

PROPOSED REVISIONS

3.2 ASSIGNMENT OF CASES.

(a) Jurisdiction. All Article III judges of the District of Montana, including senior judges designated to serve in Montana by the Chief Judge of the Circuit, shall have jurisdiction over all criminal and civil cases filed in the District of Montana, and may make and sign any orders, decrees or judgments.

(b) Assignment of Division Workload. For the purpose of allocating the work of the judges, the Chief Judge of the District shall, by order, assign each of the Divisions of the Court to one or more of the judges. All applications for orders in cases pending in any Division shall be made to the judge to whom the case is assigned for pretrial proceedings or for trial.

(c) Right to an Article III Judge. The right to have all civil proceedings conducted by a United States District Judge appointed pursuant to Article III of the United States Constitution shall be preserved inviolate.

(d) Assignment of Civil Cases to Magistrate Judges.

- (1) The full-time United States Magistrate Judges of the District of Montana are designated to hear all prisoner civil rights actions, all habeas corpus actions (excluding motions filed under 28 U.S.C. § 2255), all cases in which one or more plaintiffs are proceeding pro se, and all cases in which leave to proceed in forma pauperis is sought. Except as otherwise provided by order, all such cases shall be assigned to a magistrate judge upon filing. A case will not be reassigned based on a party's change of status after filing.
- (2) Any active Article III judge may designate a United States Magistrate Judge to exercise jurisdiction over a any other civil case in accordance with 28 U.S.C. § 636 and ~~L.R. 73~~ Chapter IV of these Rules.
- (3) ~~The magistrate judge so designated~~ A magistrate judge designated to hear a matter shall be assigned to preside over the case for all purposes, including trial and entry of judgment, only if each party not in default consents in writing within thirty (30) days after service of a notice of assignment as set forth in L.R. 73.2. ~~notification of the magistrate judge's designation.~~

Commentary: This rule is at pages 9-10 of the current Rules.

Subsection (b) of the current rule refers to the Court's general order that designates magistrate judges to preside over pretrial matters in certain Divisions. Cases in the various Divisions are randomly assigned to either Article III or

magistrate judges. Under proposed subsection (d)(1), all cases falling into the listed categories will be assigned to a magistrate judge for pretrial purposes, and random assignment will not occur. The phrase “[e]xcept as otherwise provided by order” refers to those types of cases that logically require at least initial assignment to an Article III judge, for example, bankruptcy appeals and applications for a temporary restraining order.

Subsection (d)(2) provides that any active Article III judge may choose to designate a magistrate judge to preside over any civil matter for pretrial purposes.

In all cases in which a magistrate judge is designated for pretrial purposes, an Article III judge will be assigned for purposes of trial and entry of judgment, unless, as subsection (d)(3) says, all parties consent to magistrate jurisdiction. See 28 U.S.C. § 636(c). Subsection (d)(3) also provides that the failure of a party in default to give consent will not vitiate magistrate jurisdiction if all defaulted parties consent to magistrate jurisdiction.

3.3 VENUE.

(a) Civil Cases.

- (1) Except ~~in habeas cases~~ as otherwise provided in this Rule, all civil cases are assignable to any Division containing a county in which venue would be proper under the laws of the State of Montana. Cases shall be tried within the Division to which the case is assigned, unless by agreement of the parties and with the consent of the Court, or in the Court’s discretion, or for good cause shown, such trial is ordered elsewhere.
- (2) Habeas cases ~~under 28 U.S.C. § 2254~~ 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 ~~Cases Under 28 U.S.C. § 2255~~ 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.
- (3) Prisoner civil rights cases shall be venued ~~according to the residence of one or more of the Defendants~~ in the Division where the alleged wrong was committed.
- (4) . . .

- (5) 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. . . .

Commentary. *This Rule is currently at pages 10-11.*

Subdivision (a)(3) is revised to assign prisoner civil rights cases to the Division where the alleged wrong was committed, rather than to a Division where one or more of the Defendants resides. Keeping prisoner cases within the Division where the facility is located is the best way to balance the prisoner workload among Divisions. The revision in subsection (a)(1) conforms that subsection to the revision in subsection (a)(3).

The revisions in subsections (a)(2) and (5) are stylistic only; no substantive change is intended.

3.6 PRE-FILING REQUIREMENTS.

(a) . . .

(c) Except for habeas petitions, any complaint or petition not submitted simultaneously with either the full filing fee, pursuant to subsection (b), or an affidavit or Application to Proceed In Forma Pauperis, pursuant to subsection (a), may be returned without filing or other record of its submission. Filing fees, affidavits, or Applications received after a complaint has been returned shall be promptly returned to the plaintiff or other sending authority.

Commentary. *The Rule is currently located at page 12.*

The revision in subsection (c) is made necessary by a revision in an applicable federal rule. New Rule 3(b) of the Rules Governing Section 2254 Cases (effective December 1, 2004, absent Congressional action) specifically requires the clerk to file any habeas petition, regardless of whether it is accompanied by a filing fee or a forma pauperis application. See Proposed Rule 3(b) advisory committee's note.

6.2 EXTENSIONS OF TIME.

(a) . . .

(b) All requests for extension of time or continuance shall be accompanied by an appropriate form of order, separate from the motion, ~~with sufficient copies for the clerk to mail to adverse parties.~~

Commentary. *The proposed revision in subsection (b) deletes the requirement for copies of proposed orders. A proposed order must still be submitted, but the*

original alone is sufficient.

7.1 MOTIONS.

(a)

...

(e) Within twenty (20) days after service of such a brief in support of a motion to dismiss or a motion for summary judgment, unless the Court orders a shorter time, any party opposing a motion shall file a response brief not to exceed twenty (20) pages. Response briefs shall be filed within eleven (11) days after service of a brief in support of any other motion.

(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 in excess of ten (10) pages will not be accepted and shall not be filed by the clerk if the party has not obtained prior leave of Court.

(g) ...

(j) Within the text of each motion submitted to the Court, the moving party shall note that other parties have been contacted concerning the motion and whether other parties object to the motion. Unopposed motions shall be accompanied by an appropriate Order, separate from the motion.

...

Commentary. *The current Rule is located at pages 19 and 20.*

The proposed change in subdivision (e) reduces the time allowed for briefing of non-dispositive motions. Twenty days are still allowed for responses to briefs in support of motions to dismiss or motions for summary judgment. However, responses to other motions must be made in eleven days. Time for mailing is unaffected.

The proposed revision in subdivision (f) makes clear that a reply brief in excess of the twenty-page limit will not be accepted. The revision reflects the restriction set forth in current subdivision (d).

The addition to subsection (j) requires that a proposed order be submitted with all unopposed motions.

10.1 FORM OF PAPERS.

(a) ...

(f) The signature on each original pleading or motion must be an original.

Commentary. Rule 10.1 is located at page 22 of the current Rules.

The addition of subsection (f) to Rule 10.1 clarifies that there must be an original signature on each pleading or motion. Facsimile signatures, copied signatures, etc., are not permitted.

10.3 COPIES TO BE FURNISHED TO CLERK.

(a) . . .

(b) At the time of filing, parties must provide to the clerk an original and two (2) copies of the complaint, and an original and one copy of answers, pretrial statements, motions, and briefs. No complimentary copies shall be provided directly to the presiding judge. ~~Persons applying to proceed in forma pauperis must provide one original proposed complaint with the application.~~ If in forma pauperis status is granted, the plaintiff must provide one original of each exhibit and one original and one copy of all pleadings, motions, and briefs presented for filing.

Commentary. Rule 10.3 is located at page 23 of the current Rules.

The third sentence of subdivision (b) in Rule 10.3 is deleted as unnecessary. Requiring persons applying to proceed in forma pauperis to provide two copies is not unduly burdensome, and new forms available to pro se litigants state the number of copies required.

10.5 SANCTIONS.

If any filings do not comply with L.R. 10, the clerk shall bring the failure to comply to the attention of the filing party and to the presiding judge. The Court may sanction a violation of **L.R. 10. The sanction will include a \$50.00 assessment and up to \$5.00 per page for each nonconforming page.**

Commentary. The Rule is located at page 24.

Persistent failure on the part of some lawyers or firms to provide the clerks with what is required under these rules creates unnecessary extra work and expense for the Court.

26.2 DOCUMENTS OF DISCOVERY.

(a) Initial disclosures under Federal Rule of Civil Procedure 26(a)(1), depositions upon oral examinations and interrogatories, requests for documents, requests for admissions, ~~and~~

answers and responses, and expert reports shall not be routinely filed (*see* Federal Rule of Civil Procedure 5(d)). However, when any motion is filed relating to discovery, the parties filing the motion shall attach to the motion all of the documents relevant to the motion if the documents have not been previously filed. Certificates or notices indicating service of discovery documents on opposing parties shall not be filed.

(b) If for any reason a party believes that any of the named documents should be filed, the party may move that the document be filed, stating the reasons and the authority supporting the movant's position.

(c) At trial, expert reports must be available for review by the Court.

Commentary. The Rule is located at page 43.

The proposed revision to subsection (a) makes clear that expert reports, like other discovery, are not to be routinely filed.

New subsection (c) provides that expert reports must be available for use at trial. They are not filed unless the Court so orders.

67.2 ORDERS DIRECTING INVESTMENT OF FUNDS BY CLERK.

(a) Any order obtained by a party or parties in an action that directs the clerk to invest in an interest-bearing account or instrument funds deposited in the registry of the Court pursuant to 28 U.S.C. § 2041 shall include the following:

(1) . . .

(4) wording which directs the clerk to deduct from the income earned on the investment a fee, not exceeding that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office of the United States Courts, ~~at equal to the first forty-five (45) days' income earned on the investment~~, whenever such income becomes available for deduction ~~in the investment so held~~ and without further order of the Court; and

(5) the social security number and/or tax identification number of the depositor, which may be set forth under seal in a separate document.

(b) Information regarding the authorized fee shall be made available by the Clerk's Office upon request.

Commentary. The Rule is located at page 56.

Subdivision (4) of the current Rule (subdivision (a)(4) of the proposed Rule) misstated the fee authorized to be assessed against income earned on funds deposited with the clerk. The Administrative Office periodically amends the fees

that are authorized. Proposed subdivision (a)(4) makes clear that orders directing the clerk to invest funds on deposit with the court must authorize the deduction of the authorized fee.

The revision in subdivision (a)(5) is necessary in light of L.R. 3.7.

New subdivision (b) provides that information regarding the authorized fee is available from the Clerk of Court.

**73.2 ~~CONSENT TO ASSIGNMENT OF CIVIL CASES TO A MAGISTRATE JUDGE~~
CONSENT ELECTION WHERE CASE IS ASSIGNED TO MAGISTRATE
JUDGE.**

(a) Notice. When a civil action has been conditionally assigned to a magistrate judge, the Clerk of Court shall notify the parties of such ~~designation~~ assignment and advise them that they may give or withhold consent ~~or withhold consent~~ to the magistrate's exercise of jurisdiction. In cases that are pre-screened pursuant to 28 U.S.C. § 1915(e)(2), 28 U.S.C. § 1915A(a), 42 U.S.C. § 1997e(c), or Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the clerk shall mail a notice of assignment and consent election form after all parties ordered to be served have made an appearance. In all other cases, ~~the~~ clerk shall mail the notice and consent election form ~~a notice and form for election to proceed before the~~ magistrate judge within ten (10) days of a party's appearance.

(b) Return of consent election forms. Parties shall have thirty (30) days from service of notification of the magistrate judge's ~~designation~~ the notice of assignment to complete and return to the Clerk of Court the ~~election-to-proceed form~~ consent election form indicating whether they do or do not consent to a magistrate judge's exercise of jurisdiction over the case for any and all proceedings including trial and entry of judgment, pursuant to 28 U.S.C. § 636(c). The Clerk will ~~keep custody of all election-to-proceed forms~~ consent election forms. ~~If and if all parties so give~~ consent, the case will continue before or be reassigned to a magistrate judge. In the event any party ~~does not~~ withholds consent to the magistrate judge's jurisdiction, the case will be reassigned to an Article III judge.

(c) Anonymity. Parties are free to give or withhold their consent. ~~and n~~ No judge will be notified as to the identity of any party giving or withholding ~~or giving~~ consent to the exercise of jurisdiction by a magistrate judge, except when all parties consent.

Commentary. *This Rule is currently at page 95.*

Subsection (a) provides that consent election forms will not be immediately mailed to plaintiffs in cases that are pre-screened. Up to sixty percent of such cases are recommended for dismissal before opposing parties are served. Mailing consent election forms in such cases is pointless. Therefore, the proposed rule provides that a notice of assignment and consent election form will not be mailed out until all parties required to appear have appeared.

All other changes are stylistic only; no substantive change is intended.

RULE 79

BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

79.1. JUDGMENTS OF BANKRUPTCY COURT.

Judgments issued by the Bankruptcy Court shall be entered in the District Court's civil judgment book.

Commentary. This is a new Rule. State law requires that a judgment of the federal district court may become a lien against real property upon the filing of a "transcript of judgment" in the state district court where the property is located. See *Mont. Code Ann. § 25-9-303(1)* (2003); *Miller v. Snavely (In re Snavely)*, 314 B.R. 808 (B.A.P. 9th Cir. 2004) (citing *Gaines v. Van Demark*, 74 P.2d 454, 456 (Mont. 1937)). The statute does not appear to permit filing a transcript of judgment with respect to a judgment issued by the bankruptcy court. To facilitate parties' procurement of a transcript of judgment based on a bankruptcy court judgment, the proposed Rule provides that all bankruptcy court judgments will be recorded in the District Court's civil judgment book.

83.3 ADMISSION TO AND PRACTICE IN THIS COURT.

(a) **Admission to the Bar of this Court.** Admission to the Bar of this Court is limited to attorneys of good moral character who are members in good standing of the State Bar of Montana.

...

(c) **Practice in this Court.** Except as otherwise provided in this Rule, only members of the Bar of this Court who are classified as active members in good standing by the State Bar of Montana shall practice in this Court.

...

(e) **Pro hac vice.**

(1) ...

(3) ~~Application to appear pro hac vice shall be filed and served on all parties, and shall state, under penalty of perjury~~ An attorney applying to appear pro hac vice shall file and serve on all parties an application stating, under penalty of perjury:

(A) the attorney's state or territory of residence and office addresses;

...

(4) Permission to appear pro hac vice is granted or denied solely at the discretion of the presiding judge. Revocation of permission to appear pro hac vice pertains to the instant case only and does not constitute disbarment from the Bar of this Court.

Commentary. The Rule is currently located at pages 61-62.

The proposed change in subdivision (c) clarifies that persons admitted to the Federal Bar may not practice in federal court if they are on inactive status with the State Bar of Montana.

The change in subdivision (e)(4) clarifies that it is the attorney applying for admission pro hac vice, not local counsel, who must make the application to appear.

New subdivision (e)(4) clarifies that denial or revocation of permission to appear pro hac vice does not constitute disbarment from the Federal Bar and is limited to the instant case.

CR12.1 MOTIONS.

(a) Time. Upon serving and filing a motion, or within five (5) days thereafter, the moving party shall serve and file a brief. The adverse party shall have ten (10) days thereafter within which to serve and file a response brief. A reply brief may be served and filed within five (5) days thereafter. Upon filing of the brief in support and the brief in response, the motion shall be deemed made and submitted and taken under advisement by the Court, unless the Court orders oral argument on the motion. The Court may, in its discretion, order oral argument on its own motion, or upon an application contained in the brief of either party.

(b) Length. Briefs in excess of twenty (20) pages will not be accepted and shall not be filed by the clerk if the party has not obtained prior leave of Court. Briefs exceeding twenty (20) pages shall have a table of contents and a table of cases with page references.

(c) Failure to file. Failure to file briefs within the prescribed time may subject any motion to summary ruling. Failure to file a brief by the moving party shall be deemed an admission that, in the opinion of counsel, the motion is without merit. Failure to file a brief by the adverse party shall be deemed an admission that, in the opinion of counsel, the motion is well taken.

(d) Submission by Fax. Documents may not be transmitted by use of telefacsimile ("fax") equipment or any other electronic means for filing with the Court.

Commentary. The Rule is located at page 84.

Proposed new subdivision (d) clarifies that the prohibition in Chapter II Rule 5.2 applies in criminal cases as well. Only original documents may be filed.

CR12.2 NOTICE TO OPPOSING COUNSEL AND OBJECTIONS.

Within the text of each motion submitted to the Court for its consideration, counsel shall note that ~~opposing counsel~~ has all parties have been contacted concerning the motion, and whether ~~opposing counsel~~ any party objects to the motion.

Commentary. The Rule is located at page 84.

Fed. R. Crim. P. 49(a) provides that “[a] party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.” The proposed change to the current Rule 12.2 requires that all parties be served so that in a case involving multiple defendants, one defendant’s motion must be served on all other defendants.