What's New For Southern District Of Florida Local Rules

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Aaron S. Weiss

On Dec. 1, 2016, amendments to the Local Rules for the United States District Court for the Southern District of Florida took effect. Some of these amendments were put into effect to bring the local rules into accord with amendments to the Federal Rules of Civil Procedure, which took effect the same day. Other amendments addressed a variety of rules. Lawyers who practice in this court should be aware of these amendments.

Three "Mail" Day Timing Rules: S.D. Fla. L.R. 5.1(e); S.D. Fla. L.R. 7.1(c)(1)(A) and S..D. Fla. L.R. 7.1(c)(1)(B)

As federal litigators should be aware, effective December 1, the Federal Rules of Civil Procedure were amended to eliminate the three extra "mail" days to respond to pleadings and other papers filed and served using the CM/ECF system. Two amendments to the Southern District of Florida Local Rules are intended to harmonize the local and federal rules on this issue.

First, amendments to S.D. Fla. L.R. 7.1(c)(1)(A) and S.D. Fla. L.R. 7.1(c)(1)(B) are straightforward and track the amendments to Fed. R. Civ. P. 6(d).

But what about papers that are required to be served—but not filed—such as discovery requests or initial disclosures? Fed. R. Civ. P. 6(d) still does not specifically address this situation. Fed. R. Civ. P 5(b)(2)(E) provides that service by electronic means is permissible "if the person consented in writing, in which event service is complete upon transmission, but it is not effective if the serving party learns that it did not reach the person to be served."

Two decisions in the Southern District of Florida have found that attorneys who register for the case management/electronic case files (CM/ECF) system consent to service by email for papers that are not required to be filed by CM/ECF. In Deer v. Saltzman, Tanis, Pittel, Levin & Jacobson, 2011 WL 1526829, at *3 (S.D. Fla. 2011), the court found that "plaintiff's counsel is a member of the bar of this court and, as such, has agreed to receive service by email." Id. at *3. The court also noted that Paragraph 4 of the CM/ECF Attorney Registration Form provides in relevant part that a:

> Filing User constitutes: (1) consent to receive notice electronically and waiver of the right to receive notice by first class mail ... (2) consent to electronic service and waiver of the right to service by personal service or first class mail ... except with regard to service of summons and complaint. Waiver of service and notice by first class mail applies to notice of the entry of an order or judgment.

Id. at *3. Ultimately, the court in Deer found that service of the motion "via email was proper." Id. at *4.

Likewise, in Barr v. Harvard Drug Group LLC, the court found that consent to electronic service is also "applicable to notices the attorneys send between themselves, and do not file with the court." Barr v. Harvard Drug Group LLC, (S.D. Fla. 2014) reversed on other grounds, 591 F. App'x 928 (11th Cir. 2015).

Thus, the rule of Deer and Barr is that service of papers required to be served but not filed can be made via email since the attorney consented to service by email when they registered for CM/ECF. To bring more transparency to the matter, newly added S.D. Fla. L.R. 5.1(e) states:

> (e) Consent to Service. Registration as an electronic filing user pursuant to Southern District of Florida CM/ECF Administrative Procedures §3B constitutes consent to receive service electronically pursuant to Fed. R. Civ. P. 5(b)(2)(E) and Fed. R. Crim. P. 49 and waiver of any right to receive service by any other means. Service of papers required to be served pursuant to Fed. R. Civ. P. 5(a) and Fed. R. Crim. P. 39 but not filed, such as discovery requests, may be made via email to the address designated by an attorney for receipt of notices of electronic filings.

This rule means that discovery papers—and other papers required to be served but not filed—may be served on the attorney of record by email sent to the email address that the receiving attorney designated to receive CM/ECF notices.

Note, though, this rule is specific to the Southern District of Florida and litigants should consult the local rules for each district. In the Middle District of Florida, for instance, there is a case that comes out the other way because the applicable form used for CM/ECF registration said provision of the email address did not constitute general consent for electronic service. See BCJJ LLC v. LeFevre, (M.D. Fla. Aug. 8, 2012).

S.D. Fla. L.R. 26.1(g): Timing of Discovery Motions

S.D. Fla. L.R. 26.1(g) sets the 30-day rule for making discovery motions. Under the old rule, the timing was triggered from when the “grounds for the motion” occurred. Litigants often argued over what this meant. The amended rule is intended to draw a brighter line. The new rule says the motion must be made within (a) 30 days from the actual response (b) date of deposition where the issue arose or (c) the time when the party knew or should have known the response was deficient. Subpart (c) is supposed to apply to a situation where a party, for instance, produces 50,000 pages of documents and only after reviewing them does the propounding party realize certain documents haven’t been provided. The amendment provides a brighter line than the former “ground for the motion” standard, which often invited subjective interpretations.

S.D. Fla. L.R. 7.1(c)(2) — Exceptions to Successive Summary Judgment Motion Rule

Amendments to S.D. Fla. L.R. 7.1(c)(2) add in two exceptions to the rule precluding multiple summary judgment motions. Municipal lawyers who defend government officials in civil rights cases have observed that the rule precluding successive summary judgment was perhaps at odds with the holding of Crawford-El v. Britton, 523 U.S. 574 (1998), which says that immunity must be raised at every stage. The amendment provides that a successive summary judgment motion can now be made on the distinct issue of qualified immunity.

The other amendment to this rule addresses motions to dismiss that are converted by the court to summary judgment motions. The amendment provides that if this happens, the moving party can still make a summary judgment motion later on.

S.D. Fla. L.R. 11(e) — Communications With Jurors

The amendments to S.D. Fla. L.R. 11.1(e) address communications with jurors after a jury has been discharged. The amendments bring the rule more in line with the applicable Florida Bar Rule. They also address a technical issue whereby under a strict reading of the former rule, a lawyer could never talk about anything, ever, to someone who happened to have served on a jury in a case the lawyer tried. In other words, if a person who served on the lawyer’s jury 10 years ago was sitting next to that lawyer at a Miami Heat game, the lawyer technically could not even say “Pardon me” when passing the person in the aisle. That issue has been fixed.

S.D. Fla. L.R. 88.10 – Communications With Jurors

The amendments to S.D. Fla. 88.10 address certain standing discovery orders in criminal cases and make the local rules more consistent with national practice.

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