

March 6, 1997

**SUPPLEMENTAL REPORT OF THE JOINT COMMITTEE  
ON LOCAL RULES CONCERNING COMMENTS RECEIVED  
ON RECOMMENDED REVISED LOCAL RULES OF THE  
SOUTHERN AND EASTERN DISTRICTS OF NEW YORK**

By this supplemental report, the Joint Committee on Local Rules submits to the United States District Courts for the Southern and Eastern Districts of New York its views with respect to the comments received on the recommended revised Local Rules of the Southern and Eastern Districts of New York.

On November 25, 1996, the United States District Courts for the Southern and Eastern Districts of New York gave public notice of proposed revised Local Civil and Criminal Rules, with a deadline for comments of February 14, 1997. On December 23, 1996, the Courts gave public notice of proposed revised Local General and Admiralty Rules, with a deadline for comments of February 28, 1997. On January 21, 1997, the Courts gave public notice of proposed revised Local Magistrate Judge Rules, with a deadline for comments of February 28, 1997.<sup>1</sup>

The proposed revised Local Rules received wide distribution. Copies of the public notices and the proposed revised Local Rules were mailed by the Eastern District Clerk's Office to 45 bar associations. In addition to copies made available by Pacer and over the Internet, the Southern District Clerk's Office supplied to interested persons 94 copies of the proposed revised Local Civil and Criminal Rules, 51 copies of the proposed revised Local

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<sup>1</sup> Under the Committee's recommendations, the Local General and Magistrate Judge Rules would be discontinued as separate sets of Local Rules, and would be included (as appropriate) in the Local Civil or Criminal Rules.

General and Admiralty Rules, and 34 copies of the proposed revised Local Magistrate Judge Rules.

Eight sets of written comments were received on the proposed revised Local Rules. Copies of these comments are attached hereto under Tabs 1 through 8. The persons commenting (in alphabetical order) were as follows:

Tab 1--Association of the Bar of the City of New York (Committee on Professional Responsibility)

Tab 2--Kenyon & Kenyon

Tab 3--Jackson Leeds, Esq.

Tab 4--Jackson Leeds, Esq. and Ms. Anita Schuloff

Tab 5--New York County Lawyers' Association  
(Admiralty and Maritime Law Committee)

Tab 6--New York County Lawyers' Association  
(Federal Courts Committee)

Tab 7--New York State Bar Association (Commercial and  
Federal Litigation Section)

Tab 8--Pennie & Edmonds

The comments generally reflect a positive view of the recommended Local Rules. The comments contain a number of helpful suggestions, which the Joint Committee believes are worthy of adoption as amendments to the recommended Local Rules.

The Joint Committee's views on the comments received, and the changes in the proposed rules which the Joint Committee recommends in light of the comments, are set forth below. The changes in the proposed Local Rules which the Joint Committee recommends in light of the comments are first summarized and then discussed individually below, followed by a discussion of the comments in response to which the Joint Committee does not recommend any

changes in the proposed Local Rules. (All references below are to the recommended new Local Rule numbers, not to the former rule numbers.)

**CHANGES IN THE PROPOSED LOCAL RULES  
RECOMMENDED BY THE JOINT COMMITTEE  
IN LIGHT OF THE COMMENTS RECEIVED**

**Summary of Changes Recommended  
by the Joint Committee**

For the convenience of the Court, we have set forth immediately below a summary of the changes recommended by the Joint Committee in the proposed Local Rules, together with page citations to the pages of this supplemental report where a more extended discussion of each proposed change can be found:

Local Civil Rule 5.1(a) - - add subpoenas to list of discovery documents not to be filed with the Court unless otherwise ordered (see pp. 4-5 *infra*)

Local Civil Rule 6.1(a) - - add motions to quash subpoenas to discovery motions subject to shorter time periods (see p. 5 *infra*)

Local Civil Rule 6.4 - - add new local rule making clear that provisions for computation of time under Federal Rule of Civil Procedure 6(a) and 6(e) apply to the Local Civil and Admiralty Rules (see pp. 5-6 *infra*)

Local Civil Rule 26.2 - - modify description of information required to be provided in support of claim of privilege for documents (see p. 6 *infra*)

Local Civil Rule 55.2 - - modify language of default judgment rule to achieve greater accuracy (see p. 7 *infra*)

Local Civil Rule 56.1 - - add requirement of citations for statements of fact in statements supporting and opposing motions for summary judgment (see pp. 7-8 *infra*)

Local Civil Rule 73.1 - - correct a numbering error (see p. 8 *infra*)

Local Civil Rule 77.1 - - extend the notice required for settlement of an order, judgment, or decree from two days to three days (see pp. 8-9 *infra*)

Local Criminal Rule 1.2 - - add new local rule requiring that applications for ex parte relief in criminal cases state whether a previous application for similar relief has been made (see p. 9 *infra*)

Local Criminal Rule 45.1 - - add new local rule making clear that provisions for computation of time under Federal Rule of Criminal Procedure 45(a) and 45(e) apply to the Local Criminal Rules (see pp. 9-10 *infra*)

Local Admiralty Rule B.2 - - modify language allowing notice of attachment to be given by electronic means (see p. 10 *infra*)

Local Admiralty Rule C.3 - - clarify description of vessel certificates of ownership (see pp. 10-11 *infra*)

### Local Civil Rules

Local Civil Rule 5.1(a). In response to a comment from Pennie & Edmonds (Tab 8, p. 1), the Committee recommends that a reference to subpoenas be added to proposed Local Civil Rule 5.1(a) as follows:<sup>2</sup>

“Depositions and notices of deposition, subpoenas, interrogatories, requests for documents, requests for admissions, and answers and responses thereto, and other discovery requests and materials produced in pretrial disclosure and discovery, shall not be filed with the clerk’s office except by order of the court.”

Local Civil Rule 6.1(a). In response to a comment from Pennie & Edmonds, the Committee recommends that the shorter time periods applicable to discovery motions also be

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<sup>2</sup> Here and elsewhere in this report, recommended new language is underscored, and recommended deletions are enclosed in brackets.

made applicable to motions to quash subpoenas under Federal Rule of Civil Procedure 45(c)(3), by amending recommended Local Civil Rule 6.1(a) to read as follows:

“On all motions and exceptions under Rules 26 through 37 inclusive and Rule 45(c)(3) of the Federal Rules of Civil Procedure, (1) the notice of motion, supporting affidavits, and memoranda of law shall be served by the moving party on all other parties that have appeared in the action, (2) any opposing affidavits and answering memoranda of law shall be served within four business days after service of the moving papers, and (3) any reply affidavits and reply memoranda of law shall be served within one business day after service of the answering papers.”

Local Civil Rule 6.4. The comment of Kenyon & Kenyon suggests that recommended Local Civil Rule 6.1 be amended to state expressly that Federal Rule of Civil Procedure 6(e) (allowing three extra days after service by mail) applies to the computation of time under Local Civil Rule 6.1 (Tab 2). This was indeed the intent of the Joint Committee, and to make this clear beyond any possibility of misunderstanding the Joint Committee suggests that a new Local Civil Rule 6.4 be added which would read as follows:

**“Rule 6.4. Computation of Time**

In computing any period of time prescribed or allowed by the Local Civil Rules or the Local Admiralty and Maritime Rules, the provisions of Federal Rule of Civil Procedure 6(a) and 6(e) shall apply unless otherwise stated.”

Local Civil Rule 26.2. Pursuant to a comment by the New York County Lawyers’ Association (Tab 6, pp. 1-2), and a generally similar comment from the New York State Bar Association (Tab 7, p. 3), the Joint Committee recommends that proposed Local Civil Rule 26.2(a)(2)(A), dealing with information to be supplied in connection with a claim of privilege, be revised to read as follows:

“for documents: (i) the type of document, e.g., letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in [of] the

document, and, where not apparent, the relationship of the author, addressees, and recipients to each other.”

In suggesting this change in the proposed rule, the Joint Committee contemplates that invocations of privilege will be based upon a reasonable investigation, and that privileges will not be invoked if the lawyer invoking them is aware that the documents have been shown to one or more persons not covered by the privilege.

Local Civil Rule 55.2. Pursuant to a comment by the New York State Bar Association (Tab 7, pp. 4-5), the Joint Committee recommends that recommended Local Civil Rule 55.2, dealing with default judgments, be amended to use the words “claim to which no response has been made” instead of the words “complaint” and “pleading to which no response has been made,” so that Local Civil Rule 55.2 would read as follows:

**“Rule 55.2. Default Judgment**

(a) **By the Clerk.** Upon issuance of a clerk’s certificate of default, if the claim to which no response has been made [complaint] only sought payment of a sum certain, and does not include a request for attorney’s fees or other substantive relief, and if a default judgment is sought against all remaining parties to the action, the moving party may request the clerk to enter a default judgment, by submitting an affidavit showing the principal amount due and owing, not exceeding the amount sought in the claim to which no response has been made [complaint], plus interest, if any, computed by the party, with credit for all payments received to date clearly set forth, and costs, if any, pursuant to 28 U.S.C. § 1920.

(b) **By the Court.** In all other cases the party seeking a judgment by default shall apply to the court as described in Federal Rule of Civil Procedure 55(b)(2), and shall append to the application (1) the clerk’s certificate of default, (2) a copy of the claim [pleading] to which no response has been made, and (3) a proposed form of default judgment.”

Local Civil Rule 56.1. Pursuant to a suggestion by a Judge of the Southern District, and pursuant to a generally similar suggestion by the New York State Bar Association (Tab 7, p. 5), the Joint Committee recommends that proposed Local Civil Rule 56.1 be amended by adding a new Local Civil Rule 56.1(d), reading as follows:

“Each statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e).”

The Joint Committee believes that this proposed Local Rule should not add significantly to the burden of submitting a properly supported motion for summary judgment or opposition thereto, because if the motion or opposition is properly supported the necessary citations should be readily available in the materials supporting the motion or opposition. On the other hand, such citations can be of great assistance to the Court when it is necessary to determine whether there is in actuality a genuine issue of material fact on a point that turns out to be of dispositive significance.

Local Civil Rule 73.1. Since recommended Local Civil Rule 73.1 deals with the powers of Magistrate Judges, rather than with their consent jurisdiction, the Joint Committee recommends that it should be renumbered as Local Civil Rule 72.1, because the powers of Magistrate Judges are dealt with in Federal Rule of Civil Procedure 72. If this recommendation is adopted, proposed Local Civil Rule 72.1 (Eastern District Only) would become Local Civil Rule 72.2 (Eastern District Only), and proposed Local Civil Rule 73.2 would become Local Civil Rule 73.1.

Local Civil Rule 77.1(a). Pursuant to a comment by the New York State Bar Association (Tab 7, p. 5), the Joint Committee recommends that the notice required by recommended Local Civil Rule 77.1(a) for settlement of an order, judgment, or decree be extended from two to three days, so as to be consistent with the three days’ notice required by

recommended Local Civil Rule 54.1(a) for taxation of costs. If this recommendation is adopted, the second sentence of Local Civil Rule 77.1(a) would read as follows:

“Unless the form of order, judgment or decree is consented to in writing, or unless the court otherwise directs, three (3) [two (2)] days’ notice of settlement is required.”

#### Local Criminal Rules

Local Criminal Rule 1.2. At the suggestion of a Judge of the Southern District, the Joint Committee recommends that a new Local Criminal Rule 1.2 be added, reading as follows:

**“Rule 1.2. Applications for Ex Parte Orders**

Any application for an ex parte order shall state whether a previous application for similar relief has been made and, if so, shall state (a) the nature of the previous application, (b) the judicial officer to whom such application was presented, and (c) the disposition of such application.”

The Joint Committee notes that recommended Local Civil Rule 6.1(d) (derived from existing Local Civil Rule 6(b)) already contains a similar requirement.

Local Criminal Rule 45.1. In order to parallel the new Local Civil Rule 6.4 recommended above ( see pp. 5-6 *supra*), the Joint Committee recommends that a new Local Criminal Rule 45.1 be added which would read as follows:

**“Rule 45.1. Computation of Time**

In computing any period of time prescribed or allowed by the Local Criminal Rules, the provisions of Federal Rule of Criminal Procedure 45(a) and 45(e) shall apply unless otherwise stated.”



## Local Admiralty and Maritime Rules

Local Admiralty Rule B.2. Pursuant to a suggestion from the New York County Lawyers' Association (Tab 5, pp. 1-2), the Joint Committee recommends that proposed Local Admiralty Rule B.2 be revised to read as follows:

“In an action where any property of a defendant is attached, the plaintiff shall give prompt notice to the defendant of the attachment. Such notice shall be in writing, and may be given by telex, telegram, cable, fax, or other verifiable electronic means.”

Local Admiralty Rule C.3. Pursuant to a suggestion by the New York County Lawyers' Association, the Joint Committee recommends that proposed Local Admiralty Rule C.3(b)(1), listing certain persons who must be given notice of an application for a default judgment in an action in rem, be revised to read as follows:

“If the defendant property is a vessel documented under the laws of the United States, plaintiff must attempt to notify all persons named in the [United States Coast Guard] certificate of ownership issued by the United States Coast Guard, or other designated agency of the United States, as holding an ownership interest in or as holding a lien in or as having filed a notice of claim of lien with respect to the vessel. “

### COMMENTS AS TO WHICH THE JOINT COMMITTEE DOES NOT RECOMMEND CHANGES IN THE PROPOSED LOCAL RULES

## Local Civil Rules

Local Civil Rule 1.1. The suggestion was made that Local Civil Rule 1.1 should expressly state that the Local Rules and individual Judges' rules are subject to the Federal Rules of Civil Procedure and the Judicial Code (Tab 7, p. 1). Particularly since every effort has been made to ensure that the recommended new Local Civil Rules are consistent with the Federal Rules of Civil Procedure and the Judicial Code, the Joint Committee sees no need to restate this self-evident proposition in Local Civil Rule 1.1.

Local Civil Rule 1.9. It was suggested that this rule be renumbered as Local Civil Rule 5.2 (Tab 8, p. 1). The Committee believes that the rule should remain numbered as Local Civil Rule 1.9, to make clear by its location that it is one of the Local Rules applicable to both civil and criminal cases (*see* recommended Local Criminal Rule 1.1(b)).

Local Civil Rule 1.10. One comment suggested that recommended Local Civil Rule 1.10 does not add enough to justify a new Local Rule (Tab 7, p. 1). On balance, the Joint Committee believes that the advantages of the proposed Local Rule are sufficient to justify its inclusion.

Local Civil Rule 6.1. It was suggested that the timetable for discovery motions set forth in recommended Local Civil Rule 6.1(a) is too tight (Tab 7, p. 1). This timetable is drawn from the existing rule, and applies only where no other schedule is set by the Court. The Joint Committee does not recommend a change in the proposed rule.

The suggestion was made that Local Civil Rule 6.1 should specify the number of courtesy copies of motion papers to be filed (Tab 7, p. 2; Tab 8, p. 2). Since practices in this respect vary from one Judge to another, the Joint Committee does not believe that a uniform Local Rule on this subject would be useful.

It was suggested that Local Civil Rule 6.1 should specify when motion papers are to be filed with the Court (Tab 7, p. 2). The Joint Committee previously concluded, and still believes, that it is preferable to rely upon the general provision of Federal Rule of Civil Procedure 5(d) that papers shall be filed with the Court “within a reasonable time after service.”

It was suggested that a Local Civil Rule should be adopted authorizing service by facsimile (Tab 8, p. 3). The Joint Committee believes that, unless and until the Federal Rules of

Civil Procedure are amended to authorize such service (with appropriate safeguards), it is not advisable for individual Districts to undertake to authorize such service by Local Rules.

It was suggested that a Local Civil Rule be adopted specifying the minimum number of days that should be allowed in a subpoena under Federal Rule of Civil Procedure 45 (Tab 8, p. 4). Since Federal Rule of Civil Procedure 45, unlike other rules (see, e.g., Fed. R. Civ. P. 34(b)), does not itself specify such a minimum period (see Fed. R. Civ. P. 45(c)(1)(B)), the Joint Committee does not believe that it is appropriate to specify such a minimum period by Local Rule. This is particularly true since the exigencies of a trial may necessitate the issuance of subpoenas on short notice, and since the Joint Committee is recommending that Local Civil Rule 6.1(a) be amended to allow motions to quash subpoenas to be brought on short notice.

Local Civil Rule 7.1. It was suggested that recommended Local Civil Rule 7.1 should not require a memorandum of law in support of all motions (Tab 7, p. 2). Since the recommended rule in this respect follows the present Local Rule, and since it would be difficult to specify in the form of a rule which motions do not require a memorandum of law, the Joint Committee does not recommend a change in response to this suggestion.

Local Civil Rule 11.1. It was suggested that recommended Local Civil Rule 11.1 be amended to provide that the signature required by Federal Rule of Civil Procedure 11 may be a typewritten signature rather than a handwritten signature (Tab 3). The Joint Committee opposes this suggestion, both because it represents an unwise dilution of the signature requirement under Federal Rule of Civil Procedure 11, and because it is contrary to the judicial interpretation of Federal Rule of Civil Procedure 11. See Giebelhaus v. Spindrifft Yachts, 938 F.2d 962, 965-66 (9th Cir. 1991).

It was suggested that Local Civil Rule 11.1 should require fax numbers and (where available) an e-mail address (Tab 7, p. 2). The Joint Committee believes that a general requirement to this effect would be premature at this time.

The suggestion was made that recommended Local Civil Rule 11.1 be amended to state that backs and covers are not required on court papers (Tab 8, p. 3; see also Tab 7, p. 2). The Joint Committee does not recommend such an amendment, because backs and covers, although not strictly required, are customary in the Southern and Eastern Districts, and are helpful in keeping court papers intact throughout the process of their filing and consideration by the Court.

Local Civil Rule 26.3(c)(2). A comment suggested the insertion of additional language which the Joint Committee believes to be unnecessary in light of the clear language of the proposed rule (see Tab 7, p. 3).

Local Civil Rules 26.5 et seq. A comment sought greater uniformity in the Local Civil Rules concerning discovery in the Southern and Eastern Districts of New York (Tab 7, p. 3). The Joint Committee believes that the recommended Local Civil Rules bring about as much uniformity as is reasonably feasible.

Local Civil Rule 30.1. It was suggested that recommended Local Civil Rule 30.1, dealing with the Court's discretion to award expenses (including counsel fees) when depositions are taken more than 100 miles from the courthouse, should be expanded to incorporate presumptive rules for making such awards (Tab 7, p. 4). The Joint Committee believes that it would be unwise to attempt to limit the Court's sound discretion in this manner.

Local Civil Rule 47.1. It was suggested that the assessment of one days' jury costs upon parties who settle after Noon on the business day preceding trial, which is authorized

in recommended Local Civil Rule 47.1 as it is in existing Local Civil Rule 22, may be so excessive as to deter settlement and may (on the other hand) be insufficient to encourage settlement (Tab 7, p. 4) The Joint Committee believes that the existing rule strikes a proper balance.

Local Civil Rule 54.1(b) (2). It was suggested that the costs of video depositions, as well as deposition transcripts, should be presumptively taxable (Tab 7, p. 4). The Joint Committee believes that this issue should remain subject to individualized determination, rather than being made the subject of a presumptive rule.

Local Civil Rule 83.9. The suggestion was made that recommended Local Civil Rule 83.9, which deals with procedures for contempt proceedings in civil cases, be renumbered as Local Civil Rule 4.1.1, because Federal Rule of Civil Procedure 4.1(b) deals with service of orders in civil contempt cases (Tab 6, p. 2). The Joint Committee does not recommend that this change be made, because Local Civil Rule 83.9 deals with a wide range of issues arising in contempt proceedings in civil cases, and not just with the service of orders in civil contempt cases.

In correspondence with the Joint Committee, Mitchell B. Nisonoff, Esq., has raised the question as to whether existing Local Civil Rule 43(a), from which proposed Local Civil Rule 83.9(a) is derived, is presently in effect in the Eastern District. The Joint Committee's understanding is that Local Civil Rule 43(a) is presently in effect in the Eastern District. In any event, for the reasons given in the Joint Committee's report on the Local Civil Rules (at Tab 2, pp. 56-58), the Joint Committee recommends that proposed Local Civil Rule 83.9 should be adopted in both the Southern and Eastern Districts.

### Local Criminal Rules

Local Criminal Rule 23.1. In the course of preparing this supplemental report, the Joint Committee has been given the opportunity to review an advance copy of a very thoughtful report by the Association of the Bar of the City of New York on Local Criminal Rule 7, dealing with free press-fair trial issues, the subject matter of which is dealt with in recommended Local Criminal Rule 23.1.

Having reviewed the report of the Association of the Bar of the City of New York, the Joint Committee notes that a number of the recommendations made therein are reflected, in substance, in the Joint Committee's recommended Local Criminal Rule 23.1. To the extent that the recommendations made by the Association of the Bar differ from the Joint Committee's recommended Local Criminal Rule 23.1, the Joint Committee adheres to its recommendations, for the reasons set forth in its report on the Local Criminal Rules (at Tab 2, pp. 9-17).

### Local Admiralty Rules

Local Admiralty Rule C.3. It was suggested that proposed Local Admiralty Rule C.3(a)(2), which requires a party seeking a default judgment in an action in rem to serve "the master or other person having custody of the property," be amended by adding the words "of the vessel" after the word "master," so that the rule would not apply to a special master or other master having custody of the property other than the master of a vessel. The Joint Committee does not recommend this change. If the vessel or other property is in the custody of a special master or some other type of master other than the master of a vessel, it is still appropriate to serve notice of an application for a default judgment upon such a master, in the interests of insuring that notice is given to all parties who may be interested in the application.

### Individual Judges' Rules

A number of comments urged that efforts be made to reduce or eliminate the number of individual Judges' rules (Tab 4; Tab 6, pp. 2-3; Tab 7, pp. 1-2; Tab 8, p. 2). The individual Judges' rules are outside the scope of the Joint Committee's assignment, which is confined to the Local Rules as such. The Joint Committee believes, however, that these comments are worthy of consideration by the Courts.

### CONCLUSION

The Joint Committee recommends that the United States District Courts for the Southern and Eastern Districts of New York adopt the recommended Local Civil, Criminal, and Admiralty and Maritime Rules, with the amendments recommended herein, at such time as will give as much notice as feasible of the new Local Rules prior to the required effective date of April 15, 1997.<sup>3</sup>

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<sup>3</sup> This supplemental report, and the recommended Local Rules and Committee Notes set forth in the Joint Committee's prior reports, do not necessarily reflect the views of any individual member of the Joint Committee, or of any of the entities with which they are associated, on any issue.

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