Proposed Amendments to the Local Rules of the United States District Court for the District of Montana

In the following pages, text proposed to be added is underlined. ~~Strikeout~~ text is proposed to be deleted.

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1.6 ELECTRONIC FILING GENERALLY.

(a) Authorization. The Case Management/Electronic Case Files ("CM/ECF") system is hereby authorized for use in this Court. The Clerk of Court is authorized to establish procedures for the acceptance and maintenance of electronic files and filing in the CM/ECF system and to establish registration procedures and requirements for those seeking to file documents electronically. Parties are directed to consult the CM-ECF Administrative Procedures Manual on the Court's website, www.mtd.uscourts.gov, for guidance in using the system.

The last sentence is adapted from current L.R. 1.6(f), which is proposed for deletion.

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~~**(d) Cases Under Seal.** When a case is placed under seal, the parties need not seek leave to file any document conventionally in that case.~~

This Rule is now addressed in proposed Rule 1.8(a)(2). Current subsections (e)-(m) are relettered accordingly.

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~~**(f) Clerk's Policy Directives.** The Clerk of Court may issue temporary policy directives suspending, deleting, or amending any provisions of these Local Rules with regard to CM/ECF. The Clerk must serve a copy of any policy directive on each member of the Local Rules Committee within five (5) days of its implementation. Any policy directive may be rescinded by the Local Rules Committee and must be~~

~~considered at the next regular meeting of the Committee. Parties are directed to consult the Court's website for notice and copies of current policy directives.~~

This Rule was implemented just before the Court's transition to CM/ECF. It was designed to allow the Clerk to deal with emergencies that required action before the Committee could act. Given a few years' experience with CM/ECF, it no longer appears to be necessary. Additionally, it short-circuits Fed. R. Civ. P. 83(a)(1). The last sentence is relocated and revised in proposed L.R. 1.6(a).

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(~~h~~ f) Disposal or Retention of Paper Documents. Paper documents that are submitted to the clerk for filing will be discarded after they are ~~scanned into~~ filed in the CM/ECF system. Documents that are too large to scan, that are required to be ~~maintained~~ retained in paper form, or that do not produce a legible image will be retained in paper form and the existence of a paper document shall be noted in the docket. ~~Whenever a registered user files a document in paper form,~~ Except where non-electronic filing is required, Form A, Notice of Conventional Filing of Document or Item, ~~must be used~~ must be filed when a document or item is submitted to the clerk to be retained in non-electronic form.

See Clerk's Policy Directive No. 2.

~~**(l) Proposed Orders.** Except as otherwise provided in these Rules, a proposed order is required and permitted only with a motion for extension of time or with an unopposed motion. Where required, a WordPerfect or Word version of any proposed order must be attached as an exhibit to a motion filed by a registered user, and a Word or WordPerfect version must also be e-mailed to the appropriate judge at the same time the motion is filed. The e-mail address consists of the initials of the judge to whom the proposed order is presented, immediately followed by _propord, followed by @mtd.uscourts.gov: for example, xyz_propord@mtd.uscourts.gov. The subject line of the e-mail must contain the first plaintiff's last name, the case number, and an abbreviated description of the document and the moving party, for example, Smith CV 03-289-GF p-ord gr def ext time.~~

(~~m~~ j) Judges' Requirements. Judges may require parties to submit to chambers a paper copy and/or a Word or WordPerfect copy of any document electronically filed. ~~Parties are directed to consult the Court's website for the individual requirements of~~

~~each judge.~~

Current subsection (l) is deleted because proposed orders are now fully addressed in L.R. 7.1(j) (proposed 7.1(f)) and CR 1.1. Subsection (m) is relettered following deletion of subsections (d), (f), and (l) and the last sentence is deleted as unnecessary.

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1.8 PUBLIC ACCESS, PRIVACY ~~POLICY, AND PUBLIC ACCESS TO ELECTRONIC RECORDS.~~ AND SEALING.

Rules 1.8 and 7.4 are revised and integrated in amended 1.8. This revision will put in one place all local rules regarding sealing, a process that remains a source of confusion to registered users and court staff. Striking is included here because it is sometimes unclear in practice whether a stricken document can be removed from the record or whether it should be sealed. Additionally, striking is a remedy for improper sealing. The proposed revision is also intended to redress any discrepancies that may arise between 1.8 and 7.4.

Current Rule 1.8 was implemented before certain amendments to the Federal Civil and Criminal Rules took effect in December 2007. It lists personal identifiers that a filing party should redact before filing a document electronically. The matters set forth in the current Rule are now set forth in detail, with exceptions not reflected in the local rule, in Fed. R. Civ. P. 5.2 and Fed. R. Crim. P. 49.1. Therefore, a local rule is not necessary. Current Rules 1.8(c) and (d)(1) address compliance with the redaction requirement and are also not necessary.

Current Rule 1.8(b) is not necessary because the presiding judge decides whether sealing is appropriate; there is no need to set forth the particular materials a party may seek to file under seal.

Current Rule 1.8(d)(2), which applies to pro se filings, is deleted because the Federal Rules do not make a distinction between pro se and represented litigants. Current Rule 1.8(e) lists specific documents that are not available to public access. That list is set forth in Judicial Conference policy and need not be duplicated in a Local Rule.

The process of filing a document under seal under current Rule 7.4 along with a motion for leave to rely on sealed document is essentially the same. However, the terminology is changed to "motion for leave to file under seal," rather than "motion for leave to rely on sealed document." Additionally, the

revision makes clear that a party may file certain documents under seal as a matter of course, without a motion.

In the text below, additions and amendments to the current Rules 1.8 and 7.4 that are more than stylistic are underlined.

~~**(a)** In compliance with the policy of the Judicial Conference of the United States and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interest, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the Court, including exhibits thereto, whether the document is made available electronically or only in paper, unless otherwise ordered by the Court.~~

(a) Sealed and Stricken Documents.

(1) *Sealed Documents*. A sealed document is any document not available to public access. A sealed document may not be filed by any party unless:

(A) the presiding judge grants the filing party's motion, filed in compliance with subsection (b), for leave to file under seal; or

(B) the presiding judge or a clerk seals the document *sua sponte*; or

(C) the document is one of the following:

~~(i) unexecuted criminal summonses and warrants;~~

~~(ii) pretrial bail reports and presentence investigation reports;~~

~~(iii) the sentencing judge's statement of reasons in a criminal judgment;~~

~~(iv) juvenile records;~~

~~(v) documents containing identifying information about jurors or potential jurors;~~

~~(vi) financial affidavits filed by persons seeking representation~~

~~pursuant to the Criminal Justice Act;~~

(i) a document specifically authorized to be filed ex parte by statute, rule, order, or other law, including but not limited to requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act and motions for subpoena under Fed. R. Crim. P. 17(b);

(ii) ~~sealed documents, including but not limited to motions for subpoenas under Fed. R. Crim. P. 17(b) and motions for downward departures for substantial assistance~~; a motion filed by the United States under Fed. R. Crim. P. 35 or U.S.S.G. § 5K1.1 or a plea agreement that acknowledges a defendant is entitled to such a motion;

(iii) minutes and transcripts from sealed court proceedings;

(iv) ~~other documents or proceedings as provided~~ a document specifically authorized by statute, rule, ~~or policy~~ or order to be filed under seal. When a party files a document in this category, the authority for sealing must be cited in the title of the document.

With one exception, see category (ii), this list comes from the Judicial Conference of the United States (JCUS). It is not set forth in a federal rule.

Deleted items (i) through (vi) are filed by court staff and sealed under JCUS policy. (In fact, the CM-ECF system seals them automatically.) They are covered by 1.8(a)(1)(B) and there is no need to include them in subsection (a)(1)(C).

Category (ii) here differs from the JCUS list. The JCUS policy refers to "sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation[,] or victim statements)." Unlike the other items in the JCUS list, "sealed documents" is not a content-based category. In current practice in this District, motions filed by the U.S. under Fed. R. Crim. P. 35 and U.S.S.G. § 5K1.1 are automatically filed under seal. Electronic access is provided only to the filing party, though the document is conventionally served on the defendant to whom the motion applies.

Category (ii), as proposed, would apply to a plea agreement where the

United States unconditionally promises to file a § 5K1.1 motion, but not, for example, to a plea agreement where the United States agrees to file such a motion if the defendant provides substantial assistance. Most plea agreements fall in the latter category. (In May 2008, the JCUS committee that developed this list rejected a proposal by the U.S. Department of Justice to seal all plea agreements.) If either party to a plea agreement thinks it should be sealed even though it doesn't fit category (ii), the party can file a motion for leave to file under seal.

(2) *Cases Under Seal*. No case may be initiated or conducted under seal unless expressly authorized by statute, such as a *qui tam* action, or unless the Court grants leave to seal the case or seals the case *sua sponte*. Parties to a sealed case need not seek leave to file conventionally or leave to file under seal.

This revision makes current Rule 1.6(d) unnecessary.

(3) *Stricken Documents*. No party may rely on a stricken document. A stricken document, whether filed electronically or in other form:

(A) remains in the public record if originally filed there, unless the presiding judge orders it sealed to protect legitimate privacy or security interests; or

(B) remains under seal if it was lodged or filed under seal before it was stricken.

Current L.R. 77.6 says substantially the same thing and is now proposed for deletion. The language here adds a requirement that a stricken document originally filed in the public record should be sealed only to protect legitimate privacy or security interests.

(b) Filing and Serving Sealed Documents.

Subsection (b) incorporates the procedures set forth in former Rule 7.4. When an attorney files a document under seal, the CM-ECF system will apply an "ex parte" security level – that is, the filing party and the Court can view the document electronically, but no other party can, nor can the general public. Consequently, an attorney who files a document under seal must conventionally

serve it on all other parties, unless an exception applies. That requirement is described in subsection (b)(2).

(1) ~~Filing the document under seal constitutes a certification by the filing attorney, pursuant to Fed. R. Civ. P. 11, that the document is appropriately sealed.~~ No attorney may file a document under seal, with or without leave, unless the attorney believes in good faith, pursuant to Fed. R. Civ. P. 11, Mont. R. Professional Conduct 3.3, and other applicable law, that sealing is appropriate.

(2) *Service of Sealed or Ex Parte Documents*. A sealed document or item filed by a party must be conventionally served on all other parties to the case unless:

(A) the document is described in subsection (a)(1)(C)(i);

(B) the document is described in subsection (a)(1)(C)(ii) and has been conventionally served on the appropriate defendant; or

(C) leave to serve the document on fewer than all parties to the case is requested in a motion under subsection (3) below for leave to file under seal.

(3) *Motion for Leave to File Under Seal: When Required.* Documents described in subsection (a)(1)(C) may be filed under seal as a matter of course. A motion for leave to file under seal is required only:

(A) where any party wants to file under seal a document that is not described in subsection (a)(1)(C); or

(B) where a document is described in subsection (a)(1)(C)(iii) or (iv) and the filing party requests leave to serve the document on fewer than all other parties to the case.

(3) *Motion for Leave to File Under Seal and Lodged Sealed Documents: How Filed.*

(A) *Registered Users.* ~~To file a document under seal, the attorney must:~~ Where a motion for leave to file under seal is required, a registered

user may:

(i) file in the public record a motion for leave to file under seal, ~~rely on sealed document,~~ setting forth the reason(s) the sealed document should not be accessible to the public and specifying which parties ~~have or~~ should have access to the sealed document; and

(ii) file the proposed sealed document as the next document in the case, using the "Lodged Sealed Document L.R. 1.8" event and linking it to the motion for leave to file under seal ~~rely on sealed document~~.

(B) *Conventional Filers*. A document or item requested to be filed under seal must be submitted to the clerk in a sealed envelope with the case number, date, and "Filing Under Seal Requested" clearly printed on the envelope. The envelope must be accompanied by a motion for leave to ~~rely on the sealed document.~~ file under seal. Regardless of whether the document requested to be sealed is accompanied by a motion, the clerk must file the document under seal and must not provide electronic access to any party.

(4) *Failure to Move for Leave to File Under Seal*. If the filing party must but does not move for leave to file under seal, the sealed document will remain lodged but not filed. The Court may strike any other document purporting to rely on the lodged sealed document.

(5) *Order on Motion for Leave to File Under Seal*.

~~(1) If leave to rely is granted, the sealed document is a part of the record for all purposes and any party that has access to it may rely on it.~~

~~(2) If leave to rely is denied, the filing party may:~~

~~(A) forego all reliance on the document; or~~

~~(B) refile the document in the public record of the case.~~

(A) If leave to file under seal is granted, the lodged document will be deemed filed under seal.

(B) The Court may order that a document be redacted rather than sealed. In that event, the filing party must file a redacted version of the document. When it does so, the unredacted document will be deemed filed under seal.

(C) If leave to file under seal is denied, the lodged sealed document will remain under seal but will not be deemed filed. The filing party may refile the document without sealing it.

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1.11 VENUE.

(a) Civil Cases.

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(2) Cases alleging a tort against the United States shall be venued in the Division containing the county:

(A) where the tort occurred;

(B) where the plaintiff resided at the commencement of the action; or

(C) where any defendant other than the United States resided at the commencement of the action.

Amendment proposed by the United States.

(~~2~~ **3**) Habeas cases shall be venued in the Division containing the county in which the conviction being challenged was obtained or, in cases involving the denial of parole, in the Helena Division. ~~Venue in cases under 28 U.S.C. § 2255 shall be as prescribed by Rule 4(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts.~~ Venue in all other habeas cases shall be in the Division containing the county where

the petitioner is incarcerated or, if the petitioner is not incarcerated, in the Division containing the entity whose conviction or decision the petitioner challenges. If such entity is not found within the District of Montana, venue shall be in the Division of the petitioner's residence, subject to transfer for good cause.

Sentence deleted as unnecessary. Venue for a § 2255 case is the same as the criminal case.

(~~3~~ 4) Prisoner civil rights cases shall be venued in the Division where the alleged wrong was committed.

(~~4~~ 5) A Complaint's designation of a Division constitutes a certification by counsel that the Division so designated is the proper venue of the case. If no Division is designated, the clerk shall assign the case to the proper Division.

(~~5~~ 6) At the time of appearance, any defendant who believes that the case is venued in an improper Division in this District may, in addition to any other motions, move for a change of venue to the proper Division. Within ten (10) days after the first appearance of any defendant, any plaintiff may serve and file a motion to change venue. Failure by any party to make such motion for proper assignment within the time provided shall constitute consent to venue, but the Court may of its own motion transfer the case at any time prior to trial.

Renumbering only.

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1.12 JUDGES' AUTHORITY.

An order that is within a judge's inherent authority supersedes any Local Rule.

This Rule is intended to obviate any argument that the Local Rules trump an order in a case. On the other hand, a judge may not have inherent authority to countermand a Local Rule. For instance, most judges cannot redefine the Divisions of the Court; in that case, an order would not supersede the Local Rule.

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7.1 MOTIONS.

(a) The provisions of L.R. 7 shall apply to motions, applications, petitions, orders to show cause, and all other proceedings (all such being included within the term "motion" as used herein) except a trial on the merits, habeas petitions or § 2255 motions, and applications for a temporary restraining order, unless otherwise ordered by the Court or provided by statute.

(b) . . . *[no change]*

(j c) Prerequisites to Filing a Motion.

(1) The text of the motion must state that other parties have been contacted and state whether any party objects to the motion. Parties that have not yet appeared in the action or whose default has been entered need not be contacted.

(2) When a motion is unopposed, the word "unopposed" must appear in the title of the motion. A proposed order must be attached to the motion as an exhibit. Registered users shall attach a proposed order to the motion as an exhibit, so that the proposed order is filed in the record of the case, and shall also e-mail a WordPerfect or Word version, as set forth in L.R. 1.6(l), so that the judge may alter the proposed order.

(3) Any motion for extension of time must be accompanied by a proposed order. Registered users shall attach a proposed order to the motion as an exhibit, so that the proposed order is filed in the record of the case, and shall also e-mail a WordPerfect or Word version, as set forth in L.R. 1.6(l), so that the judge may alter the proposed order.

(3) *Proposed Orders.* Except as otherwise provided in these Rules or by Order, a proposed order is required and permitted only with a motion for extension of time or with an unopposed motion. All proposed orders must:

(A) be attached to the motion **in PDF format** as an exhibit, so that the order, as proposed, is filed in the electronic record of the case;

(B) be e-mailed **in WordPerfect or Word format** to the judge, so that the judge may alter it;

(C) use 14-point font;

(D) omit macros or special coding or formatting other than appropriate citation format;

(E) be e-mailed only to the judge's address for proposed orders; for example, Judge X. Y. Zanthopoulos's e-mail address is xyz_propord@mtd.uscourts.gov; and

(F) be identified in the subject line of the e-mail by the first plaintiff's last name, the case number, and an abbreviated description of the document and the moving party, for example, Smith CV 03-289-GF p-ord gr def ext time.

(4) Failure to comply with this Rule may result in summary denial of the motion. Denial must be without prejudice on the first occasion and the filer must be given an opportunity to refile the motion.

Current subsection (j) is moved up to subsection (c). Along with deletion of current L.R. 1.6(l), the proposed changes here consolidate all information about proposed orders in one Rule. Subsections (c)(1)-(3) relocate language from current Rules 7.1(j)(1)-(2) and (3)(A), (B), (E), and (F) and incorporate the provisions of current Rule 1.6(l). New subsections (c)(3)(C) and (D) implement a larger font size and attempt to minimize the technical problems that can prevent court staff from using proposed orders. Current subsection (j)(4) is relocated to (c)(4). There is no change in current subsection (b).

~~**(c)** Upon serving and filing a motion, or within five (5) days thereafter, the moving party shall serve and file a brief. The five-day grace period does not apply in proceedings under L.R. 12..3 or 56.2. Briefs on motions shall contain an accurate statement of the questions to be decided and set forth succinctly the relevant facts and the argument of the party with supporting authorities.~~

~~**(d)** Within twenty (20) days after service of a brief in support of a motion to dismiss, a motion for judgment on the pleadings, or a motion for summary judgment,~~

~~unless the Court orders a shorter time, any party opposing a motion shall file a response brief. Response briefs shall be filed within eleven (11) days after service of a brief in support of any other motion.~~

~~**(e)** Principal briefs must not exceed twenty (20) pages, excluding exhibits, any table of contents, and certificate of service, unless the filing party has obtained prior leave of Court. If filed without leave, overlength briefs will not be considered by the Court. Briefs exceeding twenty (20) pages shall have a table of contents and a table of cases with page references. CM/ECF filers must check the Court's website or call the help desk to determine whether an overlength brief must be divided into segments before filing. Filing serial motions in order to avoid the page limitation may result in denial of all such motions.~~

~~**(f)** A reply to the response brief, not to exceed ten (10) pages, may be served and filed by the moving party within eleven (11) days after service of the opposition's statement. Reply briefs may not exceed ten (10) pages unless the filing party has obtained prior leave of Court. If filed without leave, such briefs will not be considered by the Court.~~

~~**(g)** No further briefing shall be allowed without leave of Court. Upon the filing of a brief in support and a response brief, the motion shall be deemed submitted and taken under advisement by the Court.~~

(d) Briefs.

(1) *Briefing Schedule.*

(A) A motion must be accompanied by a brief in support filed at the same time as the motion. Briefs in support of a motion may be filed in the same document with the motion or separately.

(B) Any party that opposes a motion must file a response brief. Responses to motions to dismiss, for judgment on the pleadings, or for summary judgment must be filed within twenty (20) days after service of the brief in support. Responses to all other motions must be filed within eleven (11) days after service of the brief in support.

(C) A reply to the response brief may be filed by the moving party

within eleven (11) days after service of the response.

(D) No further briefing is permitted without prior leave. A motion is deemed ripe for ruling at the close of the time for response.

(2) *Length of Briefs.*

(A) Briefs in support of a motion and response briefs are limited to 6500 words, excluding caption and certificates of service and compliance.

(B) Reply briefs are limited to 3250 words, excluding caption and certificates of service and compliance.

(C) A party may not exceed these word limits without prior leave. Any brief that exceeds standard limits must include a table of contents and a table of cases with page references.

(D) Filing serial motions to avoid word limits may result in denial of all such motions.

(E) Briefs must include a certificate of compliance that the brief complies with the word limits of this rule. The certificate must state the number of words in the brief, excluding caption and certificates of service and compliance. The signer of the certificate may rely on the word count of a word-processing system used to prepare the brief.

The five-day grace period between the filing of a motion and the filing of the brief in support is deleted. The last sentence of current L.R. 7.1(c), which essentially defines a brief, is omitted. All references to consequences of violating the rules, such as "[i]f filed without leave, [overlength] briefs will not be considered by the Court," are omitted. Also omitted is the need to consult with the help desk before filing an overlength brief; any issue there can be dealt with as it arises. All remaining provisions of former Rules 7.1(c)-(g) are consolidated in one Rule 7.1(d) with subsections and subheadings. Page limits are replaced by word counts, and a certificate of compliance is required to verify the word count.

~~**(h)** The Court may, in its discretion, order or allow oral argument on any motion or other proceeding in open court or by video conference or telephone conference call, provided that all conversations of all parties are audible to each participant and the Court. The Court may direct which party shall arrange for and/or pay the cost of the call.~~

(~~h~~ e) The Court may hear argument on the record in open court, by video conference, or by telephone conference call. The Court must ensure that each party's statements to the Court are audible to all other participants. A party may be directed to arrange for and/or pay the cost of any video or telephone conference.

Subsection (h) becomes subsection (e). The Rule is amended to clarify that the hearing must be on the record and that not all "conversations" must be audible to other parties.

(~~i~~ f) ~~Failure to file briefs within the prescribed time may subject any motion to summary ruling.~~ The moving party's failure to timely file a brief ~~shall~~ may be deemed an admission that the motion is without merit. Except where a pro se litigant files a motion for the appointment of counsel, failure to file a response brief ~~by the adverse party shall~~ may be deemed an admission that the motion is well taken. ~~The practice of filing motions to dismiss without a brief in support in order to gain additional time to respond may be viewed by the Court as a violation of Fed. R. Civ. P. 11.~~

The first sentence is unnecessary if the word "timely" is included in the second and third sentences. The mandatory "shall" is changed to the warning "may." The last sentence is unnecessary in light of the deletion of the five-day grace period.

~~**(k)** Where the Court denies a motion "subject to renewal," the renewed motion must be accompanied by an original brief and any exhibits referred to therein. Previously filed briefs may not be incorporated by reference.~~

Subsection (k) was implemented when the clerks had to recopy all supporting briefs and exhibits when a motion was renewed. With CM/ECF, recopying is unnecessary, so the Rule is likewise not necessary.

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~~**7.4 MOTIONS TO RELY ON A SEALED DOCUMENT, SEALED MOTIONS, AND EX PARTE MOTIONS.**~~

The provisions of current Rule 7.4 are incorporated in amended Rule 1.8.

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~~**7.5**~~ **7.4 NOTICE OF SUPPLEMENTAL AUTHORITY.**

If pertinent and significant authority comes to a party's notice after the briefs have been filed but before decision, a party may promptly advise the Court by notice setting forth the citations and stating the reason the authority was not cited in the party's brief. The notice must specifically refer either to a page of the brief(s) already filed or to a point argued orally. The notice may not exceed two (2) pages and shall not present a new argument. No response may be filed unless the presiding judge so authorizes.

Renumbering only.

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10.1 FORMAT OF ALL DOCUMENTS.

(a) All documents shall be typewritten or neatly handwritten and double-spaced, except for quoted material and footnotes, in at least ~~12-point~~ 14-point font size without erasures or materially defacing interlineations. ~~Spacing mechanisms such as "Exactly 24" are not acceptable.~~ Page size must be 8½x11 inches.

Change to 14-point font. With page limits deleted in favor of word limits, spacing mechanisms are not a concern.

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11.1 ~~ATTORNEY~~ SIGNATURES IN ELECTRONIC FILINGS.

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(d) Only a judge, ~~or~~ an attorney, the Clerk of Court, or deputy clerks of court may use the "/s/" signature form, and, except as provided by L.R. 11.2(a), only when signing the document as the filer. All other signatures, including those on any affidavit, must be hand signatures.

See Clerk's Amended Policy Directive No. 3.

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12.3 NOTICE AND WARNING TO PRO SE PRISONER-PLAINTIFF.

In all cases where a prisoner-plaintiff, as defined in L.R. 12.1(a), is proceeding pro se, any motion that requires the Court to consider matters outside the pleadings, such as a motion to dismiss for failure to exhaust administrative remedies, shall be accompanied by the Notice and Warning to Plaintiff as set forth in L.R. 56.2(~~b~~ a). ~~For purposes of this Rule, L.R. 7.1(c), allowing a party to file a brief in support within five (5) days of filing a motion, does not apply.~~ Motions and briefs in support must be filed and served simultaneously with, but separately from, the Notice and Warning. Failure to comply with this Rule may result in summary denial of the motion.

Change to conform to proposed 7.1(d)(1)(A) and 56.2(a).

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54.1 TAXATION OF COSTS.

(a) ~~Application to the Clerk~~ Procedure.

(1) Within ten (10) days after the entry of a judgment allowing costs, the prevailing party shall serve and file an application for the taxation of costs. The application shall be made on Form G, Application for Taxation of Costs. Failure to comply with any provision of this subsection will be deemed a waiver of all costs except clerk's costs.

~~(2) The application shall contain an itemized schedule of the costs in a statement signed by the attorney for the applicant that the schedule is correct and that the costs were necessarily incurred. The application shall be heard by the clerk not less than five (5) nor more than ten (10) days after it is filed, and notice of the time of hearing shall be endorsed upon it.~~

(~~3~~ 2) Any objections by opposing counsel to the application for costs must be filed ~~at least twenty-four (24) hours prior to the time set for the hearing~~ within ten (10) days of service of the application.

(3) Within five (5) days of filing of any objection to an application, the clerk must either tax the costs or, at his or her discretion, set a hearing on the application.

(4) Any hearing must be held within five (5) days of filing of an objection. If a hearing is set, the date, time, and manner of the hearing must be reflected in the docket of the case. Hearings must be recorded and will generally be conducted by telephone. The clerk must tax the costs within five (5) days of the hearing.

(~~4~~) ~~Upon failure to comply with this Rule, all costs, other than the clerk's costs, which may be inserted in the judgment without application, shall be waived. At the option of the clerk the hearing may be held by telephone conference call.~~

(5) Clerk's costs may be inserted in the judgment without application.

(6) A party may appeal the clerk's decision by filing a motion for review within five (5) days of entry of the clerk's taxation of costs. The party must specify each objection to the decision and give reasons for its objection. The Court will consider the same documents and evidence submitted to the clerk and any pertinent docket entries.

Subsection (2) is deleted as unnecessary because Form G, which is required by subsection (1), contains the necessary information. A hearing is made optional, so that the clerk may decide costs on the parties' written submissions. The clerk is required to make a record of any hearing. The first sentence of subsection (4) is moved into subsections (1) and (5), and the last is deleted because the hearing itself is made optional. Subsection (6) incorporates current subsection (i).

(b) Items Taxed.

(~~b~~ 1) *Depositions.* In taxing costs of depositions, the clerk shall allow the fees of the court reporter at the rates specified by the Judicial Conference of the United States, or the actual fees paid by the prevailing party, whichever is less. The party seeking costs shall furnish evidence that the deposition was used at trial or in support of a motion for summary judgment.

(~~c~~ 2) *Transcripts.* In taxing costs of transcripts the clerk shall allow fees of the court reporter at the rate specified by the Judicial Conference of the United States, or the actual fees paid by the prevailing party for the original or any portion of the transcript furnished to the Court unless it appears that it was not necessary to obtain the transcript for use in the case. In the absence of an objection from the adverse party, the clerk may presume that any portion of the transcript for which costs are claimed was reasonably necessary for the development of the case.

(~~d~~ 3) ~~**Fees and Disbursement for Witnesses**~~ *Witness Fees.*

~~(1)~~ (A) A party entitled to recover costs shall be entitled to recover the statutory fees and allowances for necessary witnesses as provided in 28 U.S.C. § 1821. Such statutory fees and allowances will be taxable costs for each day that a witness actually testifies at trial. In the case of witnesses who did not testify at trial or who were present at trial for a longer time than the days of testimony, the

party seeking costs must establish that their presence was necessary.

~~(2)~~ (B) In the case of expert witnesses, the party seeking costs will be entitled to recover only the statutory fees and mileage unless the presiding judge orders otherwise prior to the time costs are sought.

~~(3)~~ (C) Mileage will be allowed for all witnesses in accordance with the provisions of 28 U.S.C. § 1821.

(e 4**)** *Fees for Exemplification and Copies* **~~of Papers or Documents Necessarily Obtained for Use in the Case~~.** Reasonable fees for exemplification and copies of exhibit evidence such as digitally produced exhibits, charts, drawings, maps, photographs, movies, videotapes, and models, etc., which were reasonably necessary to the presentation of the prevailing party's case will be allowed as costs. In taxing costs the clerk will presume that exhibit evidence used at trial was reasonably necessary to the presentation of the case and that exhibit evidence not used was not reasonably necessary to the presentation of the case.

(~~f~~ 5**)** *Bond Premiums.* The party entitled to recover costs shall ordinarily be allowed premiums paid on undertakings, bonds or security stipulations, where the same have been furnished by reason of express requirement of the law, or an order of the Court, where the same are reasonably required to enable the party to secure some right accorded that party in the action or proceedings. In taxing costs the clerk will presume that the premiums for all bonds which are on file and of record in the case are allowable as costs.

(~~g~~ 6**)** *Other Costs.* Items of costs not specifically mentioned in this Rule shall be taxed by the clerk in accordance with the laws of the United States.

Current subsections (b)-(g) are consolidated in one subsection (b), "Items Taxed," with subsections and subheadings.

~~**(h) Objections.** Upon the hearing, specific objections supported by affidavits or other written evidence may be made to any item of costs. The clerk shall thereupon tax the costs, and if there is no appeal, record the amount of costs taxed in the docket.~~

Deleted as unnecessary because it is addressed in (a)(2) and (3).

~~**(i) Review.** A dissatisfied party may appeal upon written motion served within five (5) days of the clerk's decision, as provided in Fed. R. Civ. P. 54(d)(1). The motion shall specify all objections to the clerk's decision and the reasons for the objections. Appeals shall be heard upon the same documents and evidence submitted to the clerk.~~

Moved to subsection (a)(6), where time periods are modified and language is altered to conform to the rest of subsection (a).

. . .

56.2 MOTIONS FILED AGAINST PRO SE PRISONER-PLAINTIFFS IN CIVIL ACTIONS.

~~**(a)** For purposes of proceedings described in this Rule 56.2, L.R. 7.1(c), allowing a party to file a brief in support within five (5) days of filing a motion, does not apply. Motions and briefs in support of summary judgment must be filed and served simultaneously.~~

(~~b~~ a) In any action brought by a prisoner-plaintiff acting pro se . . . .

(~~c~~ b) Failure to provide the above Notice and Warning will result in denial of the motion for summary judgment, regardless of whether the motion is fully briefed.

(~~d~~ c) Definition of "Prisoner-Plaintiff." . . .

Change to conform to 7.1(d)(1)(A), deletion of the five-day grace period.

. . .

~~**77.6 DOCUMENTS STRICKEN FROM THE RECORD.**~~

~~When a judge orders that a document is stricken from the record, the judge may direct the clerk to seal the document. A document that is stricken will not be considered by the Court, but it must remain in the record of the case for purposes of appellate review.~~

This Rule is now addressed in Rule 1.8(a)(3) and is not necessary here.

[New Rule]

RULE 78

HEARING MOTIONS; SUBMISSION ON BRIEFS

78.1 SUBMISSION ON BRIEFS.

Except where a hearing is ordered in the Court's discretion, a matter is submitted on the briefs without oral hearing.

The Federal Rules frequently refer to hearing dates and set deadlines accordingly. Fed. R. Civ. P. 78(b) specifically authorizes a local rule permitting submission on the briefs without oral argument. The new Rule makes explicit that the general practice in the District of Montana is submission on the briefs. An attorney who doesn't already know to look at Rule 7.1 will probably look under Rule 78. See Fed. R. Civ. P. 78(b), 83(a)(1). Of course, a judge may order a hearing, but the more common practice in this District is to decide matters on the briefs.

. . .

79.2 AUDIO RECORDINGS OF COURT PROCEEDINGS.

If a proceeding has been recorded electronically, any person may request a copy of the recording. The person must make arrangements acceptable to the Clerk of Court to pay costs associated with copying. A recording may not be quoted or cited.

This new Rule is adapted from the Northern District of Iowa:

> *If a proceeding has been recorded electronically, the Clerk of Court will arrange, upon the request of any party, to have a copy made of the electronic recording or to have a transcript prepared from the electronic recording, but only after the requesting party has made acceptable arrangements with the Clerk of Court to pay the costs associated with the request in accordance with the directives of the Administrative Office of the United States Courts.*

N.D. Iowa L.Cr.R. 57.2; see also N.D. Iowa L.R. 83.7.

The District of Montana occasionally turns to audiotape when a court reporter is not available. Because audio recordings are public records, any person – not just a party – should be able to request a copy. There's no need to refer to the Administrative Office because the Clerk has to follow the AO's directives.

. . .

83.9 SUBSTITUTION AND WITHDRAWAL OF COUNSEL.

(a) Substitution of Counsel. When a party changes attorneys, a notice of substitution signed by the incoming and the outgoing attorney must be filed by the incoming attorney. The incoming attorney is responsible for ensuring that he or she is added to the case for the correct party or parties and is properly designated to receive notices of electronic filing. ~~The incoming attorney must also verify that electronic service on outgoing attorneys is properly terminated.~~ When the incoming attorney makes an appearance, the clerk must terminate electronic service on the outgoing attorney.

See Clerk's Policy Directive No. 5. The Directive explains that "CM/ECF does not allow the attorneys to terminate electronic service of another attorney." Only the deputy clerks can perform that function.

~~**(b) Withdrawal of Counsel.** When an attorney's withdrawal will leave any party without counsel for any period of time, the attorney may withdraw only by leave of Court. A motion for leave to withdraw must be accompanied by:~~

~~(1) an affidavit of counsel stating that the party has been advised of its obligation immediately to retain new counsel or appear pro se; and~~

~~(2) (A) the party's written consent to counsel's withdrawal, signed by the attorney and the party; or~~

~~(B) a showing of good cause and an affidavit showing that the motion to withdraw was personally served on the party at least ten business days prior to filing the motion to withdraw.~~

~~(3) When counsel's motion is not supported by the party's written consent, counsel may show good cause to withdraw by filing an ex parte affidavit separately from the motion and other supporting documents.~~

(b) Withdrawal of Counsel.

(1) When an attorney's withdrawal will leave any party without counsel for any period of time, the attorney may withdraw only by leave of Court.

(2) A motion for leave to withdraw must be accompanied by either:

(A) the client's written consent to counsel's withdrawal, signed by the attorney and the client and acknowledging the client's obligation immediately to retain new counsel or appear pro se; or

(B) an affidavit of counsel showing that:

(i) a notice of intent to file a motion to withdraw was personally served on the client at least fourteen days prior to filing the motion to withdraw;

(ii) the client has been advised of its obligation immediately to retain new counsel or appear pro se if the motion to withdraw is granted; and

(iii) facts constituting good cause support withdrawal. A showing of good cause may be made by filing an ex parte affidavit separate from the affidavit addressing subsections (i) and (ii) above. An ex parte affidavit must be served on the client but need not be served on any other party.

Amended and reorganized for clarification.

. . .

CR 1.1 SCOPE OF CHAPTER III.

This chapter applies in all criminal proceedings in the District of Montana. Chapter I and Local Rules 5.2, 7.1(c), 7.2, 7.3, ~~7.4~~, ~~7.5~~ 7.4, 10, 48.2, ~~58~~, 77, 79.2, and 83 also apply to criminal proceedings to the extent they are not inconsistent with federal law or with other Local Rules in this chapter.

Chapter I is called General Rules, so it should be read to apply in criminal as well as civil cases. It is sometimes overlooked, so the explicit reference is added for clarification. L.R. 7.1(c) concerns unopposed motions, motions for extension of time, and proposed orders. L.R. 7.4 is deleted because it is moved to 1.8 (in Chapter I, so it applies in criminal cases). With that change, L.R. 7.5 becomes 7.4. L.R. 58, the rule on entry of judgment, doesn't apply to criminal judgments, which can't be entered until after sentencing and which are prepared and signed by the judge, not the clerk. New L.R. 79.2 concerns the availability of audio recordings, which are especially common in criminal cases.

. . .

CR 11.1 ~~SERVICE OF NOTICE OF INTENT TO CHANGE PLEA AND PLEA AGREEMENTS ON OTHER PARTIES~~. PLEA AGREEMENTS.

~~At the time of filing a notice of intent to change plea, the defendant shall certify that all parties to the case have been informed of the defendant's intention to plead guilty and shall state whether the plea agreement is to be filed under seal~~. Any party wishing to file a plea agreement under seal must comply with Rule 1.8.

A motion to change plea has to be served on all other parties, so there is no need to certify that other parties have been informed.

As noted in connection with Rule 1.8(a)(1)(C), as proposed, plea agreements are not categorically included among documents that may be sealed without a motion from a party. Language in this Rule suggesting the contrary is deleted, and the last sentence clarifies that a plea agreement may not be filed under seal except as provided in Rule 1.8.