UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

Administrative Order 2013-58

AMENDMENTS TO THE LOCAL RULES - NOTICE OF PROPOSED AMENDMENTS, OF OPPORTUNITY FOR PUBLIC COMMENTS, AND OF HEARING TO RECEIVE COMMENTS

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The Court's Ad Hoc Committee on Rules and Procedures has recommended that this Court amend the Local General Rules. In accordance with Fed. R. Civ. P. 83(a)(1) and Fed. R. Crim. P. 57(a)(1), it is hereby

ORDERED that the Clerk of the Court is directed to: (a) publish an abbreviated notice once in the Daily Business Review (in each edition published in Miami-Dade, Broward, and Palm Beach Counties, Florida) alerting the public of the opportunity to comment on the proposed rules; (b) post prominently on the Court's website this Order and the attached proposed rule amendments for the next 30 days; (c) provide notice to this Court's bar through the CM/ECF electronic noticing system; and (d) offer every person who files any papers in any action in this Court, and to give to anyone who so desires, a copy of this Order with the attached proposed rule amendments for the next 30 days.

IT IS FURTHER ORDERED that the Court will conduct an *en banc* public hearing on the proposed rule amendments on November 7, 2013, at 3:30 p.m. at the Paul G. Rogers Federal Building and United States Courthouse, 701 Clematis Street, West Palm Beach, Florida 33401. Those who desire to appear and offer oral comments on the proposed rule amendments at this hearing shall file written notice to that effect with the Clerk of the Court no later than five days prior to the hearing. Those who desire to offer only written comments on the proposed rule amendments should do so in accordance with the mechanism provided on the Court's website in connection the publication of the proposed rule amendments. The proposed rule amendments contain alternate versions of Local Rule 5.4(e). At the *en banc* hearing, the Court will consider which alternative should be adopted.

DONE AND ORDERED in Chambers at Miami, Florida this 18th day of September, 2013.

FEDERICO A. MORENO
CHIEF UNITED STATES DISTRICT JUDGE

Copies furnished to:

Honorable Ed Carnes, Chief Judge, United States Court of Appeals for the Eleventh Circuit
All Southern District Judges and Magistrate Judges
James Gerstenlauer, Circuit Executive, Eleventh Circuit
Kevin Jacobs, Chair, Ad Hoc Committee on Rules and Procedures
All members of the Ad Hoc Committee on Rules and Procedures
Library

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

GENERAL RULES

Rule 5.4. Filings Under Seal; Disposal of Sealed Materials

(a) General Policy. Unless otherwise provided by law, Court rule, or Court order, proceedings in the United States District Court are public and Court filings are matters of public record. Where not so provided, a party seeking to file matters under seal shall follow the procedures prescribed by this Local Rule. and Ppursuant to Section 5A of the CM/ECF Administrative Procedures, which attorneys are prohibited the electronic from filing of sealed documents electronically.

(b) Procedure for Filings Under Seal in Civil Cases. A party seeking to make a filing under seal in a civil case shall:

(1) Conventionally file a motion to seal that sets forth the factual and legal basis for departing from the policy that Court filings be public and that describes the proposed sealed filing with as much particularity as possible without revealing the confidential information. The motion shall specify the proposed duration of the requested sealing. The motion to seal (but not the proposed sealed filing) and the docket text shall be publicly available on the docket.Deliver to the Clerk's Office an original and one (1) copy of the proposed filing, each contained in a separate plain envelope clearly marked as "sealed document" with the case number and style of the action noted on the outside. The Clerk's Office shall note on each envelope the date of filing and docket entry number.

(2) Conventionally file the proposed sealed filing in a plain envelope clearly marked "sealed document" with the case number and style of the case noted on the outside. File an original and a copy of the motion to seal with self-addressed postage-paid envelopes, setting forth a reasonable basis for departing from the general policy of a public filing, and generally describing the matter contained in the envelope. The motion shall specifically state the period of time that the party seeks to have the matter maintained under seal by the Clerk's Office. Unless permanent sealing is sought, the motion shall set forth how the matter is to be handled upon expiration of the time specified in the Court's sealing order. Absent extraordinary circumstances, no matter sealed pursuant to this Local Rule may remain sealed for longer than five (5) years from the date of filing.

(3) Accompany the motion with a completed sealed document tracking form, which can be obtained from the Clerk's Office in any Division or downloaded from the forms section of the Court's website (www.flsd.uscourts.gov).

(c) Court RulingProcedure for Filing Under Seal in Criminal Cases. A party seeking to make a filing under seal in a criminal case shall:

(1) Conventionally file a motion to seal that sets forth the factual and legal basis for departing from the policy that Court filings be public and that describes the proposed sealed filing with as much particularity as possible without revealing the confidential information. The motion shall specify the

proposed duration of the requested sealing. Unless the Court expressly orders otherwise, the motion to seal will itself be sealed from public view and the docket text appearing on the public docket shall reflect only that a sealed filing has been made.

(2) Conventionally file the proposed sealed filing in a plain envelope clearly marked "sealed document" with the case number and style of the case noted on the outside.

~~If the Court grants the motion to seal, the Clerk's Office shall maintain the matter under seal as specified in the Court order. If the Court denies the motion to seal, the original and copy of the proposed filing shall be returned to the party in its original envelope.~~

(d) Court ruling. An order granting a motion to seal shall state the period of time that the sealed filing shall be sealed. If the Court denies the motion to seal, the proposed sealed filing shall not be public and shall be deleted from the docket by the Clerk's Office.

(~~d~~e) Disposition of Sealed Matter. As to sealed filings filed on or after December 2, 2013, the ~~Unless the Court's sealing order permits the matter to remain sealed permanently, the~~ Clerk's ~~of the Court~~Office will ~~dispose of the sealed matter upon expiration of the time specified in the Court's sealing~~ unseal sealed filings one year after the case has been closed and the appeal period has expired or one year after the issuance of the mandate following appeal, whichever is later, unless a statute, rule, or Court order under paragraph (d) or otherwise directs that the sealed ~~by unsealing, destroying, or returning the matter to the~~ filing be sealed for a different period of time ~~party~~.

ALTERNATIVE VERSION OF (E)

(~~d~~e) Disposition of Sealed Matter. If the sealing order does not state when the seal expires, the seal will remain in effect until further order of the Court.~~Unless the Court's sealing order permits the matter to remain sealed permanently, the Clerk of the Court will dispose of the sealed matter upon expiration of the time specified in the Court's sealing order by unsealing, destroying, or returning the matter to the filing party.~~

Comments

(2000) This Local Rule codifies existing procedure. By its terms, this Local Rule does not apply to materials covered by specific statutes, rules or court orders authorizing, prescribing or requiring secrecy. However, the Clerk's Office and litigants may find it helpful to complete a "Sealed Filing Cover Sheet" in the form set forth at the end of this Local Rule for materials being filed under seal after the entry of, and pursuant to, a protective order governing the use and disclosure of confidential information.

(2001) The current amendments are intended to reflect more accurately existing procedures, and to assist the Court in the maintenance and ultimate disposition of sealed records by creating a form order which specifies how long the matter is to be kept under seal and how it is to be disposed of after the expiration

of that time. By its terms, this Local Rule does not apply to materials covered by specific statutes, rules or court orders authorizing, prescribing or requiring secrecy. However, litigants are required to complete an "Order Re: Sealed Filing" in the form set forth at the end of this Local Rule for materials being filed under seal after the entry of, and pursuant to, a protective order governing the use and disclosure of confidential information.

(2005) The form order previously prescribed by this Local Rule has been deleted. This Local Rule is intended to conform to current case law. *See, e.g., Press-Enterprise Co. v. Super. Ct.,* 478 U.S. 1 (1986); *Globe Newspaper Co. v. Super. Ct.,* 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980); *Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978); *United States v. Valenti,* 987 F.2d 708 (11th Cir. 1993); *Newman v. Graddick,* 696 F.2d 796 (11th Cir. 1983). The sealed document tracking form is an administrative requirement.

(2007) Amended to conform to CM/ECF Administrative Procedures.

(2010) Amended to conform tabulation to the style used in the federal rules of procedure.

(2013) Amended to require that motions to seal in civil cases be publicly available on the docket and to clarify the circumstances of when a sealed document becomes unsealed.

Rule 88.7. Retained Criminal Defense Attorneys

(a) Retained criminal defense attorneys are expected to make financial arrangements satisfactory to themselves and sufficient to provide for representation of each defendant until the conclusion of the defendant's case at the trial level. Failure of a defendant to pay sums owed for attorney's fees, or failure of counsel to collect a sum sufficient to compensate him for all the services usually required of defense counsel, will not constitute good cause for withdrawal after arraignment. Every defendant, of course, has a right to appeal from any conviction.

(b) *All* notices of permanent appearance in the District Court, and motions for substitution of counsel, shall state whether the appearance of counsel is for trial only or for trial and appeal.

(c) At arraignment, the Magistrate Judge will inquire of each defendant and counsel whether counsel has been retained for trial only or for trial and appeal. Where counsel indicates that he or she has been retained only for trial, the defendant will be notified that it is the defendant's responsibility to arrange for counsel for any necessary appeals.

(d) In cases where the defendant moves the Court to proceed in forma pauperis on appeal, or for appointment of Criminal Justice Act appellate counsel, the Court will consider, in passing upon such applications, factors such as (~~a~~i) the defendant's qualified Sixth Amendment right to counsel of choice, recognizing the distinction between choosing a trial lawyer and choosing an appellate lawyer; (~~b~~ii) the contract between the defendant and trial counsel; (~~c~~iii) the defendant's present financial condition and ability to have retained only trial counsel; (~~d~~iv) retained counsel's appellate experience; (~~e~~v) the financial burden that prosecuting the appeal would impose upon trial counsel, in view of the fee received and the professional services rendered; and (~~f~~vi) all other relevant factors, including any constitutional guarantees of the defendant.

(e) In assessing whether the legal fees previously paid to defense counsel should reasonably encompass appellate representation, the Court is to apply the provisions of Rule 41.5 of the Rules Regulating The Florida Bar. The Court is to consider the following factors as guides in determining the reasonableness of the fee: (~~a~~i) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service proffered; (~~b~~ii) the likelihood that the acceptance of the particular employment precluded other employment by the lawyer; (~~c~~iii) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature; (~~d~~iv) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained; (~~e~~v) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client; (~~f~~vi) the nature and length of the professional relationship of the client; and (~~g~~vii) the experience, reputation, diligence and ability of the lawyer or lawyers performing the service and the skill, expertise or efficiency of efforts reflected in the actual providing of such services.

In determining a reasonable fee, the time devoted to the representation and the

customary rate of fee are not the sole or controlling factors; nor should the determination be governed by fees or rates of fee provided under the Criminal Justice Act. All factors set out in this Local Rule and in the Rules Regulating The Florida Bar should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

(f) ~~All~~ Those parts of proceedings undertaken~~, and determinations made,~~ pursuant to paragraphs (d) and (e) of this Local Rule that ~~,~~ involve confidential or privileged information or communications shall be held in camera, ex-parte, and under seal. ~~All such proceedings and determinations shall be strictly confidential, and not subject to disclosure by subpoena or otherwise.~~

Authority

(1993) This rule is new in its entirety. Added at the request of the Eleventh Circuit.

Comments

(2010) Amended to conform tabulation to the style used in the federal rules of procedure.

(2011) New Notice of Permanent Appearance Form approved.

(2013) Amended to clarify that only those parts of proceedings held pursuant to paragraphs (d) and (e) involving confidential or privileged communications need to be held in camera, ex parte, and under seal.

Rule 88.10. Criminal Discovery

(a) The government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof, which are within the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the government:

(1) Written or recorded statements made by the defendant;

(2) The substance of any oral statement made by the defendant before or after his arrest in response to interrogation by a then known-to-be government agent which the government intends to offer in evidence at trial;

(3) Recorded grand jury testimony of the defendant relating to the offenses charged;

(4) The defendant's arrest and conviction record;

(5) Except as provided in Fed. R. Crim. P. 16(a)(2), ~~B~~books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are material to the preparation of the defendant's defense, or which the government intends to use as evidence at trial to prove its case-in-chief, or which were obtained from or belonging to the defendant; and

(6) Results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with this case.

(b) The defendant shall permit the government to inspect and copy the following items, or copies thereof, or supply copies thereof, which are within the possession, custody or control of the defendant, the existence of which is known or by the exercise of due diligence may become known to the defendant:

(1) Books, papers, documents, photographs or tangible objects which the defendant intends to introduce as evidence-in-chief at trial.

(2) Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case which the defendant intends to introduce as evidence-in-chief at trial, or which were prepared by a defense witness who will testify concerning the contents thereof; and

(3) If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, or intends to introduce expert testimony relating to a mental disease or defect or other mental condition bearing on guilt or, in a capital case, punishment, he or she shall give written notice thereof to the government.

(c) The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

(d) The government shall disclose to the defendant the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or

other inducements made to prospective government witnesses, within the scope of *Giglio v. United States,* 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959).

(e) The government shall supply the defendant with a record of prior convictions of any alleged informant who will testify for the government at trial.

(f) The government shall state whether defendant was identified in any lineup, showup, photospread or similar identification proceeding, and produce any pictures utilized or resulting therefrom.

(g) The government shall advise its agents and officers involved in this case to preserve all rough notes.

(h) The government shall advise the defendant(s) of its intention to introduce extrinsic act evidence pursuant to Federal Rule of Evidence 404(b). The government shall provide notice regardless of how it intends to use the extrinsic act evidence at trial, i.e. during its case-in-chief, for impeachment, or for possible rebuttal. Furthermore, the government shall apprise the defense of the general nature of the evidence of the extrinsic acts.

(i) The government shall state whether the defendant was an aggrieved person, as defined in 18 U.S.C. § 2510(11), of any electronic surveillance, and if so, shall set forth in detail the circumstances thereof.

(j) The government shall have transcribed the grand jury testimony of all witnesses who will testify for the government at the trial of this cause, preparatory to a timely motion for discovery.

(k) The government shall, upon request, deliver to any chemist selected by the defense, who is presently registered with the Attorney General in compliance with 21 U.S.C. §§ 822 and 823, and 21 C.F.R. § 101.22(8), a sufficient representative sample of any alleged contraband which is the subject of this indictment, to allow independent chemical analysis of such sample.

(l) The government shall permit the defendant, his counsel and any experts selected by the defense to inspect any automobile, vessel, or aircraft allegedly utilized in the commission of any offenses charged. Government counsel shall, if necessary, assist defense counsel in arranging such inspection at a reasonable time and place, by advising the government authority having custody of the thing to be inspected that such inspection has been ordered by the court.

(m) The government shall provide the defense, for independent expert examination, copies of all latent fingerprints or palm prints which have been identified by a government expert as those of the defendant.

(n) The government shall, upon request of the defendant, disclose to the defendant a written summary of testimony the government reasonably expects to offer at trial under Federal Rules of Evidence 702, 703, or 705. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and

the witnesses' qualifications. If the defendant seeks and obtains discovery under this paragraph, or if the defendant has given notice under Federal Rule of Criminal Procedure 12.2(b) of an intent to present expert testimony on the defendant's mental condition, the defendant shall, upon request by the government, disclose to the government a written summary of testimony the defendant reasonably expects to offer at trial under Federal Rules of Evidence 702, 703, 705 or Federal Rule of Criminal Procedure 12.2(b), describing the witnesses' opinions, the bases and the reasons for these opinions, and the witnesses' qualifications.

(o) The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which is not contested and the early resolution of which will expedite the trial.

(p) The parties shall collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations entered into at the conference. No stipulations made by defense counsel at the conference shall be used against the defendant unless the stipulations are reduced to writing and signed by the defendant and his counsel. This statement, including any stipulations signed by the defendant and his counsel, shall be filed with the Court within seven (7) days following the conference.

(q) Schedule of Discovery.

(1) Discovery which is to be made in connection with a pre-trial hearing other than a bail or pre-trial detention hearing shall be made not later than forty-eight (48) hours prior to the hearing. Discovery which is to be made in connection with a bail or pre-trial detention hearing shall be made not later than the commencement of the hearing.

(2) Discovery which is to be made in connection with trial shall be made not later than fourteen (14) days after the arraignment, or such other time as ordered by the court.

(3) Discovery which is to be made in connection with post-trial hearings (including, by way of example only, sentencing hearings) shall be made not later than seven (7) days prior to the hearing. This discovery rule shall not affect the provisions of Local Rule 88.8 regarding pre-sentence investigation reports.

It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this Local Rule.

Authority

(1994) Former Standing Order on Criminal Discovery of the Southern District, as amended after public hearing in 1994.

(1996) A.5. revised to include provisions of Federal Rule of Criminal Procedure 16(a)(1)(C).

(1998) Section N is revised to conform to amendments to Federal Rules of

Criminal Procedure 16(a)(1)(E) and (b)(1)(C)(ii). Section Q.2 is amended to effectuate discovery within fourteen days or arraignment, without the entry of a Court order, or within such other time period as the Court may order.

Comments

(2000) With regard to discovery practices related to search warrants in criminal cases *see* September 7, 1999, letter from the then United States Attorney for the Southern District of Florida which has been posted at the U.S. Attorney's website at http://www.usdoj.gov/usao/fls/Discovery_Practices.html.

(2003) B.3 amended to conform to 2002 amendment of Federal Rule of Criminal Procedure 12.2.

(2005) H amended to conform to 2004 amendment to Standing Discovery Order. *See United States v. Carrasco,* 381 F.3d 1237, 1240 n. 3 (11th Cir. 2004).

(2010) Amended to conform tabulation to the style used in the federal rules of procedure.

(2013) Amended at (a)(5) to correspond to amended Fed. R. Civ. P. 16(a)(2).