rule 30, F.R.Civ.P. Paragraph (f)(4) was retained as Rule 30.1(b).

30.2 [Depositions]: Subsection (a) of this rule (dealing with filing of depositions) was preempted by the 2000 amendment to F.R.Civ.P. 5(d). Subsections (b) and (c) (dealing with publication and use of depositions as exhibits) were retained as Rule 32.1.

30.3 [Audio-Visual Depositions]: Except for paragraph (d)(4), which deals with depicting the witness in a video-taped deposition, this rule did nothing more than replicate Rule 30, F.R.Civ.P. Paragraph (d)(4) was retained as Rule 30.1(a).

31.1 [Depositions Upon Written Questions]: Deleted in its entirety; everything in this rule is fully covered by F.R.Civ.P. 31.

37.1 [Failure to Make Disclosures or Cooperate in Discovery; Sanctions]: Except for the materials in paragraph (b)(3), dealing with the standards for imposing sanctions, there was nothing in this rule that is not fully covered by F.R.Civ.P. 37. Paragraph (b)(3) was retained as Rule 37.1.

RULE BY RULE HISTORY/COMMENTS

RULE 1.1 SCOPE AND PURPOSE OF RULES

Source: Rule 37(A) (1981); Rule 1.1 (1995)

2002 Revision: Subsections 1.1(b) and (e) (1995) deleted as obsolete. Effect of amendments governed by new Rule 86.1. Paragraph 1.1(c)(2) (1995) became Rule 81.1 (applicability); ¶ 1.1(c)(1) (1995) renumbered as subsection 1.1(b) and subsection 1.1(d) (1995) now subsection 1.1(c).

RULE 1.2 AVAILABILITY OF LOCAL RULES

Source: Rule 37(B) (1981)

2002 Revision. Stylistic.

RULE 1.3 SANCTIONS

Source Rules 5(H), 36(D) (1981)

Committee Comment. This rule and other provisions of these Local Rules authorizing sanctions should be construed and administered in light of the case law on sanctions under the Federal Rules of Civil Procedure holding that in general, the minimum sanction necessary to obtain compliance should be imposed. *See, e.g., Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992). The self-limitation on disbarment is designed partially to avoid retaliatory lawyer complaints against other lawyers. Instead, all complaints are referred to the relevant bar association.

2002 Revision. Stylistic.

RULE 3.1 PAPERS TO ACCOMPANY INITIAL FILING

Source: Rules 6(M), 7 (1981); Rules 3.1, 4.1 (1995)

Committee Comment. While the magistrate judge consent form may be distributed at the scheduling conference, 28 U.S.C. § 636(c)(2) requires it to be distributed when an action is filed. In an appropriate case, a notice of related case must also be filed. *See* D. Ak. LR 40.2.

2002 Revision. Subsection 3.1(a) former Rule 3.1 (1995) and 3.1(b) former Rule 4.1 (1995) renumbered without substantive change.

RULE 3.2 PAYMENT OF FEES BY IN *FORMA PAUPERIS* LITIGANTS

Source: Rule 27 (1981); Rule 4.2 (1995)

Committee Comment. The provision of subsection (a) requiring approval of applications for *in forma pauperis* status only applies to cases where such approval is required, typically requests made pursuant to 28 U.S.C. § 1915(d). Seamen may proceed without paying filing fees or costs in certain suits pursuant to 28 U.S.C. § 1916.

Paragraph (b)(2) is modeled on Rule 9(k)(1) of the Local Rules for the United States District Court for the Northern District of New York. This information is required by the provisions of the habeas rules, *see* Rule 3(a) of the Rules Governing Section 2254 Cases, and the Committee feels that it is appropriate to require this information in all cases in which an incarcerated litigant requests in forma pauperis status. The committee has added a provision for partial payment, suggested by the national, local rules committee. Abusive and frivolous in forma pauperis cases take up a disproportionate amount of clerks', magistrate judges', and judges' time, as well as imposing considerable burdens on the defendant's. Small fees for prisoners with significant amounts in their accounts, may encourage some desirable evaluation by the applicants. When considering a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(d), the court must examine the pleadings to assure itself that the claim is not frivolous. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989). *See also* D. Ak. LR 9.3. *Compare* former Local Rule 34(b).

2002 Revision. Rule 4.2 (1995) renumbered without substantive change.

2003 Amendment. Paragraph (b)(2)([B] amended to eliminate conflict with 28 U.S.C. § 1915.

RULE 3.3 VENUE AND PLACE OF TRIAL

Source: Rule 6.1 (1981); Rule 3.2 (1995)

Committee Comment. Subsection (b) slightly modifies former Local Rule 6.1. Its function is to prevent removal from working a change of location for trial. Thus, a case originally filed in the Superior Court for the First Judicial District at Juneau will be removed to the United States District Court at Juneau. If some parties seek a change of location to one of the other locations designated in 28 U.S.C. § 81A, a motion for change of location is necessary. *See* 28 U.S.C.§ 1404(c).

2002 Revision. Rule 3.2 (1995) renumbered; added subsection (c), which incorporates the provisions of MGO 834 (2/4/00).

2004 Amendment. Paragraphs (c)(1) and (c)(2) have been amended to clarify that not only to they apply to pleadings but also to all subsequent motions, documents, papers or other documents filed in the case. Paragraph (c)(3) is added to ensure that papers and documents filed on the "eve-of-hearing" are received timely in the location where the hearing or trial is to be held. It also provides for an additional chambers copy to be filed in the location where the presiding judge maintains chambers. Often-times a district or magistrate judge who maintains chambers in Anchorage will have a hearing scheduled in a satellite location but will not travel until the afternoon or evening preceding the hearing. The rule is intended to ensure that the presiding judge receives a chambers copy in as timely a manner as possible.

RULE 4.1 SUMMONS

Source: New (2002)

2002 Revision. Added at the request of the clerk's office. Requires that the summons be completed before presentation to the clerk for issuance. [NOTE: Rule 4.1 (1995) re-designated as subsection 3.1(b)]

RULE 5.1 FILING AND PROOF OF SERVICE WHEN SERVICE IS REQUIRED BY RULE 5, FEDERAL RULES OF CIVIL PROCEDURE

Source: Rule 7 (1981); Rule 5.2 (1995)

Committee Comment. An important function of proof of service is its use as a checklist assuring that copies are mailed correctly. Placing a certification on the last page of the document in checklist form should facilitate service. For example, on the bottom of the document, the person making certification can write

> "Mailed 10/12/92
> John Doe
> Richard Doe"

and put a check mark next to the names when the person making certification has mailed them their copies, and signed said certification. Affidavits are generally meaningless, because they are sworn to before the affiant has actually mailed the documents which the affiant swears have already been mailed.

Fax technology has changed the practice of law, and should be the subject of an explicit rule. The Committee anticipates that in most cases, lawyers will agree to mutual fax service, particularly with the assurance of hard copy follow-up. The hard copies are usually easier to read, more certain to arrive, and provide a second chance to avoid a calendaring mistake for the recipient attorney. The

Committee anticipates that attorneys may wish to keep their adversaries from clogging their fax machines with very long documents. *See* former Local Rule 7.

Subsection (c) is similar to changes being made to other federal rules and is designed to incorporate the Supreme Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988) and the Ninth Circuit's decision in *Faile v. Upjohn Co.*, 988 F.2d 985 (9th Cir. 1993). Inmate mail is often not mailed out on the same day it is deposited and the last provision of subsection (c) is designed to ensure that parties engaged in litigation with inmates are not deprived of the full response time allowed by the rules.

2002 Revision. Rule 5.2 (1995) renumbered. Added subsections (d) and (e) to provide a procedure to consent to electronic service and standards applicable; implements the December 2001 amendments to F.R.Civ.P. 5(b). The 25-page limit on facsimile service limitation of ¶ (d)(1) addresses the concerns raised in the Committee Comments to the 1995 revisions. Informal polling of practitioners having experience with facsimile service indicated that 25 pages is a reasonable "cut-off" point. However, a person accepting facsimile service may opt to have no page limitation. Adobe Acrobat is universally available format for web-based transmissions (the Acrobat Reader may be downloaded for free) and, when the court transitions to CM/ECF, all documents generated by the court will and all documents electronically filed with, must be in portable document format.

RULE 5.2 SERVICE UPON PARTIES BY THE COURT

Source: Rule 5.5 (1995)

2002 Revision. Rule 5.5 (1995) renumbered without substantive change.

RULE 7.1 MOTION PRACTICE

Source: Rule 5 (1981)

Committee Comment. This rule uses portions of former Local Rule 5. Former Local Rule 5(A) regarding service was not needed, because Fed. R. Civ. P. 5 and D. Ak. LR 3.1 cover the matter. The fragmentation of the rule on motion papers results from the national uniform numbering system. The Committee has eliminated the separate paper for a motion and memorandum. The court needs to know exactly who is seeking relief, and what relief is ought, but it is of no particular help to have this on a separate paper.

Paragraph (a)(4) is new both to the Former Local Rules and to the Uniform Local Rules. Bulky and sensitive exhibits are sometimes lodged in support of or opposition to motions. As a practical matter the clerk's office has inadequate facilities to handle and protect such exhibits, and the Committee accordingly adopted the procedures for the possession of exhibits at trial set forth in D. Ak. LR 39.3 and former Local Rule 10. In addition, the rule provides that all such exhibits must be photographed or otherwise presented to opposing counsel with the motion or opposition or in rare instances the reply together with any summaries or demonstrative exhibits to be used at oral argument. The Committee is concerned that opposing counsel have sufficient opportunity to see and study all materials that are to be presented to the court. Consequently, the rule provides that charts, graphs, computer simulations or other demonstrations which are to be used at oral argument, be submitted along with the motion, opposition or reply thereto. This rule is not designed to preclude the use of charts, blackboard drawings, or other demonstrative exhibits prepared spontaneously at a hearing or trial, by counsel or a witness, in order to illustrate a point or answer a question.

Unpublished decisions are often improperly cited. Where a judge has not prepared a decision for publication, it often can not be properly understood outside its context. In addition, firms which maintain libraries of unpublished decisions, have an unfair advantage if unpublished decisions are used. The rule sharply restricts their use. Unpublished decisions can only be used if they are on the same issue by another judge of this district, or if they are in the same or related case by another court for purposes of res judicata or collateral estoppel. Unpublished decisions of the Ninth Circuit can not be used. See 9th Circuit L.R. 36.3.

Subsection (c) of this rule follows former Local Rule 5(B)(4) that failure to file a brief supporting the motion may be deemed an admission that it is meritless and a failure to file a brief opposing a motion may be deemed a consent to its being granted. While this inference was mandatory under the old rule, it is now permissive in conformity with Ninth Circuit Authority. *See Henry v. Gill Industries, Inc.*, 983 F.2d 943,950 (9th 1993). The proviso in D. Ak. LR 7.1(c) conforms to *Henry*. Of course, if a party ignores a specific order directing a response to a dispositive motion, the court may enter consent to disposition in accord with the motion. *Brydges v. Lewis*, 18 F.3d 651, 652-53 (9th Cir. 1994). In addition, see D.Ak. LR 5.1 (Format of Papers Presented for Filing).

The Committee gave much consideration to tracking state motion times because of the ease in calendaring, but decided that the 3 day time period for reply put excessive pressure on counsel and reduced the value of a reply to the court. Overly short opposition and reply times generate motions for leave to supplement. To avoid the burden on the court, time periods for dispositive motions are liberalized to what is, as a practical matter ordinarily necessary. Fed. R. Civ. P. 6(e) mandates an additional three days whenever service is by mail.

The fax machine should reduce or eliminate most of the unsigned affidavits. Attorneys can have the witness or client sign the document, or sign a fax of it, and the fax it back to the attorney's office. Thermal paper fades, so if plain paper fax machines are not used, attorneys should have their faxes photocopied on permanent paper. Faxes are often hard to read, so the Committee believe an original should be filed within five days. The court will not accept filing by fax because this would, as a practical matter, prevent it from using its own machines and lines on internal court business.

The filing of supplemental briefs can be a considerable burden. It can be difficult for the court to determine what must be read to prepare for argument, and it is difficult to obtain closure on the materials. The court does need to know about controlling authorities, even if they are decided after briefing. There is rarely much value in supplemental citations of non-controlling authority. The rules on supplemental submissions are designed to obtain finality and avoid gamesmanship.

The time within which to request oral argument has been slightly lengthened, to give adversaries a fair opportunity to respond if a reply brief or late filed affidavit necessitates oral argument. Any party is entitled to take advantage of another party's request for argument, and it cannot be withdrawn unilaterally.

Motions for reconsideration, under state practice, cannot be opposed unless the judge so requests. The committee decided to follow this practice. If the motion appears to have some merit, the judge should have the benefit of the other side's argument.

The provision regarding notice of the oral ruling includes language designed to fit the practice of those judges who announce rulings from the bench without notice to parties, so that the parties first learn of the of the ruling when they receive a copy of the clerk's minutes. A transcript of any oral decision from the bench of the ruling being reconsidered is a helpful but not a required supplement

to the motion. Affidavits, except those authenticating earlier existing documents, ordinarily will not be considered if prepared after the ruling.

The Committee removed the sanctions provision of the former Local Rule 5(H), only because F. R. Civ. P. 11, 28 U.S.C. § 1927, and D. Ak. LR 1.3 cover the area of sanctions sufficiently.

The court often schedules an adversary hearing on applications for temporary restraining order, and, of course, sets hearings on motions for preliminary injunctions and for summary judgment on motions for final injunction. Counsel sometimes are not clear on whether to bring witnesses to the hearings. The rule makes it clear that generally, live witnesses are not allowed, but leave may be granted. Counsel may need to use a motion for shortened time to obtain a ruling before the hearing on whether live testimony will be presented. In addition, the Committee has provided a rudimentary disclosure provision for hearings where live testimony is presented, requiring parties to summarize the testimony of witnesses they intend to present. The "where possible" language of subsection (j) recognizes that it may not always be feasible to serve documents that one intends to refer to an evidentiary hearing on party appearing telephonically, for example in the case where the party appearing telephonically requests and receives at the last minute permission to appear telephonically.

2002 Revision. Subsections (i) [Oral Argument], (k) (Shortened Time), and (m) [Motions requiring Evidentiary Hearing] were removed from this section and placed in a new Rule 7.2 titled "Hearings." Subsection (l) [Motions for Reconsideration] was revised and renumbered as Rule 59.1. This makes Rule 7.1 a little less cumbersome.

In subsection (c) (Citation of Unpublished Decisions; Judicial Notice) ¶ (c)(1) has been modified. What constitutes a "published" or "unpublished" decision is a matter that defies definitive definition. Technically, all decisions of every court are "published" when issued. Ten years ago this did not present a problem, few decisions were "published" other than in a recognized publication, *e.g.* official or unofficial national reporters, and the courts would specifically denote decisions that were "not for publication." However, in the past five years there has been an significant increase in decisions posted on court web sites that may or may not appear in any recognized reporter, official or unofficial. These decisions, while not binding on the court, may be persuasive and parties should not be automatically precluded from citing them as long as the court and other parties are provided copies of the decision. The real issue is the extent to which a particular "unpublished" decision may be cited as precedent, a matter that is determined by the court that rendered the decision. Unfortunately there is no uniformity among the various courts regarding citation of "unpublished" decisions. They run the gamut of no citation to any court in the circuit under Ninth Circuit Rule 36-3 to permissive citation for persuasive value under Eleventh Circuit Rule 36-2. As redrafted, ¶ (c)(1) allows citation to extent the decision may be cited in the rendering court, but requires a copy of decisions not published in the National Reporter System (West) or a National Loose-Leaf Reporter (*e.g.*, CCH, Prentice-Hall; BNA; RIA, *etc*.] be provided to the court and other parties.

RULE 7.2 HEARINGS

Source: Rule 7.1(i), (k), (m) (1995)

2002 Revision. Subsections 7.1(i), (k), and (m) renumbered. This rule was amended to (1) make the time for requesting an evidentiary hearing or oral argument the same (three days for both); and (2) eliminate the apparent bifurcation of oral argument followed by an evidentiary hearing. A party may request either oral argument or an evidentiary hearing; the court will determine whether to grant an evidentiary hearing or simply hear argument, or, alternatively, deem neither necessary, deny the

request and order the matter submitted on the briefs. If an evidentiary hearing is granted, oral argument will normally follow the conclusion of the evidentiary hearing. Practitioners should note the provision of the rule that unless an evidentiary hearing is expressly granted, it is to be presumed that a hearing is for oral argument only, not the presentation of evidence.

RULE 7.3 TELEPHONIC PARTICIPATION IN CIVIL CASES

Source: Rule 7.2 (1995)

Committee Comment. The committee has adopted the State of Alaska procedure outlined in Alaska R. Civ. P. 99 and Alaska R. Admin. P. 48. The committee assumes that with a stipulation this procedure could be used at trial.

2002 Revision. Renumbered Rule 7.2 (1995) without substantive change.

RULE 7.4 PROPOSED ORDERS

Source: Rule 6(G) (1981); Rule 5.4 (1995)

Committee Comment. Judges may want to experiment with allowing parties to submit proposed orders on disk in certain cases, so that the court may make changes and then issue a clean typed order. This might be appropriate as regards findings of fact and conclusions of law required after lengthy trials or evidentiary hearings, *see* D. Ak. LR 52.1, and may also be appropriate as regards certain motions. By enacting this rule, the United States District Court for the District of Alaska is exercising its authority under Fed. R. Civ. P. 5(e) to vary filing methods. The United States District Court for the District of Alaska does not yet have the technical capability to allow filing by electronic means such as direct transmission from computer to computer via modems. This rule contemplates that judges may, in their discretion, allow filing of proposed orders regarding dispositive motions on a computer disk in a computer language compatible with the court's computer system. Such filing should be done by submitting the proposed order on a disk with nothing else on it, along with a notice of filing of the disk. A hard copy of the proposed order should be served on other parties.

A proposed order filed or lodged with the court should not require a review of the motion to understand the order. Therefore, the form "it is so ordered" should not be used, except that "it is so ordered" may be used on stipulations, provided that there is sufficient information in the order to connect the order with its subject matter.

2002 Revision. Rule 5.4 (1995) renumbered without substantive change.

RULE 9.1 SOCIAL SECURITY CASES

Source: Rule 9.1 (1995)

2002 Revision. Revised to reflect current practice by requiring inclusion of social security numbers in the complaint instead of as a separate attachment and that a copy of the decision of the Commissioner be attached to the complaint.

RULE 9.2 THREE-JUDGE COURT

Source: Rule 9.2 (1995)

2002 Revision. Stylistic.

RULE 10.1 FORM OF PLEADINGS AND OTHER PAPERS

Source: Rule 6 (1981); Rule 5.1 (1995)

Committee Comment: The Committee chose to tailor format of papers presented for filing as closely as possible to the format required in state court. *See* Alaska R. Civ. P. 76. The Committee believes that these provisions are compatible with Fed. R. Civ. P. 10. The Committee did not adopt Alaska R. Civ. P. 76(h)–(I), as those subsections were incompatible with various provisions of the Federal Rules of Civil Procedure and the Local Rules. Alaska R. Civ. P. 76(h) provides that:

> (h) **Compliance with Rule**. No paper or document shall be accepted for filing or filed by the clerk which does not comply with the requirements of this rule. The judge to whom the case is assigned may, in cases of emergency or necessity, permit departure from the requirements of this rule.

This subsection violates Fed. R. Civ. P. 5(e), which requires the clerk to file any document presented for filing but permits the court by order to strike non-conforming documents. Alaska R. Civ. P 76(i) provides that:

> (i) **Use of Original File by Court**. At the trial of any issue of law or fact, or upon the hearing of any motion, the original file shall be for the use of the court, except as may appear otherwise necessary.

This conflicts with D. Ak. LR 5.1(b), where the court uses chamber's copies.

Subsection (c) concerns exhibits attached to motions and other similar documents. The use of exhibits at trial and evidentiary hearings is govern by D. Ak. LR 39.3.

The original proposed local rules contained a subsection (g) setting out page limitations for briefs. This was moved to D. Ak. LR 7.1 dealing with motion practice.

2002 Revision. Rule 5.1 (1995) renumbered. Paragraph (a)(7) added 12-point proportional spaced fonts (the equivalent of 11-point, 10 pitch mono-spaced). Subsection (c) amended to require exhibits be tabbed [¶ (c)(1)(A)] and a table of contents included if the number of exhibits exceeds five [¶ (c)(2)].

2004 Amendment. Subsection (e) amended to require inclusion of an e-mail address along with the address, telephone and facsimile numbers.

RULE 11.1 APPEARANCE BY ATTORNEY

Source: Added 2002

2002 Revision. Clarifies that filing a pleading on behalf of a party constitutes an entry of appearance without the need for a separate entry of appearance.

RULE 15.1 MOTIONS TO AMEND

Source: 1981 Rule 6(J).

Committee Comment. The Committee believes that Fed. R. Civ. P. 10(c) does not apply to motions to amend pleadings, and that incorporation by reference is impermissible for motions to amend pleadings. A party should be able to tell what amendments another party seeks by reading the memorandum in support of the motion to amend, and not need to compare the language paragraph by paragraph in the existing and proposed pleadings. See former Local Rule 6(j).

2002 Revision. Stylistic.

RULE 16.1 PRE-TRIAL PROCEDURES

Source: Rule 9 (1981)

Committee Comment. Former Local Rule 9 has been moved to D. Ak. LR 16.1 to fit the proposed national uniform numbering system. Former subsections A and B are no longer necessary, because of the present form of Federal Rule of Civil Procedure 16. The exception for non-Anchorage cases has been dropped because conferences can be held by telephone, Sections D, E and F were dropped because they added nothing. Former Local Rule 4(B) was dropped because different judges provide in different ways for setting of trial dates.

2002 Revision. Subsections (b) and (c) are new. The scheduling conference report [subsection (b)] is designed to expedite matters by getting the report to the court in a timely manner and simplifying the process. If the parties' scheduling conference report shows the parties are in agreement and assuming the time expected to be ready for trial is satisfactory with the court, there is no apparent reason for the court to hold a hearing. If the parties are not in agreement, then they may request a conference. Only too frequently parties have requested a conference as a "fee-generating event" with nothing to discuss at the hearing. The rule requires the parties to inform the court of the matters or issues upon which a hearing is requested. The court may then determine whether to hold a hearing or to resolve the matter without a hearing.

The provisions on pre-trial procedures and times are adaptations of general current practice. Including them in a rule is intended to set a standardize the time for pretrial actions and, as with the discovery provisions in the F.R.Civ.P., by simply referencing the published local rule the length of documents filed may be substantially shortened.

A form for reporting to the court has been developed and, even if not specifically ordered, its use is strongly urged. If nothing more, it serves as a check list of those items that should be considered at the planning conference.

RULE 16.2 ALTERNATIVE DISPUTE RESOLUTION

Source: Rule 16.2 (adopted by MGO 849, 12/21/00).

2002 Revision. Stylistic only.

RULE 24.1 PROCEDURES FOR NOTIFICATION OF ANY CLAIM OF UNCONSTITUTIONALITY

Source: Rule 24.1 (1995)

2002 Revision. Subsection (c) added; all other changes stylistic only.

RULE 30.1 DEPOSITIONS

Source: Rules 30.1 and 30.3 (1995)

Committee Comment. [The committee comments to Rules 30.1 and 30.3 (1995) addressed matters in those rules other than those retained in the 2002 revision and are, therefore, omitted.]

2002 Revision. Rules 30.1(f)(4) and 30.3(d)(4) renumbered without substantive change.

RULE 32.1 USE OF DEPOSITIONS

Source: Rules 8, 10 (1981); Rule 30.2 (1995)

Committee Comment. Sometimes, particularly in bench trials, depositions are not read out loud during the trial, but are instead filed for the judge to read during recesses or before trial. The clerk should maintain these in a separate folder or box and not as docket numbered items in the file folder of pleadings and filings. Fed. R. Civ. P. 30(f) requires that deposition shall be filed with the court unless otherwise ordered by the court. This rules constitutes such an order and is adopted because of space limitations in the clerk's office.

Questions increasingly arise as to duties of confidentiality relating to discovery materials. At one time, depositions were routinely sealed unless opened on a motion to publish. In recent years discovery probes have increasingly been made of trade secrets and other materials. The parties may have a legitimate concern with confidentiality, while the public or other litigants may have an interest in disclosure. The rule puts the burden on the party seeking confidentiality to obtain an agreement or order to that effect. *See* former Local Rule 8.

2002 Revision. Subsections 30.2(b) and (c) (1995) renumbered without substantive change.

RULE 37.1 SANCTIONS FOR DISCOVERY VIOLATIONS

Source: Rule 8 (1981); Rule 37.1 (1995)

2002 Revision. Paragraph 37.1(b)(3) (1995) retained without substantive change. All other parts of the rule were deleted. [See Discussion on Discovery Rules, *ante*, p. 6]

RULE 38.1 NOTATION OF JURY DEMAND IN THE PLEADING

Source: Rule 4(G) (1981)

Committee Comment. The Committee has eliminated former Local Rule 4(G), requiring that a jury demand be on a separate document, because it is inconsistent with Fed. R. Civ. P. 38(b). A jury demand noted in a Case Characterization form is not adequate to invoke the right to jury trial. Fed. R. Civ. P. 81(c) applies to jury demands in cases removed from state court.

2002 Revision. Stylistic.

RULE 39.1 OPENING STATEMENTS AND CLOSING ARGUMENTS

Source: Rule 18(C) (1981)

Committee Comments. This rule addressees the usual case. Some cases merit much shorter arguments, such as small Miller Act cases and some routine misdemeanor cases, and some need longer arguments, or interim summaries during trial, such as unusually lengthy and complex criminal and civil cases. Sometimes parties nominally on the same side are as a practical matter adverse, so they should not be required to divide their nominal side's time. Ordinarily the judge should be apprised of special needs at the final pretrial conference.

A stipulation regarding the use of exhibits during opening argument may be pursuant to the exhibit marking rule at D. Ak. LR 39.3, or may be a separate stipulation. See former Local Rule 18(c).

2002 Revision. Stylistic.

RULE 39.2 TRIAL BRIEFS

Source: Rule 12 (1981)

Committee Comment. The trial brief is primarily for the judge's use, but can also be useful to the parties in last minute settlement negotiations and trial planning. The Committee has changed the

filing date from 10 days before trial to 20 in civil cases, for these latter purposes and to reduce the congestion of requirements during the last few days before trial. See former Local Rule 12.

2002 Revision. Stylistic.

RULE 39.3 EXHIBITS

Source: Rule 10 (1981)

Committee Comment. The Committee has retained the procedures set forth in former Local Rule 10 because they have worked well in the past. These procedures are in direct contrast to those of the Superior Court for the State of Alaska. *See* Alaska R. Civ. P. 43.1.

New subdivision (b) is added so that the parties can agree to special numbering systems where they agree that a special numbering system will contribute to clarity. Sometimes the parties may agree to mark all exhibits of a particular type in chronological order, or all with numbers instead of letters, even though plaintiff will argue on the basis of some and defendant on the basis of others.

Subparagraph (c) has been changed from former Local Rule 10(A)(3). Where full admissibility cannot be agreed upon prior to trial, counsel may stipulate that certain objections to admissibility are reserved, such as relevance, but no other objections shall be made to an offer; this may be useful to avoid the need for foundation witnesses. The "ADM" notation in advance of trial may often be useful to avoid the need to bring witnesses to trial, and a pretrial "ADM" designation may be so relied upon by a party.

A copy of exhibits is made for opposing counsel in part for the protection of the counsel retaining the exhibits, and in part as a safeguard to protect against substitution and alteration and loss of exhibits, since the parties are to retain exhibits under sections (F) and (G) of this rule.

The Committee believes the procedure set forth in paragraph (H) is consistent with 9th Circuit LR 11-4.2 and Fed. R. Civ. P. 10.

2002 Revision. Subdivision (b) is new. Added to provide special rules for guns, drugs, *etc.* [1996 recommendation of Criminal Rules Committee]; former subdivision (b) is now subdivision (c). Other changes stylistic.

RULE 39.5 COURTROOM CONDUCT

Source: Rule 18(D) (1981)

Committee Comments. Speaking objections and arguments about evidence can easily violate Fed. R. Evid. 103(c), causing inadmissible evidence to be suggested to the jury, or encouraging the jury to disregard or misapply instructions.

Occasionally two attorneys for a party may need to argue an important evidentiary matter outside the presence of the jury, and occasionally two attorneys will split questioning of a witness, as one does liability and one does damages. Such questioning or argument is the exception, and leave of court is required.

Counsel should manage their Courtroom clothing, demeanor and conduct so that it does not distract from the substance of their or opposing counsel's presentations, or from the dignity of proceedings. See former Local Rule 18(d) (1-10).

Pursuant to D. Ak. LR 1.1(f)(3), the provisions of this rule apply to unrepresented parties as well as attorneys.

2002 Revision. Stylistic.

RULE 40.1 JUDICIAL ASSIGNMENTS

Source: Rule 4(A) (1981)

Committee Comment. See former Local Rule 4(A).

2002 Revision. Changed "disability" to "inability to proceed" to be consistent with the 1991 amendment to F.R.Civ.P. 63. Also added reference to Rule 63.

RULE 40.2 NOTICE OF RELATED CASE

Source: Added in 1995

Committee Comment. The committee adopted this rule from Rule 205.2 of the Local Rules for the United States District Court for the Northern District of California.

2002 Revision: Subsection (d) was replaced by the current subsection relating to judicial assignment of related cases that are consolidated. Former subsection (d) was deleted as unnecessary.

RULE 40.3 CALENDARING CASES FOR TRIAL

Source: Rule 4(D) (1981)

Committee Comment. Different judges have different approaches to calendaring trials. Some judges will not set a case for trial until discovery is complete, some will set trial as soon as the case is at issue, and some will not set trial until after dispositive motions have been decided. The matters required to be certified in a motion to set trial will as a practical matter lead to denial before some judges, a trial date with others, and a scheduling conference to set trial with others. Counsel will become familiar with individual judge's practices and any local Civil Justice Reform Act Plan in order to avoid useless motions to set for trial. Most trial setting is currently done at scheduling conferences. If a motion for a trial date is sought when discovery or other procedures remain to be completed, estimates of the amount of time reasonably necessary should be included. See former Local Rule 4(D).

2002 Revision. Stylistic.

RULE 41.1 DISMISSAL OF ACTIONS

Source: Rule 24 (1981)

Committee Comment. This rule generates automatic orders from the clerk's office where the docket sheet shows no action for one year, and no motions have been pending for that amount of time. Any party asserting a claim, whether a plaintiff, counterclaimant, or cross claimant should file a status report explaining what they have been doing and why the case, or their claim, should not be dismissed. The time for the show cause orders has been maintained at one year to conform with state limits. See Alaska R. Civ. P. 41(e). The Committee has also maintained a 30 day time from the date of the clerk's order to show cause. Thirty days should be sufficient. The extra time for service by mail under Fed. R. Civ. P. 6(e) does not apply.

The automatic show cause order shall read as follows: "This claim shall be dismissed in its entirety and without prejudice as to all claims and all parties unless a party or parties asserting claims shall

show cause within 30 days after this date why this action shall not be dismissed." See former Local Rule 24.

2002 Revision. Stylistic.

RULE 43.1 EXAMINATION OF WITNESSES

Source: Rule 18(A) (1981)

Committee Comment. *See* D. Ak. LR 39.5 for rules governing courtroom conduct and examination of witnesses. *See also* former Local Rule 18(A).

2002 Revision. Stylistic.

RULE 45.1 SUBPOENAS IN NON-DISTRICT CASES

Source: New (2002)

2002 Revision. Provides a procedure for enforcing subpoenas issued in cases pending in other districts but enforced in the District of Alaska under Rule 45, F.R.Civ.P. Generally subpoenas are enforced in this district in the same manner as in the district in which the case is pending; however, the burden is on the party seeking to enforce the subpoena to establish the standards of the other district otherwise the standards used in this district will be applied. In addition, the rule provides that, as a matter of inter-district comity, the attorney issuing the sister-district subpoena is automatically authorized to appear before the court in a proceeding to enforce the subpoena.

RULE 47.1 VOIR DIRE

Source: Rule 14(B), (C) (1981)

Committee Comment. Each judge exercises discretion over the manner of jury selection, and the manner may change as practices evolve in accord with the amendments to Fed. R. Civ. P. 47. Consequently, the Committee has provided no rule beyond the deadline for proposed voir dire questions. The rule does not specify whether the judge or the attorneys conduct voir dire, because Fed. R. Civ. P. 47(a) leaves this to the discretion of the judge presiding at trial. The trial judge also exercises discretion in directing the clerk on how many names to draw, where to seat them, manner of exercising peremptory challenges, and the other provisions contained in former Local Rule 14. The custom of the judges has been to follow the "Arizona Plan," of simultaneous written strikes, but attorneys unfamiliar with a particular judge's practice should inquire at the final pretrial or inquire of the case management clerk regarding that judge's procedure. *See* former Local Rule 14(b) & (C).

2002 Revision. Stylistic.

RULE 51.1 JURY INSTRUCTIONS

Source: Rule 15 (1981)

Committee Comment. See former Local Rule 15.

2002 Revision. Stylistic.

2003 Amendment.

Subsections (a) – (d) are the current rule without change.

Post-Publication Changes. *The rule underwent substantial change after publication: the following comments relate to the rule as adopted by the court*.

Subsection (e) requires the parties to meet and confer on jury instructions, resolve to the extent possible any disagreements, and file but a single set of instructions on those matters on which there is no material disagreement, *e.g.*, standard form introductory instructions. This, in addition to eliminating some objections, should eliminate duplicative instructions being submitted by both parties where the differences are nonsubstantive, thereby eliminating the need for the trial judge to read through two separate instructions and choose which one to use.

Subsection (f) permits reference to a model or pattern jury instructions that is requested be given without modification without reproducing the entire text of the requested instruction. The court may provide the hard copy to be read to the jury or may request the that the requesting party submit a hard copy. It is expected this will determined at the conference provided in ¶ (g)(1).

Subsection (g) requires the court and counsel to meet and confer on the instructions to be given to the jury. No set procedure for the conference is specified. The procedure to be utilized is left to the trial judge depending upon the judge's preference and, as the legal complexity of cases varies widely, the nature of the case. The trial judge may meet with counsel in chambers followed by a hearing on the record [as required by Rule 51(b)(2)], or hold the entire process on the record, whichever method is deemed appropriate in a particular case. Paragraph (g)(2) conforms to the requirements of Rule 51(b) by informing the parties of the court's intent and affording an opportunity place on the record any objections to the instructions.

PUBLICATION COMMENTS (Provided for historical purposes only):

Subsection (e) requires the parties to meet and confer on jury instructions, resolve to the extent possible any disagreements, and file but a single set of instructions on those matters on which there is no material disagreement, *e.g.*, standard form introductory instructions. This, in addition to eliminating some objections, should eliminate duplicative instructions being submitted by both parties where the differences are nonsubstantive, thereby eliminating the need for the trial judge to read through two separate instructions and choose which one to use.

Subsection (f) governs objections to proposed instructions, including the time within which objections are to be filed. Paragraph (f)(1)[B] requires the objecting party to set forth the authorities for the objection, while ¶ (f)(1)[C] requires an alternative instruction be proposed in those situations where appropriate. [NOTE: Rule 51(c)(1) already specifies that the grounds for the objection be distinctly stated so is not replicated in the draft propose LR.] Paragraph (f)(2) sets the time for a response to the objection. The alternative is that no response is permitted unless requested by the court. [If the party submitting the proposed instruction has fully complied with subsection (b), there should be little additional authority that can be cited or argument that can be made.]

Subsection (g) presumes that in most cases the court will instruct the jury in accordance with either the joint instructions submitted by the parties under subsection (e) or proposed instructions filed under subsection (a) to which no objection has been made. However, the court always retains broad discretion on whether the jury is to be instructed on a particular matter or the instruction to be given. Paragraph (g)(2) conforms to the requirements of Rule 51(b) by informing the parties of the court's intent and affording an opportunity to be heard on omitted instructions.

Subsection (h) governs those requests that fall within the purview of Rule 51(a)(2). Paragraph (h)(1) specifies the time and form for those "close of evidence" objections. Paragraph (h)(2) requires the party to explain why the proposed instruction could not have been reasonably anticipated prior to trial while ¶ (h)(3) essentially imposes a Rule 60(b)(1) showing on late requests for instructions that do not fall within Rule 51(a)(2)(A).

No procedure for resolving objections to proposed instructions has been recommended. The procedure to be utilized is left to the trial judge depending upon the judge's preference and, as the legal complexity of cases varies widely, the nature of the case. For example, the trial judge may meet with counsel in chambers followed by a hearing on the record [as required by Rule 51(b)(2)], or hold the entire hearing on the record in open court, whichever method is deemed appropriate in a particular case.

RULE 52.1 PROPOSED FINDINGS

Source: Rule 13 (1991)

Committee Comments. Since the 1983 amendments to Fed. R. Civ. P. 52, it has been clear that the court may make its own findings orally. Consequently, in many cases, submission of proposed findings is unnecessary. Where it will be valuable, the court can structure the issues on which findings shall be submitted, the dates and opportunities if any for cross submissions or objections depending on the needs of the case. *See* former Local Rule 13.

Regarding the submission of proposed orders on disk, the parties should also refer to the to the commentary to D. Ak. LR 5.4.

2002 Revision. Stylistic.

RULE 53.1 DISCOVERY MASTERS

Source: Rule 8.1 (1981)

Committee Comments. A reduction of the court's workload is a secondary purpose for the foregoing rule. The principal purpose of D. Ak. LR 53.1 is to facilitate the process of discovery in civil cases. If it should become apparent that goal is not being achieved by the appointment of a discovery master, the discovery master is expected to so advise the court which may then, in its discretion, withdraw the appointment. It is hoped that and expected that the appointment of discovery masters will provide parties with a neutral appraisal of the discovery needs of the case with a view towards a consensual arrangement for limiting the scope, duration, and expense of discovery to the greatest degree possible.

Although paragraph (d)(5) allows the discovery master to set the timing of discovery motions, he is not authorized to alter the date set for the close of discovery in any case (even with the agreement of the parties) unless the court expressly approves such a recommendation.

2002 Revision. Stylistic.

RULE 54.1 TAXATION OF COSTS

Source: Rule 21(1981)

Committee Comments. Under 28 U.S.C. § 1920 and *Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), the costs allowable are codified by statute and cannot be varied. Counsel should specify the applicable subsection of the statute for each item of costs, so that the clerk will

be able to check the claim against the statutory language. Times are governed by Fed. R. Civ. P. 54(d), and cannot be governed differently by local rule. The form of the statutory verification is prescribed by 28 U.S.C. § 1924 and cannot be varied by local rule either. Review procedure is governed by Fed. R. Civ. P. 54(d), and nothing is consequently specified in this rule. Attorneys' fees awards are dealt with separately in D. Ak. LR 54.3. *See* former Local Rule 21.

2002 Revision. In ¶ 54.1(a)(2) deleted the "less than three" in the second sentence; F.R.Civ.P. 54(d)(1) permits taxation upon one day's notice. In ¶ 54.1(e)(3) added specific reference to audio-visual depositions to clarify those costs are taxable as well as a "traditional" deposition. Former 54.1(d)(3) deleted in its entirety; subject matter covered by F.R.Civ.P. 54(d)(1). The first sentence of former Rule 54.1 deleted in its entirety; duplicated F.R.Civ.P. 54(d)(2)()B).

RULE 54.3 AWARD OF ATTORNEY'S FEES

Source: Rule 21.1 (1981)

Committee Comments. This rule governs the recovery of attorney's fees in an action brought in federal court. Generally attorney's fees are not recoverable in actions brought on a federal cause of action in federal court. *Alyeska Pipeline Service Co. V. Wilderness Society*, 421 U.S. 240, 247 (1975); *Home Savings Bank v. Gillam*, 952 F.2d 1152, 1162-63 (9th Cir. 1991). This so unless a federal statute expressly provides for an award of fees, *see e.g., Alyeska*, 421 U.S. at 260. Illustrative of such a statute is 42 U.S.C. § 1988. Where a federal statute does permit a fee recovery, the award shall be made in conformity with the "lodestar" approach approved in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) where by the court must determine "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id*. at 433. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. *Ibid*. The court may then modify the award to reflect other factors legitimately considered such as the results obtained and other factors recognized in *Johnson v. Georgia Highway Express, Inc*., 488 F2d 714, 717-719 (5th Cir. 1974).

In contrast, where the federal court's jurisdiction is based upon diversity of citizenship, Alaska law applies and the prevailing party is entitled to an award of attorney's fees in conformity with Alaska R. Civ. P. 82. *See Price v. Seydel*, 961 F.2d 1470 (9th Cir. 1992). The local rule applies Alaska R. Civ. P. 82 as it is when the judgment is entered incorporating by reference amendments as they occur.

In a contingent fee case, the attorney may sometimes not keep an account of hours spent. In such a case an affidavit to that effect may suffice. Sometimes a case looks like a contingent fee case but isn't, and the fee charged is less than the usual contingent fee percentage, and even less than the Alaska R. Civ. P. 82 percentage; disclosure of actual fees charged assures that where the percentage in Alaska R. Civ. P. 82 is not an appropriate measure, an alternative measure can be used, and gives important information in other types of cases as well. The amount charged and the basis for it cannot be confidential when compensation for it is sought from an adverse party. There may occasionally be circumstances where sealed filings and in camera disclosure of certain details may be appropriate, as where future litigation is expected and strategy may be disclosed by billing or hourly details. Alaska R. Civ. P. Provides for a 10 day limit, Fed. R. Civ. P. 54(d)(2)(B) allows 14 days. Contrast with former Local Rule 21.1.

2002 Revision. Stylistic.

RULE 55.1 ENTRY OF JUDGMENT UPON DEFAULT

Source: Rule 16 (1981)

Committee Comment. Parties applying for default judgment against infants and incompetents, and persons in the military service, will wish to refer to one of the treatises for the procedural intricacies, such as appointment of counsel. Of course, for default judgments against persons in military service, compliance with the Soldiers and Sailors Civil Relief Act of 1940 is required. *See* former Local Rule 16.

2002 Revision. Stylistic.

RULE 58.1 JUDGMENTS

Source: Rule 20 (1981)

Committee Comment. The Committee has modified former Local Rules 20(F), (G), and (H) in order to assure closer conformity to the purposes of Fed. R. Civ. P. 58 and to provide a smoother path from decision to judgment.

The custom had developed under the previous practice of the court for the clerk to endorse the word approved and a signature line for the judge on all forms of judgment. This is inconsistent with the Fed. R. Civ. P. 58(1). The simple forms of judgment are not to be delayed for or made contingent upon judicial direction under that rule.

In preparing the judgment, the clerk should recite who recovers what against whom and nothing else. A judgment will ordinarily be on Administrative Office Form 450 as amended from time to time, which contains printed language saying whether the judgment results from a jury verdict or a decision by the court and then says, "It is ordered and adjudged." The words following those printed words should be of the sort in the official forms referenced such as, "That the plaintiff John Doe recover of the defendant Richard Roe the sum of $56,000 plus prejudgment interest of $_____, costs of $_____, and attorney's fees of $_____, for a total judgment of $_____, with interest thereon at the rate of ____% as provided by 28 U.S.C. § 1961." The words after "It is ordered and adjudged," should not recite, "That plaintiff recovers a verdict, " or "That summary judgment is granted to defendant," because those words do not show who is entitled to take what from whom and afford no assistance in levying execution upon the judgment.

Certain rules, such as Fed. R. Civ. P. 59, provide an important deadline of ten days from entry of judgement. Occasionally, the running of these times from entry of judgment, combined with delays in transmission of the judgment to counsel has resulted in unreasonably short periods for counsel to take necessary action. The rule therefore provides for effective service upon entry of judgment. If the clerk has no time to prepare the envelopes and make copies of the judgment on a particular day, then the clerk should delay entry of the judgment until the next working day, when service as well as docket entry can be accomplished. The unusual reference to the mail is designed to assure that service to counsel actually proceeds on its way on the date the judgment is entered in the docket. Thus, for example, if the last mail pickup is at 5:00 p.m., the clerk should not docket a judgment when the service copy is merely placed in the clerk's out box at 5:00 p.m. or deposited in the mailbox after the last pickup is made, since that would unreasonably deprive parties of at least one day permitted under the rule. Instead the clerk should delay entry of the judgment until the next business day, when the clerk can give the envelope to the postal employee or put it in the mailbox prior to the last pickup of the day on the same day that judgment is entered.

Many district court judgments include prejudgment interest, particularly in diversity cases governed by Alaska law. The prejudgment rate is usually different from the postjudgment rate, and the prejudgment rate must be computed to the date of judgment. To avoid delay while computations are made and to avoid the need for a daily interest figure and multiplication of that by number of days between some date in the computation and the date the clerk enters judgment, the rule provides for judgment first, with a blank for interest like a blank for costs. The calculation of interest should be presented in such a way that the clerk can, if there is no dispute, simply fill in the number without performing any computation. However, the computation should disclose the means by which the number was arrived at so that other parties can determine wether they agree with the computation. We have eliminated the provision for oral argument on the interest computation since in most cases the judges do not find oral argument necessary for that purpose and retain discretion to order it when desirable.

2002 Revision. In ¶ 58.1(a)(1) added the words "or party preparing the judgment" after the word "clerk." Clarifies that this provision applies as well in those cases where the prevailing party is ordered to prepare the judgment after a court-trial.

RULE 58.2 SATISFACTION OF JUDGMENTS

Source: Added in 1995

Committee Comment. In Alaska practice, parties recovering involuntary payments made pursuant to a judgment are required to file satisfactions of judgment pursuant to AS 09.30.300. The D. Ak. LR 58.2 adds a provision requiring this salutary practice in federal court.

2002 Revision. Stylistic.

RULE 59.1 MOTIONS FOR RECONSIDERATION OF NON-APPEALABLE ORDERS

Source: Rule 7.1(l) (1995)

Committee Comment. [*See* comment to Rule 7.1]

2002 Revision. Rule 7(l) (1995) renumbered. Revised to make clear that this rule only applies to those orders to which F.R.Civ.P. 59, which applies solely to final judgments and appealable interlocutory orders [*Balla v. Idaho State Bd. Of Corrections*, 869 F.2d 461 (9th Cir. 1989)], does not apply. The court has inherent power to review non-appealable orders. [*See United States v. Martin*, 226 F.3d 1042 (9th Cir. 2000)] LR 59.1 applies to those non-appealable orders. The major change from existing practice is to add an "open-ended" time for reconsideration where there has been an intervening change in controlling law. Placing an arbitrary time limit on bringing intervening changes in controlling law to the attention of the court is not conducive to either judicial efficiency or the interests of justice.

RULE 67.1 DEPOSIT OF FUNDS IN THE REGISTRY ACCOUNT; CERTIFICATE OF CASH DEPOSIT

Source: Rule 27(B) (1981)

2002 Revision. Stylistic.

RULE 67.2 INVESTMENT OF FUNDS ON DEPOSIT

Source: Rule 67.2 (1995)

2002 Revision. Stylistic.

RULE 68.3 SETTLEMENTS AND JUDGMENTS IN FAVOR OF A MINOR

Source: Rule 36.1 (1981)

Committee Comment. Under this rule the court will defer to Alaska R. Civ. P. 90.2 by referring approval of minor settlements to the Alaska Superior Court.

2002 Revision. Stylistic.

RULE 69.1 JUDICIAL SALES: CONFIRMATION

Source: Rule 29 (1981)

2002 Revision. Stylistic.

RULE 77.1 ORDERS AND JUDGMENTS BY THE CLERK

Source: Rule 20(D), (F) (1981)

Committee Comment. This rule is similar to former Local Rule 20. It has been the custom of the court, maintained by Local Rule, for judges to have clerks enter minute orders, often at the clerk's discretion, regulating the calendaring or hearings, stipulations, extensions, and other routine matters. Minute orders are also sometimes entered by the clerk pursuant to judicial direction on substantive matters where speed and convenience will be facilitated by the use of minute orders. In addition on routine stipulations, such as stipulations foe extension of time, the clerk grants these stipulations subject to review de novo by the judge within ten days. These are rarely revised except where the judge is aware of a problem that might be caused by the stipulation, such as where an extension would mean that motion papers would be filed to close to the trial date.

2002 Revision. The last sentence of 77.1(a) (1995) was deleted; replicated the provisions of F.R.Civ.P. 77(c).

RULE 77.6 COURT LIBRARY

Source: Rule 30 (1981)

Committee Comment. This rule is similar to former Local Rule 30.

2002 Revision: Stylistic.

RULE 79.2 BOOKS AND RECORDS OF THE CLERK

Source: Rule 25 (1981)

Committee Comment. Files serve as essential archives not only for the court but also for parties, attorneys in other cases which may be related to the case at issue, credit and security examiners, reporters, and the general public. This rule is designed to assure that the file will remain available in the clerk's office in the locality where the case was filed or venue was established. Judges may from time to time order extra photocopies of papers to be provided to the court or made by the clerk where a need to maintain extra copies of a file at different locations is foreseen. It is the responsibility of the clerk's office to keep track of locations of files so that the files can be quickly, accurately and fully retrieved for persons seeking to examine them. In general, to avoid lengthy checkouts of original files by law clerks or others, photocopies should be made of the file.

Documents are filed for in camera examination in a number of circumstances. In discovery disputes, the party objecting to discovery may, on its own motion or pursuant to an order, lodger documents for in camera examination. These documents will not be filed and will be returned after examination. In camera examinations occur in numerous other circumstances in both civil and criminal cases, such as trade secrets, medical information, bank failures, and pre-sentence reports. Sometimes the parties have access to these documents, but the public does not. Occasionally the court may determine on motion that disclosure is appropriate, and the court will direct that the materials be removed from the sealed containers and filed in the ordinary way. The practice of the court has been that the judge opens the envelope, examines the papers, and then reseals the envelope, except on motions and orders to the contrary. On occasions where such a file is presented for examination, in the clerk's office to an inquirer, the clerk should take such steps as may be appropriate to assure that the inquirers do not obtain access to the sealed documents. Violation of the rule on sealed documents or of any court orders relating to such a rule may subject the violator to criminal penalties, civil damages relief, penalties for contempt of court, or other sanctions.

2002 Revision. Stylistic.

RULE 80.1 RECORD OF PROCEEDINGS

Source: Rule 25.1(1981)

Committee Comment. This rule adopts the former Local Rule 25.1 and adds the provision found in model D. Ak. LR 80.1(E).

2002 Revision. Stylistic.

RULE 81.1 APPLICABILITY

Source: Rule 37(A) (1981); Rule 1.1(c)(2) (1995)

2002 Revision: Rule 1.1(c)(2) (1995) renumbered without substantive change.

RULE 81.2 NATURALIZATION PETITIONS

Source: Rule 28 (1981)

Committee Comment. This rule follows former Local Rule 28.

2002 Revision. Stylistic.

RULE 83.1 ATTORNEYS

Source: Rule 3 (1981)

Committee Comment. This rule modifies former Local Rule 3. The lettering and numbering of subsections has been revised to conform to the usual style.

Section B has been expanded to clarify and regulate the procedure for obtaining information and resolving objections to admission, as, for example, in the case of an individual seeking admission to practice before the district court after having been suspended before the Alaska courts. (B)(2) has been expanded to give the court information about discipline, withdrawals from the bar, and suspension and other actions. (B)(3) assures the bar association of notice. (B)(5) puts a time limit on the objection process. The former 30 day limit for resolving objections has been eliminated since that amount of time might be insufficient to schedule necessary hearings.

The major change in the rule is in subsection (C). It has been changed to eliminate the residency requirements which may raise constitutional concerns under *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), *Frazier v. Heebe*, 482 U.S. 641 (1987), and *Barnard v. Thorstenn*, 489 U.S. 546 (1989). The revision also brings requirements for association of local counsel into closer accord with the purposes of court regulation of association and the practicalities of the relationship between local and associated counsel.

Traditionally an attorney admitted to the bar of this court may represent clients without association with local counsel anywhere in the district, and an attorney not so admitted must associate with one admitted to the bar of this court. The increasingly national character of some areas of practice, the size of Alaska, and the customs in the Bar regarding the relationship between local and non-local counsel have combined to make exceptions to this traditional approach desirable. The rule has been changed in order to avoid needless burdens on counsel and their clients and also to fit the restrictions of the rule more closely to the needs of the court and opposing counsel.

D. Ak. LR 83.5 especially notes "opposing counsel" because, although the rule is often rationalized in terms of its impact on the court, the greatest burdens of associated counsel often fall on the associated counsel's adversaries. These attorneys encounter undue difficulty getting telephone calls returned by highly peripatetic "national" attorneys, obtaining routine stipulations, and negotiating. Telephone and fax solve problems where both sides want them solved, but sometimes one side limits its availability for communications for tactical reasons or simply has a lawyer at his desk too rarely for routine two-way communication. The court also needs to be able to have attorneys physically present on short notice for some hearings, especially in criminal cases. Counsel representing other parties sometimes needs an attorney physically available for service of papers, discovery proceedings, and other matters.

The rule allows for more flexibility for non-Alaskan attorneys to represent parties without association of local counsel but also allows for the privilege to be lost if the court or opposing counsel encounter undue difficulties with communications or scheduling. The provision for *nunc pro tunc* orders and filings by non-local attorneys without prior judicial approval in (C)(3) is particularly designed to avoid unnecessary compliance with the statute of limitations by non-local attorneys and Fed. R. Civ. P. 11 concerns for local attorneys asked to associate in the filing of a complaint shortly before the statute of limitations might bar the action. There are several circumstances in which association is not desirable or necessary.

One occasion for "good cause" for representation by nonlocal counsel without associated local counsel may be in small cases which cannot support two fees or division of a fee. The desirability may also arise in some large cases involving little local law expertise where non-local counsel perform all substantive work. Where association is required, the amendments eliminate the requirement that local counsel be "at the place within the district at which the action is pending" because usually an attorney from one town will be able to handle a proceeding in another. Because of the immense distances and occasional travel and telephone difficulties in Alaska, an attorney in one town within the district cannot perform his duties without unduly inconveniencing the court or opposing counsel located in another town. Where this occurs, the court now can require association of local in the place where the action is pending regardless of whether non-Alaskan counsel is associated.

D. Ak. LR 83.5 gives the court discretion to require non-Alaskan counsel to associate with local counsel where problems arise. For example, association may be required if non-local counsel has not made himself available for telephone contact and routine stipulations with local counsel, has

been unavailable for hearings at which personal presence was desirable, or for other reasons the remote representation causes undue difficulties for the court or for other parties and their attorneys. Even with Alaskan counsel, association or replacement with local counsel might occasionally be required for similar reasons where the case was at a different location within the district.

In (c)(2), the requirement that local counsel sign all papers has been eliminated. Often, the non-local attorney acts as lead counsel, but local counsel, receiving papers a few hours before they are filed, must sign under the traditional rule. Since the 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure, this is too onerous a burden on an attorney who cannot, as a practical matter, control or adequately review the content of the document he signs.

D. Ak. LR 83.5(h) adopts the Alaska State Code of Professional Responsibility, which hereby becomes binding in Federal Court. D. Ak. LR 83.5(h) follows Rule 110-3 of the Local Rules in the Northern District of California. *See United States v. Lopez*, 989 F.2d 1032 (9th Cir. 1993).

The committee is considering possible future revision of D. Ak. LR 83.5 to take into account the concerns raised in *Dondi Properties Corporation v. Commerce Savings and Loan Assn*, 121 F.R.D. 284 (N.D. Texas 1988), but prefers to await more experience in other districts before proceeding.

2002 Revision. Adds a provision that requires persons admitted to practice before the district court to timely keep the court apprised of address changes [83.1(j)]. Provisions related to the responsibilities, duties, and conduct of attorneys were modified to clarify that the rules apply with equal force to attorney's appearing *pro hac vice* as well as attorneys admitted to practice before the court.

2004 Amendment. Paragraph (4) has been added to subsection (d) specifying the information that an applicant for admission *pro hac vice* must provide the court in the application. The information requested is directed primarily to determining fitness for admission by requiring disclosure of any pending or past disciplinary actions against the applicant (on those that were in the past, only those actions that resulted in suspension or disbarment must be disclosed).

New subsection (k) codifies the current admission fee collected imposed for original admission and proposes an increase in the current fee for *pro hac vice* admission to $150.

RULE 83.2 STUDENT PRACTICE RULE

Source: Rule 3.1 (1981)

Committee Comment. This rule follows former Local Rule 3.1.

2002 Revision. Stylistic.

RULE 83.3 PHOTOGRAPHS, VIDEO OR AUDIO RECORDERS, BROADCASTS PROHIBITED

Source: Rule 82.1 (1995)

2002 Revision. Renumbered from 82.1 without substantive change.

RULE 84.1 FORMS

Source: Added in 2002.

2002 Revision. Encourages use of standard forms.

RULE 86.1 EFFECTIVE DATE OF AMENDMENTS

Source: Added in 2002

2002 Revision. Defines effective date of amendments to rules and applicability to pending actions/proceedings.

CRIMINAL RULES

BACKGROUND

In August 1995 a committee was formed under the chairmanship of Magistrate Judge John D. Roberts to review and make recommendations to the court on modifications or amendments to the local criminal rules adopted in 1982 ("Roberts Committee"). The members of this committee included: Robert C. Bundy, Esq. (U.S. Attorney) (replaced during the process by Karen L. Loefler); Valerie Teehan, Federal Public Defenders Office (later replaced by Kevin F. McCoy); Sidney K. Billingslea, Esq.; Brian M. Doherty, Esq.; John M. Murtagh, Esq.; Ronald A. Offret, Esq.; and Christine S. Schleuss, Esq. This committee completed its work in the fall of 1996 and submitted its final report to the Local Rules Oversight Committee in November 1996. The proposed rules were forwarded to the court, but were not adopted.

2002 REVISION

The 2002 revision process, utilizing the recommendations of the Roberts Committee as a framework, was four-fold: (1) renumbered and restructured as necessary the rules to coincide with the Federal Rules of Criminal Procedure numbering; (2) reviewed the rules to eliminate any duplication of or conflict with the Federal Rules of Criminal Procedure or statutes; (3) updated the rules to reflect changes in statutes and Federal Rules of Criminal Procedure; and (4) redrafted the rules consistent with Garner, *Guidelines for Drafting and Editing Court Rules*. Magistrate Judge John D. Roberts, Magistrate Judge A. Harry Branson, representatives of the U.S. Attorney, Federal Public Defender, and U.S. Probation Office participated in the 2002 review.

RULE BY RULE HISTORY / COMMENTS

RULE 1.1 SCOPE

Source: Addition recommended by the Roberts Committee [Proposed Rule 10(c)].

2002 Review: Primarily stylistic; ¶ (a)(2) added to make explicit the implicit power to modify or dispense with the rules in the interest of justice.

RULE 2.1 PURPOSE AND CONSTRUCTION

Source: Addition recommended by the Roberts Committee [Proposed Rule 10(d)].

2002 Review: Stylistic.

RULE 5.1 INITIAL APPEARANCE BY VIDEO TELECONFERENCING

2003 Amendments. Added. Implements locally the authorization in Rule 5, F.R.Cr.P. to hold initial appearances utilizing video teleconferencing.

Rule 10.1 Arraignments

Source: Addition recommended by Roberts Committee [proposed revisions to LR 1(a) and 6(a)]

2002 Review: Stylistic.

RULE 10.2 ARRAIGNMENT BY VIDEO TELECONFERENCING.

2003 Amendments. Added. Implements locally the authorization in Rule 10, F.R.Cr.P. to hold arraignments utilizing video teleconferencing.

RULE 11.1 CHANGE OF PLEA.

Source: Rule 3.2 (added 5/4/93)

Committee Comment: The sentencing guidelines promulgated by the United States Sentencing Commission became effective November 1, 1987. The court's initial procedures for guideline sentencing were set out in Miscellaneous General Order No. 590 of February 25, 1988. The revised procedures were adopted on an interim basis on January 8, 1993, by Miscellaneous General Order No. 725, which also provided for public notice and comment as required by 28 U.S.C. § 2071.

Local Criminal Rule 3.2(a) of this rule addresses the court's need to know whether a case will go to trial in sufficient time to efficiently cancel a jury call. The court understands that there will be occasions when, for good reason, counsel cannot comply with this rule. However, more often than not, counsel know well in advance of a trial date that there will be a change of plea; and in those cases, counsel must observe this rule. Moreover, counsel sometimes assume that because a plea agreement has been reached, it is sufficient to have the change of plea entered at the time set for trial. Such delay in informing the court of the status of a case preempts the court from scheduling other matters in place of a trial, and puts all concerned at risk where, as sometimes occurs, the parties believe they have a plea agreement but find out at the last minute that they do not. The court needs to ascertain such problems in sufficient time to allow the court to go forward as scheduled.

2002 Revision. As drafted by the Committee subsection (a) did not address how to "arrange" a hearing and apparently there has been substantial confusion among the members of bar. Revised to provide that the procedure is the filing of a Notice of Plea Change not later than three days prior to the trial.

RULE 11.2 PLEA AGREEMENTS

Source: Rule 3.3 (added 5/4/93)

Committee Comments: Local Criminal Rule 3.3(a) is intended to mesh with the scheduling requirements of Rule 3.2. The court realizes that it is not always possible to have a signed plea agreement twenty-four hours in advance of the date set for a change of plea hearing. However, there are good reasons why the arrangements suggested by this rule should be observed. Counsel have an obligation to their clients and to the court to do their work timely. If change of plea negotiations are not timely conducted, there is a substantial risk that counsel will needlessly do trial preparation work. Moreover, the longer counsel wait to inform the court of a change of plea, the more difficult it is for the court to schedule necessary hearings or schedule other matters in place of a trial which has become unnecessary due to a plea.

The requirement that plea agreements be reduced to writing applies only to offenses involving felonies. The court may, of course, instruct the parties to reduce misdemeanor plea agreements to writing whenever the court determines the nature of the case or the terms of the agreement make such a written agreement desirable. The court encourages all plea agreements to be reduced to writing. The limitation of this requirement to felony cases should not in any way discourage the parties from submitting written agreements in other cases as they deem necessary. However, the court recognizes that the heavy misdemeanor calendar, particularly in Fairbanks, which often involves defendants who appear telephonically from remote parts of Alaska and from out-of-state, makes impractical a requirement that all plea agreements be reduced to writing.

Where it is not possible to provide the court with a signed plea agreement in accordance with this rule, counsel should observe the following suggestions:

(1) Where a plea agreement has been agreed upon and reduced to writing, but for good reason has not yet been signed, counsel may lodge an unsigned copy of the final agreement with the court's case management clerk when a change of plea hearing is scheduled.

(2) Counsel, should not attempt to file with the clerk of court any unsigned proposed plea agreement.

In Local Criminal Rule 3.3(c) the court has endeavored to amplify its requirements for an appropriate plea agreement in a fashion which will minimize the need for revisions in the current practices of the United States Attorney and criminal defense counsel with respect to plea agreements. Plea agreements must be tailored to suit the peculiar needs of each case. However, there are many aspects to most plea agreements as to which there is no need for variation. It will expedite and simplify the process for all concerned if the same format and language are used in all plea agreements unless there is some reason to vary the same. *See generally* Rule 32, Federal Rules of Criminal Procedure.

2002 Revision. (1) Added Class A Misdemeanors to Felonies. (2) In ¶ (d)(6), deleted subparagraphs (A) and (B) of the committee proposal. "Facts" affecting sentencing are not fully developed until after the sentencing report is completed and reviewed by counsel making it virtually impossible for any agreement or disagreement on those "facts" to be reached at the time the plea agreement is entered into. Consequently, in practice, counsel simply inform the court that this is the case.

RULE 16.1 OMNIBUS DISCOVERY IN CRIMINAL CASES

Source: Addition recommended by the Roberts Committee [proposed New-LR-02]

Committee Comment: The rule does not apply to defendants who represent themselves in criminal cases because of the apparent conflict of interest in having the prosecution meet and confer with a defendant.

2002 Revision: Stylistic.

RULE 32.1 PROCEDURES FOR GUIDELINE SENTENCING.

Source: Rule 3.4 (added 5/4/93)

Committee Comments: The sentencing process under the United States Sentencing Commission Guidelines has become far more mechanical and objective than pre-guideline sentencing which was by and large a subjective process. As a consequence, guideline sentencing requires a more mechanical process as reflected by this rule. It is absolutely essential to the efficient administration of sentencing for all concerned to observe the time line set out in this rule. The court expects strict compliance with the time requirements of the rule. The disclosure of the presentence report is controlled by Rule 32, Federal Rules of Criminal Procedure. Counsel may be subject to potential sanctions for failure to comply with the strict requirements of this rule.

2002 Revision: This rule as originally adopted and the revision drafted by the committee ran afoul of the proscriptions mandated by F.R.Cr.P. 57 on replicating or paraphrasing provisions of the F.R.Cr.P. Portions of the committee draft subsection (a), all of subsections (b), (c), (d) [except the duties of counsel that is now embodied in subsection (g)], (e), and (f) are covered completely by F.R.Cr.P. 32 and were deleted from the revised rule.

2003 Amendment. Subsection (b) amended to make clear that the confidential sentencing memorandum was not be made available to any entity.

RULE 32.2 DISCLOSURE OF PRETRIAL SERVICES AND PRESENTENCE REPORTS

2003 Amendment. Added.

General: This rule is intended to enhance and reinforce the general confidentiality of pretrial sentencing reports. Disclosure of a PSR is to be the exception, not the rule. The disclosure of PSRs prior to sentencing is governed by 18 U.S.C. § 3552(d), F.R.Cr.P. 32, and D.Ak. LCrR 32.1. This rule governs postsentencing/postdisposition disclosures. Under current practice, when the USPO receives a request for disclosure of a PSR, the USPO sends a memo to the court seeking approval of the request. This rule is designed to relieve the administrative burden on the USPO in two ways. First, it eliminates many of the requests for information that are routinely approved by the court. Second, it shifts the burden to the party seeking additional disclosure to seek and obtain a court order authorizing further disclosure. This should also tend to reduce, if not eliminate, the number of requests processed by the court.

Subsection (a): Paragraph (1) is derived from similar language in the rules adopted in Connecticut, Idaho, Illinois (Northern District), Indiana (Southern District), Maryland, New Jersey, New Mexico, North Carolina (Eastern and Western Districts), Ohio (Southern District), Oklahoma (Eastern and Northern Districts), Tennessee (Western District), Texas (Western District), Utah, Vermont, West Virginia (Northern and Southern Districts), Wisconsin (Eastern District), and Wyoming, and is intended to make clear that a PSR is a court document. Paragraph (2) sets forth the general rule limiting disclosure. The "ends of justice" standard for court-ordered disclosure is the standard mandated by the Ninth Circuit in *U.S. v. Schlette*, 842 F.2d 1574, 1581 (9th Cir. 1988).

18 U.S.C. § 3153(c)(1), the Guide to Judiciary Policies and Procedures Vol XII, Chapter III, Part A, and D.Ak. LCrR 46.1(d) provide for disclosure of the pretrial services report to the accused and the attorneys for the accused and the government. The Guide to Judicial Policies and Procedures further requires that the pretrial services report be returned to the pretrial services officer at the conclusion of the bail/detention hearing. The pretrial services report may also be released to the probation office for use in preparing the presentence report. Full or partial disclosure under strict guidelines to family members or third-party custodians to whom the accused has been released is also authorized. In addition, if the defendant poses a danger to a person or the community, information in the pretrial services report may be disclosed to the endangered person, but, in the absence of an imminent or immediate threat, disclosure must be authorized by the court. Nothing in this rule expands the authority of the USPO to release or disclose information contained in the pretrial services report.

Guide to Judiciary Policies and Procedures Vol. X, Chapter III, Part C provides for disclosure to the Bureau of Prisons while Part D provides for disclosure to the U.S. Sentencing Commission. Vol X, Chapter IV, Part D, authorizes limited disclosure on parolees, probationers, and those on supervised release. Summarized: (1) to law enforcement agencies of the offender's location and handwriting exemplars; (2) to correctional agencies if authorised by the offender and does not violate a specific promise of confidentiality or place the offender or others in danger of harm; (3) to family or social agencies with the consent of the offender; and (4) information that the offender poses a reasonably foreseeable danger to third persons under strict guidelines.

18 U.S.C. § 4042(b) requires disclosure of certain information to state and local law enforcement on defendants released on probation or supervised release convicted of a drug trafficking crime or a crime of violence. [Name, criminal history, and restrictions on conduct or other conditions of release.]

18 U.S.C. § 4042(c) requires disclosure of information to state and local law enforcement on certain sex offenders released on probation or supervised release. [Name, criminal history, restrictions on conduct or other conditions of release, and that the sex offender is subject to registration as a sex offender.]

Subsection (b): Derived from similar rules in Connecticut and Vermont. Paragraph (1) imposes a duty on the person to whom disclosure is made to continue to hold the information received in confidence and prevent its further dissemination. Paragraph (2) is intended to permit the recipient of a PSR, or excerpts of it, to contact or examine sources of the information. If the recipient is able to obtain the information from another source, even if knowledge of the source is derived from the PSR, the recipient may use the information without violating the rule (no "fruit of the poisoned tree" issue). Paragraph (2) also makes clear that although this is the rule in general, the court may order otherwise with respect to a particular matter. Paragraph (3) creates a written record that the recipient understands the rules of confidentiality. .In the event that it becomes necessary to seek sanctions for an unauthorized re-disclosure through contempt proceedings the defense "lack of notice" would not be available.

Subsection (c): PSRs are released as a matter of course to the Federal Bureau of Prisons, The U.S. Sentencing Commission (and, prior to 2002 when the delayed repeal of Chapter 311, title 18 [§§ 4201 – 4218] took effect, the U.S. Parole Commission). The Supreme Court in *U.S. Department of Justice v. Julian,* 486 U.S. 1 (1988) ruled that the subject of the PSR could obtain a copy of it from the Bureau of Prisons or Sentencing Commission under the FOIA. The holding in *Julian* has **not** been extended beyond release to the defendant or with the defendant's consent, *i.e.*, a third-party may not obtain a copy under FOIA. This subsection is adapted from similar rules in Connecticut, Georgia (Northern and Southern Districts), Kansas, New Mexico, Pennsylvania (Eastern District), and Washington (Western District), and is designed to preclude FOIA disclosure to a third party. While, under *Julian*, it will not preclude release under a FOIA request by the defendant (subject) or where the defendant consents to release, it should establish lack of "control in the agency" sufficient to preclude other third-party releases under Exception (5) to the FOIA [5 U.S.C. § 552(b)(5)]

Subsection (d). No other district appears to have adopted a rule similar to subsection (d). The purpose of subsection (d) is to eliminate from the process of obtaining court approval for the release of information from a PSR in those situations where release is generally granted as a matter of course. By pre-approving release of the information delineated in subsection (d), the administrative burden on both the USPO and the court is reduced. The USPO will not be required to prepare a request and the court will no longer be burdened with processing requests for this information. It should be noted, however, that where there is a promise of confidentiality involved, the information may not disclosed except by court order. In addition, although it is expected it will be seldom exercised, in any given case the court may remove a presentence report in a given case from the "automatic" disclosure provisions of subsection (d).

Release of the presentence report under ¶ (d)(1) to the Alaska Department of Corrections is solely a matter of comity to permit the state criminal justice system to avoid duplication of effort and resources. The provisions of subparagraphs [A] and [B] are intended to make clear that the presentence report is not subject to disclosure under the Alaska FOIA, AS § 42.25.120. . Subparagraph [C] makes clear that further disclosure may be made only in accordance with this rule. For example, the Alaska Department of Corrections may go to the source of the information, and obtain the same information contained in the presentence report and use that information without restriction [¶ (b)(2)]. The Alaska Department of Corrections may also make further disclosure to the

same extent as if the presentence report were still in the hands of the USPO, *e.g.*, treatment [(d)(2)] or law enforcement [(d)(3)].

The information to be released under ¶ (2) can only be released without a court order if consented to by the subject of the report. [If the court has ordered the defendant to undergo treatment, the defendant and counsel have received notice and have had the opportunity to object to disclosure.] If the subject consents to release of medical history information to a treatment provider, there appears to be no public policy consideration that would be promoted by denying its release.

The information released to mental health treatment professionals under ¶ (3) is somewhat broader than that released to "regular" health and drug treatment professionals. The rationale for this additional disclosure is that when the court orders the defendant into mental health treatment it is typically because the defendant poses a danger to another. Therefore, mental health professionals need additional information about the defendant's conduct, which is contained in the offense conduct and prior records of the report.

The information designated to be released under ¶ (4) was derived from and is included in the information released to the U.S. marshal in the case of a probationer who has absconded [Probation Form 20]. The "automatic" release is with respect to defendants in custody or on parole, probation or supervised release, including those who may have absconded. Normally a request should be made to the BOP for incarcerated defendants and this paragraph authorizes release by BOP. For those on parole, probation, or under supervision, the request should be made to the USPO. For a person who has been released and is no longer on parole, probation or subject to supervised release, disclosure should be permitted only upon order of the court and in extraordinary circumstances.

Subsection (e). Although other districts have a requirement that a petition/motion be filed for authorizing disclosure [Alabama (Middle District), Arizona, Connecticut, Georgia (Middle and Southern District), Idaho, Illinois (Central and Northern Districts), Indiana (Southern District), New Jersey, New Mexico, North Carolina (Eastern and Western Districts), Tennessee (Western District), Vermont, West Virginia (Northern and Southern), and Wisconsin (Eastern District)] no other district provides a procedure. Under current practice, the request is made to the USPO who passes the request on to the court for authorization to make the release. This subsection places the onus on the party seeking disclosure to make direct application to the court and to justify the necessity for the requested disclosure. It is believed that service on the subject, his/her counsel, the U.S. Attorney and the Probation Office is the minimum necessary to ensure that all interested parties are given adequate notice of the requested disclosure in order to permit those parties to take appropriate steps to protect their respective interests.

Subsection (f). Several districts have similar enacted rules embodying the materials contained in ¶ (4) [Alabama (Middle District), Arizona, Florida (Middle and Northern Districts), Georgia (Middle and Southern Districts), Kansas, Illinois (Northern and Southern District), Maryland, New Jersey, New Mexico, North Carolina (Eastern District), Ohio (Southern District), West Virginia (Southern District)]. Those districts also provide for the USPO to file a petition with the court. Unlike the foregoing districts, ¶ (1) shifts the onus of obtaining court authorization for disclosure from the USPO to the party at whose request the subpoena is issued by requiring the party to file a motion authorizing disclosure in the same manner as without a subpoena. As with other disclosures of PSRs, it is believed that the subject of the PSR and the U.S. Attorney should be provided notice of the subpoena and, if appropriate, oppose or support, compliance. The 15-day response period may be lengthened

or shortened as the circumstances may require. For example, the time within which a response to the subpoena is due may not allow the full 15 days.

Subsection (g): Similar to rules adopted in Connecticut, Pennsylvania (Western District), and Ohio (Southern District). The language used was adopted from the Western District of Pennsylvania. The other two districts make unauthorized disclosure *ipso facto* a contempt of court.

Post-Publication Changes.

¶ (a)(2) – Added references to pretrial services reports to clarify that pretrial services reports were to be treated in the same manner as presentence reports.

¶ (d)(3) – Added this provision for release to mental health providers as a separate category from drug and health care providers at the suggestion of the USPO.

¶ (d)(4) – The was ¶ (d)(3) in the published draft renumbered without substantive change.

Subsection (e) – This was revised at the suggestion of the USPO to shift the onus of obtaining court approval from the USPO to the party subpoenaing the report. The extent of the materials that may be disclosed without further court order is such that subpoenas should be rare and will require substantial justification for the additional release. Current practice has the USPO preparing the petition. However, inasmuch as the requesting party will have to demonstrate a reason for the further disclosure in any event, it seems logical and administratively more efficient to require that party to initiate the process. The USPO, as well as other interested parties, can review the basis for the requested disclosure and respond as deemed appropriate. The proposal replaces what was essentially a three-step process [initiation by USPO, reply by the requesting party, and then a response to the requesting party] with a two-step process [initiation by the requesting party and a response by the USPO and other interested parties as appropriate.]

Subsection (g) – Amended to clarify that coverage extended to any and all information and documents as described in ¶ (a)(1), not just PSRs.

RULE 32.1.1 REVOCATION OF PROBATION OR SUPERVISED RELEASE.

Source: Addition recommended by Roberts Committee [proposed New-LR-05].

Committee Comment: The revocation sentencing process under the United States Sentencing Commission Guidelines and statutes has become far more mechanical and objective than pre-guideline revocation sentencing, which was by and large a subjective and discretionary process. As a consequence, guideline revocation sentencing requires a more mechanical process as reflected by this rule. It is absolutely essential to the efficient administration of revocation sentencing for all concerned to observe the time lines set out in this rule. The court expects strict compliance with the time requirements of the rule. Failure by counsel to comply with the strict requirements of this rule may subject counsel to potential sanctions.

The preliminary hearing, if any, and the revocation hearing will be conducted pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure. Local Criminal Rule 3.3 outlines factors that may be relevant to plea agreements in probation or supervised release revocation proceedings and should be reviewed before entering into an agreement.

At the onset of the revocation disposition hearing, the court may announce its tentative findings and provide a reasonable opportunity for counsel to state objections to the findings before those findings are adopted and sentence is imposed. See Rule 1101 of the Federal Rules of Evidence which is applicable to these proceedings.

2002 Revision: Subsection (a) of the committee proposal was substantially revised for purposes of clarity and to bring the rule into conformity with actual practice. Committee proposed (a)(3) [revised subsection (c)] as drafted, although the language used is somewhat ambiguous, appeared to address solely supervised release, but not probation. Although under *U.S. v. Colacurcio*, 84 F3d 326 (9th Cir. 1996) a district judge is required to conduct a probation revocation evidentiary hearing *de novo* where the sentence was imposed by a district judge, 18 U.S.C. § 3401(d) authorizes a magistrate judge to hold evidentiary hearings on probation and supervised release condition violations where the sentence was imposed by a magistrate judge. As revised, ¶ (c)(1)(A) clarifies this point. 18 U.S.C. § 3401(i) authorizes magistrate judges to conduct evidentiary hearings on violations of supervised release and make a report and recommendation to the district judge. Revised ¶ (c)(1)(B) and (2) clarifies this point. Also as drafted, proposed (a)(3)(A) appears to indicate that if revocation or modification is recommended a disposition hearing is automatic but not if denial is recommended. However, in actual practice a disposition hearing is not set until the court finds a violation and that can not occur until after the district court rules on the report and recommendation of the magistrate judge. There is no procedure specified in either F.R.Cr.P. 32.1 or elsewhere in the F.R.Cr.P. or local rules, that govern review of magistrate judge reports and recommendations. Revised ¶ (c)(2) fills that gap, treating it the same as a non-dispositive motion.

Proposed (a)(3)(B) only addressed dispositions by district judges; revised subsection (d) was drafted to cover all cases in which an order finding a violation is entered, whether by a district judge or a magistrate judge in cases where the sentence was imposed by a magistrate judge.

Unlike F.R.Cr.P. 32, 32.1 does not provide for a disposition report by the probation office; the requirement for a disposition report is solely a product of the local rule. Consequently, the detailed procedure for preparing and the time frames contained in 32.1.1 do not suffer from the same infirmity as did 32.1.

In ¶ (b)(2) [(e)(2) in revised rule], service by facsimile was changed because of application of the "3-day rule" to electronic service change to F.R.Civ.P. 5 effective 12/01/01 incorporated by reference by F.R.Cr.P. 49(b).

Proposed subsection (c) [revised subsection (g)] was amended to include entry on the record in open court as well as by a written agreement.

2003 Amendments. Paragraph (e)(4) amended to clarify that the confidential recommendation of the USPO is not to be disclosed to any entity without an order of the court.

RULE 32.1.2 DISCLOSURE OF DISPOSITION REPORTS

2003 Amendments. Added. In a sense, probation or supervised release disposition reports are an updated presentence report. Disclosure of disposition reports used in revocation of probation or supervised release proceedings prior to the disposition is covered by D.Ak. LCrR 32.1.1. This rule covers postdisposition disclosure and is intended to make clear that revocation disposition reports are to be treated in the same manner as presentence reports.

RULE 44.1 APPEARANCES AND WITHDRAWAL OF RETAINED COUNSEL

Source: Rule 1 (1982)

2002 Revision. Stylistic

RULE 44.2 APPOINTED COUNSEL

Source: Addition recommended by Roberts Committee [proposed revised Local Rule 1(b)

2002 Revision: Substituted a definite 10 days for the somewhat nebulous "reasonable time" in ¶ (a)(1) at the joint request of the U.S. Attorney and Federal Public Defender. The consensus was that 10 days was an appropriate outer time limit to permit timely representation by the Federal Defender in the case.

RULE 46.1 BAIL HEARINGS; PRETRIAL RELEASE.

Source: Rule 3 and 3.1 (1982)

Committee Comment: The Local Rules do not limit the number of special service requests for third party custodians, although the court considers it unusual when more than two third-party custodians are proposed without success. In those circumstances counsel for the government and the defense should confer with the pretrial services officer regarding further proposals.

The court expects counsel to strictly adhere to the confidentiality provisions of this rule and of 18 U.S.C. § 3153(c)(1)

2002 Revision: Stylistic.

RULE 46.2 NON-CUSTODIAL TRANSPORTATION OF DEFENDANTS AND WITNESSES

Source: Addition recommended by Roberts Committee [proposed New-LR-01]

Committee Comment: Advance notice for non-custodial transportation of defendant(s) and/or defense witnesses is needed by the United States Marshal to permit coordination of travel arranged by the Marshal through centralized ticketing.

(This rule replaces Miscellaneous General Order No. 645, dated 12-11-89)

2002 Revision. Stylistic.

RULE 47.1 CRIMINAL MOTION PRACTICE.

Source: Addition recommended by Roberts Committee [proposed New-LR-03]

2002 Revision. At the request of the U.S. Attorney and without objection by the defense side, the 10-day window for motion practice was changed to split 7 – 3 instead of 5 – 5. This comports to what is essentially universal practice, *i.e.*, the time to file opposition to motions, briefs, *etc.* is longer than the time allotted for replies.

RULE 50.1 ASSIGNMENT OF CASES; CALENDAR

Source: Rule 6 (1982)

2002 Revision. Added Class A misdemeanors to (a)(1). Should a defendant consent to trial by a magistrate judge after the matter is referred to the magistrate judge for arraignment, the district judge would be notified of this consent and the matter will simply remain with the magistrate judge for all matters. Changing the docket to change the status from a case assigned to a district judge is accomplished internally through the clerk's office when the consent is filed and need not be part of the rules.

Rule 50.2 Continuances; Excludable Time

Source: Rule 5 (1982)

Committee Comment: The revised Local Criminal Rule no longer contain the requirement of Local Criminal Rule 5.1, which required all criminal motions to contain a statement directed to the

determination of excludable time under the Speedy Trial Act and Speedy Trial Plan for this District. Practicing attorneys should now be sufficiently familiar with the Federal Speedy Trial Act so that an excludable delay statement is no longer necessary for all criminal motions. The determination of excludable time becomes highly relevant when the government or a defendant seeks a continuance of trial. Hence, the rule retains the requirement that the moving party address statutory excludable time when requesting a continuance of trial.

2002 Revision. Stylistic.

RULE 56.1 RELEASE OF INFORMATION IN CRIMINAL CASES.

Source: Rule 4 (1982)

Committee Comment: Present Local Criminal Rule 4 Revised. Release of information by attorneys is addressed in D.Ak. LR. 83.1(h) which incorporates the Alaska Rules of Professional Conduct. *See* Rule 2.6 Trial Publicity of the Alaska Rules of Professional Conduct. These rules are modeled after the American Bar Association's Standards for Criminal Justice Fair Trial and Free Press (3rd Ed. 1991). These standards recognize a broad and comprehensive right of public and media access to information concerning criminal proceedings. *See also* The Model Rules of Professional Conduct (1982).

The Third Edition of the ABA Standards employs a "substantial likelihood" test of Model Rule 3.6 to establish the standard of proof of prejudice required to prescribe an extra judicial statement by an attorney. Both criminal attorneys and the public have substantial First Amendment interests in case-related attorney speech that must be balanced with the unique potential of such speech to prejudice the fair administration of justice. *See Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966). In conformity with the ABA Standards, LR. 83.1(h) incorporates the general rule applicable to all extrajudicial comment by attorneys. The rule requires that no statement be prescribed absent a finding of a substantial likelihood of prejudice. The standard provides a means for an attorney to decide upon self restraint and for a judge to issue a specific order that would constitute a prior restraint. According to the drafters of the model rule, the "substantial likelihood" standard provides a higher level of protection than the "reasonable likelihood" test of an earlier edition. The majority opinion written by Justice Rehnquist in *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991) upholds the substantial likelihood standard of the rule as constitutionally permissible.

Section (b) deletes from the previous local criminal rule the limiting reference to a "highly publicized or sensational case" since the court needs to ensure the preservation of decorum in all cases. Reference to notice and opportunity to be heard acknowledges the public and press access doctrine of *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980).

Section (d) recognizes the trend that the court may formulate more restrictive rules relating to the release of information about juvenile offenders.

Former L.Cr.R. 4(J) pertaining to the taking of photographs and operation of tape recorders, etc., in the courtroom or its environs, has been revised and codified as D.Ak. LR 82.1(a).

Former L.Cr.R. 4(K) regarding recordings by a court reporter has been relocated under D.Ak. LR 82.1(b).

Release of information by law enforcement officers is not specifically addressed in these rules. The court is of the opinion that this topic is better left to agency policy in the first instance. *See*, for example, Statement of Policy (for Department of Justice, 28 C.F.R. part 50 (7-1-95 Ed.).

Closure orders and procedures for obtaining such orders are strictly limited by law. *See e.g., Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210 (1983); *United States v. Sherlock*, 865 F.2d 1069, 1076 (9th Cir. 1989).

2002 Revision. Stylistic.

RULE 58.1 MISDEMEANOR APPEALS FROM MAGISTRATE JUDGE.

Source: Rule 7 (1982)

Committee Comments: The above rule on appeals addresses the time for filing briefs on an appeal but does not address the time from a magistrate judge ruling by which a notice of appeal must be filed. The time by which a notice of appeal must be filed is set forth in Rule 58, Federal Rules of Criminal Procedure. Briefs shall be prepared in accordance with Rule 28, Federal Rules of Appellate Procedure.

2002 Revision: During the adoption process the court eliminated subsection (b) [former 7(b)] governing district judge review of magistrate judge orders on nondispositive matters.

RULE 58.2 PAYMENT OF FIXED SUM IN LIEU OF APPEARANCE

Source: Rule 8 (1982)

Committee Comment: In all misdemeanor criminal cases involving traffic matters a certified copy of the judgment entered is forwarded by the clerk of court to the Alaska Department of Motor Vehicles at Juneau, Alaska.

2002 Revision. Stylistic.

RULE 59.1. EFFECTIVE DATE.

Source: Addition recommended by Roberts Committee [Proposed revised LR 10(c)]

2002 Revision. Subsection (b) was added to avoid any argument in the future as to the applicability of future amendments to the rules. Paragraphs (a)(2) and (b)(2) simply restate the generally applied rule with respect to application of amendments to procedural rules on pending proceedings and were added to avoid future arguments over whether and the extent the rule applies to those pending actions. Parties retain the right to argue that application of a new or amended rule is prejudicial to some right, but in the absence of prejudice it is simply inefficient to have matters proceeding along using two separate procedural rules.

RULE 60.1 TITLE AND CITATION.

Source: Addition recommended by Roberts Committee

2002 Revision. Stylistic.

HABEAS CORPUS RULES

2002 REVISION

The 2002 rules revision process produced the *Habeas Corpus* rules as a separate set. The prior *Habeas* rule was part of the Local Rules (Rule 9.3). The Roberts Committee, as part of its review of the criminal rules, recommended changes to the *Habeas* rules [proposed New LR 04]. The 2002 revision used the existing *Habeas* rule and the recommendations of the Roberts Committee as a beginning frame work. Magistrate Judge John D. Roberts, Magistrate Judge A. Harry Branson, and Diane Smith, *Pro Se* Clerk, participated in the review and revision of the *Habeas Corpus* rules.

COMMITTEE COMMENT TO RULE 9.3 — 1995 REVISION OF CIVIL RULES

This rule modifies former Local Rule 34. The magistrate judge will ordinarily decide whether a petition not filed on the court's standard form needs to be amended. The rule no longer requires use of the standard form for initial filing because some correctional institutions may not have the forms. Use of the standard form, if available, is encouraged. The general rules governing habeas corpus petitions are found in the rules governing 28 U.S.C. § 2254 cases in the United States District Court and similar rules governing 28 U.S.C. § 2255 which have been adopted by the United States Supreme Court and approved by Congress. These rules should be consulted.

Subsection (c) provides that petitions and motions should be sent to the clerk of the court, and should include an original and two copies. This reference is to the initial petition and any accompanying motions, such as requests for in forma pauperis status, bail, *etc*. This is appropriate because in habeas practice the initial documents are served on the court, and if the petition is determined to be non-frivolous, the court then serves it on the respondent and orders him to respond. In such a situation this provides for an original for the court file, a chamber's copy, and a chamber's copy, and a copy for the respondent. Once a habeas case has passed this phase of the litigation, and the respondent has answered or moved to dismiss, the normal rules of procedure regarding motion practice apply, and the petitioner should file an original and a chamber's copy with the court and serve a copy on the respondent.

RULE BY RULE HISTORY / COMMENTS

RULE 1.1 SCOPE.

Source: Added in 2002

2002 Revision. Added this "boiler-plate" introductory rule.

RULE 2.1 PETITIONS/MOTIONS.

Source: Rule 9.3(a) (1995)

2002 Revision. Subsection (a) derived from LR 9.3(a) (1995). Subsection (c) simply provides a "default" time period for the petitioner/moving party to return a deficient petition/motion if returned under Rule 2(e) of the § 2254 Rules or 2(d) of the § 2255 Rules. LR 9.3(a) has the time set by the clerk, but current versions of Rules 2(e)/2(d) provide for the court to direct its return.

RULE 3.1 IN FORMA PAUPERIS.

Source: Rule 9.3(b) (1981)

2002 Revision. Stylistic.

RULE 4.1 APPOINTMENT OF COUNSEL.

Source: Added in 2002. Adoption recommended by the Roberts Committee [Proposed New LR-04(b)]

2002 Revision. Although the Habeas Corpus Rules do not require the appointment of counsel before either discovery proceedings, if any, are commenced [Rule 6(a)] or an evidentiary hearing, if one is held [Rule 8(c)]; Rule 8(c) clearly authorizes the court to appoint counsel at any stage if the interests of justice require. This section has been revised to provide a second (or third) chance for a petitioner to request counsel if either Rule 6 or Rule 8 come into play.

RULE 7.1 EXPANSION OF RECORD.

Source: Added in 2002

2002 Revision. An entirely new rule providing a procedure for expanding the record. In § 2254 cases, the respondent is responsible under Rule 5 for providing the initial record for the hearing and for the petitioner to request additional transcripts. For this reason, it is assumed that the respondent will not generally be requesting expansion of the record unless deemed necessary to respond to an expansion request made by the petitioner. The rule also provides that the person making the request must either furnish or identify the materials requested to be added to the record. Finally, unless the court orders, no response to a motion is permitted.

RULE 8.1 EVIDENTIARY HEARING.

Source: Added in 2002

2002 Revision. Also an entirely new rule designed to provide a specific procedure for obtaining an evidentiary hearing. The "norm" is for *Habeas Corpus* proceedings and motions attacking federal sentences to be determined on the record without additional evidence. It places the onus on the party (presumably the petitioner or moving party) requesting an evidentiary hearing to justify the necessity for a hearing and further provides that no response is permitted unless ordered by the court.

RULE 8.2 MERIT BRIEFS.

Source: Recommended by Roberts Committee [proposed new Rule 04(c)]

2002 Revision. Adapted from proposed Rule 04(e).

MAGISTRATE JUDGE RULES

BACKGROUND

In 1995 a committee was formed chaired by U.S. Magistrate Judge A. Harry Branson and composed of U.S. Magistrate Judge Matthew D. Jamin, Michael Jungreis, Esq., Donna C. Willard, Esq., Kathleen A. Weeks, Esq., and John R. Strachan, Esq., ("Branson Committee) to review and make recommendations to the court on modifications or amendments to the local magistrate rules adopted in 1982. The committee completed its work in the fall of 1996 and submitted its final report to the Local Rules Oversight Committee in November 1996. The proposed rules were forwarded to the court, but were not adopted.

2002 REVISION

The 2002 revision process, utilizing the recommendations of the Branson Committee as a framework, was essentially three-fold: (1) review the rules to eliminate any duplication of or conflict with the federal rules of practice and procedure (civil and criminal) or statutes; (2) update the rules to reflect intervening changes in statutes and federal rules of practice and procedure (both civil and criminal); and (3) redraft the rules consistent with Garner, *Guidelines for Drafting and Editing Court Rules*. Magistrate Judge John D. Roberts and Magistrate Judge A. Harry Branson participated in the review and revision process.

The Branson Committee recommended certain differences be recognized between full-time and part-time magistrate judges. The court, in adopting the rules declined to follow this recommendation; thus, as adopted, the magistrate rules do not differentiate between the powers, and duties of magistrate judges, be they full- or part-time.

RULE BY RULE HISTORY / COMMENTS

RULE 1 SCOPE, TITLE AND EFFECTIVE DATE.

Source: Added in 2002

2002 Revision: Added this rule. This is a "boiler-plate" type rule usually found at the beginning of most rules.

RULE 2 AUTHORITY OF MAGISTRATE JUDGES.

Source: Rule 1 (1982)

Committee Comment. It is the intent of this rule to confer upon full time magistrate judges in this district all those powers provided for by statute or court rule, subject only to the power and discretion of a district court judge to otherwise provide by order in a particular case, matter, or proceeding.

The principal statutory source of power for magistrate judges to act is in 28 U.S.C. §§ 631 *et seq*., especially 28 U.S.C. § 636. Magistrate judges are also specifically authorized to perform duties under other sections of federal law, *e.g.*, matters relating to bail and detention of defendants in criminal cases, 18 U.S.C. §§ 3141 *et seq*., and trials in misdemeanor cases upon consent of the parties, 18 U.S.C. §§ 3401 *et seq.*

In civil matters, 28 U.S.C. § 636(c) authorizes magistrate judges, upon consent of the parties, to hear civil matters in their entirety, including trial. In this district, litigants are urged to take advantage of this option upon filing of any civil complaint by receiving a form from the clerk's office which authorizes such consent jurisdiction.

In this district, magistrate judges typically perform a wide range of duties in civil cases upon specific request of the assigned district judge. Included among them are the general supervision of discovery matters, ruling on discovery and other non-dispositive motions, 28 U.S.C. § 636 (b)(1)(A), and preparing reports and recommendations to the assigned district judges on case dispositive motions such as motions for summary judgment, 28 U.S.C. § 636 (b)(1)(B). Increasingly magistrate judges are assigned to hold pretrial conferences, to serve as settlement judges, and to serve as special masters under 28 U.S.C. § 636(b)(2). Upon consent of the parties to a civil proceeding, the entire matter, including trial, can be referred to the magistrate judge. 28 U.S.C. § 636 (c).

Practitioners are urged to familiarize themselves with the special procedures relating to matters referred to magistrate judges contained in the Federal Rules of Civil Procedure, especially rules 72 and 73, and the Federal Rules of Criminal Procedure, especially rules 4, 5, 5.1, 40, 41, and 58.

2002 Revision: As proposed this rule left open to question the authority of part-time magistrate judges. Amended to encompass all magistrate judges to eliminate that uncertainty or ambiguity. Part-time magistrate judges need to have the full powers conferred on magistrate judges for those matters referred to them under the rules.

RULE 3 CRIMINAL MATTERS ROUTINELY ASSIGNED TO MAGISTRATE JUDGES.

Source: Rule 2 (1982)

Committee Comment. In this district, magistrate judges typically perform the majority of pretrial proceedings in both felony and misdemeanor cases. After initial proceedings in criminal proceedings, most of the magistrate judges' activities are authorized by 28 U.S.C. § 636(b)(1)(A) (directly rule on non-dispositive matters, *e.g.*, requests for discovery) and 28 U.S.C. § 636(b)(1)(B) (prepare reports and recommendations on such case-dispositive matters as motions to dismiss, and motions to suppress). No complete listing of motion matters committed to magistrate judges is possible, but it includes *Nebbia* hearings related to the source of bail, suppression motions, collateral forfeitures, mental competency hearings and motions to participate in lineups. For a more complete list, *see Inventory of United States Magistrate Judge Duties*, (Administrative Office of U.S. Courts 1995).

All Class B misdemeanors involving motor vehicles, Class C misdemeanors and infractions may be tried by the magistrate judge without the consent of the defendant. All such cases are referred in their entirety to magistrate judges. For Class A misdemeanor and Class B misdemeanors other than involving motor vehicles cases, if a criminal defendant consents, the entire case is routinely assigned to the magistrate judge.

In addition to the matters specifically delineated in subsection (b) of this rule, certain matters are committed to magistrate judges by statute or the Federal Rules of Criminal Procedure. Subsection (a) of this rule automatically provides for their assignment to magistrate judges unless a district judge orders otherwise. Any matter that may be designated by statute of national rule for hearing by magistrate judges in future will automatically become included among those matters routinely assigned to magistrate judges with necessity for amending this rule. Included in those matters covered by subsection (a) are: Arrest warrants [F.R.Cr.P. 4(c)]; search warrants [F.R.Cr.P. 41(a)]; initial appearances [F.R.Cr.P. 5]; preliminary examinations [F.R.Cr.P. 5.1]; removal hearings [F.R.Cr.P. 40(a)]; Class B misdemeanors involving motor vehicles and Class C misdemeanor cases, and infractions in their entirety [28 U.S.C. § 636(a)(4); 18 U.S.C. § 3401]; Class A Misdemeanor and non-motor vehicle Class B Misdemeanor cases in their entirety upon consent of the defendant [28 U.S.C. § 636(a)(5); F.R.Cr.P. 58]. The practitioner is also referred to 18 U.S.C.

§§ 3141 *et seq*. relating to release of defendants in criminal cases, and 18 U.S.C. §§ 3401 *et seq*. relating to misdemeanors.

2002 Revision. Corrected certain references in the committee proposed rule and eliminated the differentiation between motor vehicle and non-motor vehicle Class B misdemeanors to conform to 18 U.S.C. § 3401 as amended [both are triable without consent].

RULE 4 CIVIL MATTERS ROUTINE ASSIGNED TO MAGISTRATE JUDGES.

Source: Rule 3 (1982)

Committee Comments. Rule 3 covers those substantive matters that are generally referred in the first instance to magistrate judges without such a case specific assignment by the assigned district judge.

2002 Revision: Stylistic changes plus minor changes to correct code section citation and deleted references to repealed sections of the United States Code.

2003 Amendment. Prior to November 1999, Local Admiralty Rule 4(G) automatically referred all matters under Admiralty Rule C to a magistrate judge. When the local Admiralty Rules were revised in 1999, that provision was not carried into the new rules. The Magistrate Judge Rules were not amended to pickup that referral. As adopted in 2002, LMJ Rule 4(12) only provided for automatic referral arrests of vessels. The proposed amendment to Rule 4(12) restores the practice in effect prior to November 1999 by including any proceeding under Supplemental Rule C irrespective of the nature of the property sought to be arrested or seized.

RULE 5 REVIEW OF MAGISTRATE JUDGE CIVIL PRE-TRIAL ORDERS.

Source: Rule 12 (1982)

2002 Revision. Subsection (a) is derived from current LR 74.1(b) with primarily non-substantive, stylistic changes. The single substantive change is paragraph (2), which makes clear that, in the absence of unusual circumstances, new issues will not normally be considered on an objection to the decision of the magistrate judge. This provision codifies the long-standing rule that issues raised for the first time on appeal will not be considered.

Subsection (b) is new. Generally objections to recommended dispositions will be decided on the basis of the record made before the magistrate judge and the objection and reply made. The rule does, however, also provide a procedure for implementing the "further evidence" provision of Rule 72(b), F.R.Civ.P.

2003 Amendment. Prior to November 1999, Local Admiralty Rule 4(G) automatically referred all matters under Admiralty Rule C to a magistrate judge. When the local Admiralty Rules were revised in 1999, that provision was not carried into the new rules. The Magistrate Judge Rules were not amended to pickup that referral. As adopted in 2002, LMJ Rule 4(12) only provided for automatic referral arrests of vessels. The amendment to Rule 4(12) restores the practice in effect prior to November 1999 by including any proceeding under Supplemental Rule C irrespective of the nature of the property sought to be arrested or seized.

RULE 6 OBJECTIONS TO DISPOSITIVE MATTERS UNDER 28 U.S.C. § 636(B)(1)(B) IN CRIMINAL MATTERS

Source: New in 2002

2002 Revision: This rule for the most part codifies current practice. Although an objection to the initial findings and recommendations is not the equivalent of a motion for reconsideration, subsection

(b) is designed to give the magistrate judge a "second look." Subsection (c), as does Rule 5, makes clear that any objection to the findings and recommendations must be based on issues that were raised before the magistrate judge.

RULE 7 TRIAL BY CONSENT

Source: New in 2002

2002 Revision. This rule simply "specially designates" magistrate judges as being authorized to exercise consent jurisdiction. Although it is possibly included within the broad grant of powers in Rule 2, this rule is added in an abundance of caution given the language of F.R.Civ.P. 73 that magistrate judges be "specially designated to exercise such jurisdiction by local rule or order." [*See e.g.*, *Columbia Record Productions v. Hot Wax records, Inc.*, 966 F.2d 515 (9th Cir. 1992)]