

Summary of Proposed Change to Criminal Rules of Practice

Proposed LCR 10-1. Written Waiver of Defendant's Appearance at Arraignment.

Proposed LCR 10-1 would require that a written waiver of appearance at an arraignment contain the same acknowledgment of rights and the same declaration by counsel that the defendant is competent as are customarily made when a defendant personally appears at an arraignment.

LCR 16-1. Discovery.

The revisions to Rule 16-1 concern two areas not addressed by the current rule: (1) discovery in complex cases; and (2) discovery in non-complex cases that are not governed by a Joint Discovery Statement, i.e., the so-called "closed file" cases. The revised rule addresses these two areas in subsections (a) and (b)(2) respectively.

Proposed LCR 32-2. Disclosure of Presentence Investigation Reports, Supervision Records of the United States Probation Office, and Testimony of the Probation Officer.

Proposed LCR 32-2 specifies the limitations on, and the procedures for, seeking authorization for secondary disclosure of the presentence investigation report and other confidential materials generated by the U.S. Probation Office.

LCR 35-1. Motions and Responses Pursuant to Fed.R.Crim.P.35.

A defendant may no longer seek a sentence modification under Rule 35. Only the government may seek a downward modification of a sentence as a reward for a defendant who renders substantial investigative or testimonial assistance to the government. Hence, LCR 35-1 is no longer applicable to post-conviction motion practice and should be rescinded.

Proposed LCR 44-3. Continuity of Representation on Appeal.

This rule tracks Circuit Rule 4. The committee agreed to add this rule to make the Circuit requirements easily available to counsel in the trial court.

LCR 47-6. Caption, Title of Court and Name of Case.

Case number changed to reflect modifications required by CM/ECF.

LCR 46-8. Investment of Funds on Deposit.

Changed to reflect that all funds on deposit in the Registry Account are invested in an interest bearing account established by the clerk.

LCR 12-1. Time for Filing Motions, Responses, and Replies.

The pretrial motion deadlines are modified to conform with existing practice. The proposed rule also extends the right to file a reply to support nondispositive motions as well as dispositive motions.

PROPOSED CHANGES TO CRIMINAL RULES OF PRACTICE

Proposed LCR 10-1. Written Waiver of Defendant's Appearance at Arraignment.

A defendant who is charged by indictment or misdemeanor information may waive his or her right to be present for an arraignment if:

(a) at least three (3) court days prior to the date set for arraignment the defendant and defense counsel sign and submit to the court a written waiver that contains the following:

(1) an acknowledgment that the defendant has received and read a copy of the indictment or information, and understands the nature of the charge(s);

(2) a declaration that the defendant understands that he or she has the right to remain silent, the right to trial by jury, the right to compulsory process, and the right to the assistance of counsel;

(3) a declaration that counsel has no reason to question the defendant's competence to assist in the defense of the case;

(4) an acknowledgment of the defendant's right to be present at the arraignment, and an express waiver of that right; and

(5) a declaration that the defendant's plea to the charge(s) is not guilty; and

(b) the court accepts the waiver.

Waiver of Appearance Form:

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

United States of America

**WAIVER OF APPEARANCE AT
ARRAIGNMENT**

vs.

Case No. CR-_____

I understand that I need not be present for the arraignment in this case so long as (1) I have been charged by indictment or misdemeanor information; (2) I have received a copy of the Indictment or information; (3) my plea is not guilty; and (4) the court accepts the waiver.

_____ I have received and read a copy of the indictment or misdemeanor information and I understand the nature of the charges;

_____ I understand that I have the right to remain silent, the right to trial by jury, the right to compulsory process, and the right to assistance of counsel.

Understanding that I have a right to be present at the arraignment, I hereby waive my right to appear and that I wish to enter a plea of not guilty to the charge(s) contained in the Indictment or misdemeanor information.

Dated: _____

Defendant

Undersigned counsel represents that he has discussed the foregoing waiver with the defendant and that counsel has no reason to question the defendant's competence to assist in the defense of this case;

Dated: _____

Counsel for Defendant

Commentary Note re LCR 10-1:

In 2002, Fed.R.Crim.P. 10 was amended to create an exception to the general rule requiring the defendant to be physically present in court for the arraignment. Where a defendant is charged by indictment or misdemeanor information, Rule 10(b) permits a waiver of appearance at arraignment if the defendant, in a written waiver signed by the defendant and defense counsel, waives appearance, affirms that he or she has received a copy of the indictment or information, and enters a plea of not guilty.

For many years in this District it has been the practice of the Magistrate Judges at the arraignment to advise the defendant not only of the nature of the charges, but also of his or her right to a trial by jury, to compulsory process, and to the assistance of counsel. The Magistrate Judges also customarily inquire as to whether counsel believes the defendant is competent to assist in the defense of the case. Proposed LCR 10-1 would require that a written waiver of appearance at an arraignment contain the same acknowledgment of rights and the same declaration by counsel that the defendant is competent as are customarily made when a defendant personally appears at an arraignment.

LCR 16-1. Discovery.

(a) Complex Cases.

(1) At any time after arraignment, the Court on its own motion or upon motion by any party, and for good cause shown, may designate a case as complex.

(2) In all cases designated as complex, the parties shall, not later than five (5) days following such designation, confer to develop a Proposed Complex Case Schedule, addressing the following:

(I) the scope, timing, and method of the disclosures required by federal statute, rule, or the United States Constitution, and any additional disclosures that will be made by the government;

(ii) whether the disclosures should be conducted in phases, and the timing of such disclosures;

(iii) discovery issues and other matters about which the parties agree or disagree, and the anticipated need, if any, for motion practice to resolve discovery disputes;

(iv) proposed dates for the filing of pretrial motions and for trial; and

(v) stipulations with regard to the exclusion of time for speedy trial purposes under Title 18, United States Code, Section 3161.

(3) The parties shall file the Proposed Complex Case Schedule no later than five (5) days after conferring under Section 16-1(a)(2).

(4) As soon as practicable after the filing of the Proposed Complex Case Schedule, the Court shall enter an Order fixing the schedule for discovery, pretrial motions, and trial, and determining exclusions of time under Title 18, United States Code, Section 3161, or shall conduct a pretrial conference to address unresolved scheduling and discovery matters.

(b) Non-Complex Cases. In cases which are not designated as complex under Section 16-1(a), the parties shall confer to designate whether discovery in the case will be governed by a Joint Discovery Agreement or a Discovery Statement.

(1) Joint Discovery Agreement.

(I) In cases that will be governed by a Joint Discovery Agreement, the parties agree the government will (A) disclose all matters required by federal statute, rule, or the United States Constitution, and (B) subject to any applicable work product protections, law

enforcement privileges, or protective orders, voluntarily disclose (a) any investigative reports describing facts relating to charges in the indictment and (b) any audio or video recordings relating to the charges in the indictment. The defense will make any reciprocal disclosures required by federal statute, rule, or the United States Constitution.

(ii) The parties shall confer promptly to discuss the scope, timing, and method of the disclosures required under Section 16-1(b)(1)(I) and any additional disclosures upon which the parties agree. The parties shall file a Joint Discovery Agreement within five (5) days after arraignment, except upon leave of Court.

(iii) The Joint Discovery Agreement shall set forth the scope, timing, and method of the required disclosures and any additional disclosures upon which the parties agree.

(iv) In cases governed by a Joint Discovery Agreement:

(A) all parties shall be deemed to have made all requests, and reciprocal requests, for discovery required by statute, rule, or the United States Constitution;

(B) all matters concerning discovery shall be deemed to be governed by this Section and the Joint Discovery Agreement;

(C) the government shall make the disclosures required by federal statute, rule, or the United States Constitution available within five (5) calendar days of filing the Joint Discovery Statement;

(D) the government shall make all other disclosures to which it has agreed available within the times set forth in the Joint Discovery Agreement;

(E) the defense shall provide the government with its reciprocal disclosures no later than fourteen (14) calendar days before trial;

(F) both parties shall have a continuing duty to disclose; and

(G) neither party shall withhold a disclosure subject to this rule or the Joint Discovery Agreement without providing the other party with notice of the intention to withhold the disclosure. The notice shall describe the nature of the disclosure being withheld and the basis upon which it is being withheld in sufficient detail to permit the opposing party to file a discovery motion.

(2) Government Disclosure Statement.

(I) In cases in which the parties have not entered into a Joint Discovery Agreement, the government shall file a Disclosure Statement. In such cases, within five (5) calendar days of arraignment, the parties shall confer regarding the timing, scope, and

method of the disclosures and reciprocal disclosures required by federal statute, rule, or the United States Constitution, and any additional disclosures which will be made by the government.

(ii) Within five days of the conference, but in no event more than ten (10) calendar days after the date of arraignment, the government shall file its Disclosure Statement, which shall include the following information:

(A) The date on which the parties discussed the Disclosure Statement, or an explanation of why a discussion has not occurred;

(B) The scope, timing, and method of the government's disclosures required by federal statute, rule or the United States Constitution; and

(C) The scope, timing, and method of any additional disclosures which will be made by the government.

(C) **Discovery Disputes.** Before filing any motion for discovery, the moving party shall confer with opposing counsel in a good faith effort to resolve the discovery dispute. Any motion for discovery shall contain a statement of counsel for the moving party certifying that, after personal consultation with counsel for the opposing party, counsel have been unable to resolve the dispute without court action.

Commentary Note re LCR 16-1:

The revisions to Rule 16-1 concern two areas not addressed by the current rule: (1) discovery in complex cases; and (2) discovery in non-complex cases that are not governed by a Joint Discovery Statement. Subsections (a) and (b)(2), respectively, provide a framework for managing discovery in these two areas.

The committee recognizes that in the vast majority of cases, discovery in the so-called "open file" case has been governed by a Joint Discovery Statement and the Court's standard Order Regarding Pretrial Procedure. The committee believes that current Rule 16-1 does not adequately address cases that are complex either within the meaning of the Speedy Trial Act or because of the sheer volume of documentary and/or other physical evidence (e.g., hundreds of hours of court-authorized wire interceptions) and/or a large number of defendants. Such cases are normally best served by early court intervention to promote efficient management of the discovery process and timely resolution of pretrial disclosure issues. Subsection (a) of the proposed revised rule requires the parties to confer early in the litigation to develop an agreed-upon case management plan (a "Complex Case Schedule") that sets forth the "scope, timing, and method" of the provision of discovery, and a realistic pretrial motion schedule and trial date. Where the parties cannot agree on a scheduling order or have a dispute concerning discovery issues, the proposed rule requires the assigned magistrate judge to conduct one or more pretrial conferences to resolve the parties' differences and monitor the progress of discovery.

The committee also recognizes that there are certain non-complex cases in which, for reasons of witness security or otherwise, the government is unwilling to enter into a Joint Discovery Agreement and declare an “open file” status -- the so-called “closed file” case. Under subsection (b)(2), the government may unilaterally issue a Disclosure Statement, but only after the parties have conferred early in the litigation in an effort to agree upon the extent, if any, to which the government is willing to make disclosures beyond those required by federal statute or rule, or the United States Constitution.

Lastly, section (c) formalizes the requirement that in all criminal cases, the parties must first attempt in good faith to resolve disclosure issues informally before filing a discovery motion.

Proposed LCR 32-2. Disclosure of Presentence Investigation Reports, Supervision Records of the United States Probation Office, and Testimony of the Probation Officer.

(a) Confidentiality. The presentence investigation report, supporting documents, and supervision records are confidential documents of the Court and are not available for public inspection. They are not to be reproduced or distributed to other agencies or other individuals unless permission is granted by the determining official or as mandated by statute. The determining official authorized to make disclosure decisions under this rule is a District Judge, Magistrate Judge, or Chief Probation Officer (after consultation with the Chief Judge) of the District of Nevada.

(b) Release of the Presentence Investigation Report and Confidential Materials for Purposes of Sentencing.

(1) When a copy of a presentence investigation report is released for sentencing purposes, the Probation Office will advise the parties of the release in writing that (i) defense counsel is responsible for providing the defendant with a copy of the report, (ii) the report is not a public record, and (iii) the contents of the report may not be further disclosed to unauthorized persons.

(2) If the presentence investigation report (i) contains information or material that includes diagnostic opinions which might seriously disrupt a program of rehabilitation, (ii) identifies a source of information obtained upon a promise of confidentiality, or (iii) contains any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or another person, such information will be excluded from the presentence investigation report and included in an addendum or attachment, which shall not be distributed to the defendant's counsel or the attorney for the government. Counsel shall be notified in writing that such materials have been delivered to the Court. This procedure shall constitute compliance with Federal Rules of Criminal Procedure 32(d)(3) and 32(i)(1)(B).

(c) Application for Disclosure of Presentence Investigation Reports or Supervision Records for Purposes Other Than Sentencing.

(1) Disclosure of the presentence investigation report, supporting documents, or supervision records, for purposes other than sentencing of the defendant, shall be made only upon written application accompanied by an affidavit setting forth a description of the records sought, an explanation of their relevance to the proceedings, and a statement of the reasons why the information contained in the records is not readily available from other sources or by other means. Where the request does not comply with this rule, the determining official may deny the request or request additional information.

(2) The written application shall be provided to the determining official at least fifteen (15) days in advance of the time the production of records is required. Failure to meet this requirement shall constitute a sufficient basis for denial of the request.

(3) The determining official may waive the fifteen (15) day requirement upon a showing of a good faith attempt to comply with this rule.

(d) Testimony of a Probation Officer. A request for testimony of a probation officer shall comply with the requirements set forth in subsection © of this rule.

Commentary Note re Proposed LCR 32-2:

Former Fed.R.Crim.P. 32(c)(3)(F) required the attorney for the government, the defendant, and the defendant's counsel to return their respective copies of the presentence investigation report to the U.S. Probation Office immediately upon the conclusion of the sentencing hearing. In 1989, Rule 32(c)(3)(F) was abrogated. Rule 32 is now silent with respect to limitations on further (or "secondary") disclosure of the report and other confidential materials following the imposition of sentence.

Chief Probation Officer Chris Hansen informed the Criminal Rules Subcommittee that there have been several instances of unauthorized secondary disclosure of presentence investigation reports by both the U.S. Attorney's Office and defense counsel. To address the problem, the Committee drafted proposed LCR 32-2, which specifies the limitations on, and the procedures for seeking authorization for, secondary disclosure of the presentence investigation report and other confidential materials generated by the U.S. Probation Office.

LCR 35-1. Motions and Responses Pursuant to Fed.R.Crim.P.35.

Commentary Note re Rescission of LCR 35-1:

Until 1991, a defendant could file a motion under Fed. R. Crim. P. 35 for a modification of sentence, in essence to give a convicted defendant a second chance before the sentencing judge. All that changed in 1991. Rule 35 was no longer a vehicle by which a defendant could request a modification of sentence. Rule 35 became the means by which the government could seek a downward modification of a sentence as a reward for a defendant who rendered substantial investigative or testimonial assistance to the government. Hence, LCR 35-1 is no longer applicable to post-conviction motion practice.

Proposed LCR 44-3. Continuity of Representation on Appeal.

Counsel in criminal cases, whether retained or appointed by the district court, shall ascertain whether the defendant wishes to appeal and file a notice of appeal upon the defendant's request. Counsel shall continue to represent the defendant on appeal until counsel is relieved and replaced by substitute counsel or by the defendant pro se in accordance with Rule 4-1 of the Ninth Circuit Rules. If counsel was appointed by the district court pursuant to 18 U.S.C. §3006A and a Notice of Appeal has been filed, counsel's appointment automatically shall continue on appeal.

If counsel has not obtained permission to withdraw by the district court prior to the filing of the Notice of Appeal, the Motion to Withdraw must be addressed to the Circuit Court of Appeals. For the procedure to be followed in the Circuit Court of Appeals, see Ninth Circuit Rule 4-1.

Commentary Note re Proposed LCR 44-3:

This rule tracks Circuit Rule 4. The committee agreed to add this rule to make the Circuit requirements easily available to counsel in the trial court.

LCR 47-6. Caption, Title of Court and Name of Case.

The following information shall be stated upon the first page of every paper presented for filing, single-spaced::

(a) The name, address, telephone number, fax number, e-mail address and Nevada State Bar number, if any, of the attorney and any associated attorney filing the paper, whether such attorney appears for the plaintiff, defendant or other party, or the name, address and telephone number of a party appearing *in pro se*. This information shall be set forth in the space to the left of center of the page beginning at the top of the first page. The space to the right of center shall be reserved for the filing marks of the clerk.

(b) The title of the court shall appear at the center of the first page at least one inch (1_) below the information required by subsection (a) of this rule, as follows:

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

© The name of the action or proceeding shall appear below the title of the court, in the space to the left of center of the paper, i.e.:

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
vs.)
)
RICHARD ROE,)
)
Defendant.)

(d) In the space to the right of center, there shall be inserted the docket number which shall include a designation of the the nature of the case (“CR” for criminal), the division of the court (“S2” for Southern and “N3” for Northern), and, except for the original pleading, the case number and the initials of the presiding district judge followed in parentheses by the initials of **the magistrate judge if one has been assigned. This information shall be separated by dashes.** as follows: 3:05-CR-115-HDM-(RAM).

(e) Immediately below the caption and the docket number there shall be inserted the name of the paper and whenever there is more than one defendant a designation of the parties affected by it, e.g., Defendant Richard Roe's Motion for Disclosure of Confidential Informant.

Commentary Note re LCR 47-6:

Case number changed to reflect modifications required by CM/ECF.

LCR 46-8. Investment of Funds on Deposit.

(a) Funds on deposit in the Registry Account of the court pursuant to 28 U.S.C. § 2041 will ~~not~~ be invested in an interest bearing account established by the clerk in the absence of an order by the court.

(b) All motions or stipulations for an order directing the clerk to invest Registry Account funds in an ~~alternative interest bearing account~~ account other than the court's standard interest bearing account shall contain the following:

(1) The name of the bank or financial institution where the funds are to be invested;

(2) The type of account or instrument and the terms of investment where a timed instrument is involved; and

(3) Language that either

(A) Directs the clerk to deduct from 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; or

(B) States affirmatively the investment is being made for the benefit of the United States and, therefore, no fee shall be charged.

(bc) Counsel obtaining an order under these rules shall cause a copy of the order to be served personally upon the clerk or the chief deputy and the financial deputy. A supervisory deputy clerk may accept service on behalf of the clerk, chief deputy or financial deputy in their absence.

_____ (cd) The clerk shall take all reasonable steps to deposit funds into interest bearing accounts or instruments within, but not more than, fifteen (15) days after having been served with a copy of the order for such investment.

_____ (de) Any party who obtains an order directing investment of funds by the clerk shall, within fifteen (15) days after service of the order on the clerk, verify that the funds have been invested as ordered.

_____ (ef) Failure of the party or parties to personally serve the clerk, the chief deputy and financial deputy, or in their absence a supervisory deputy clerk with a copy of the order, or failure to verify investment of the funds, shall release the clerk from any liability for the loss of earned interest on such funds.

_____ (fg) It shall be the responsibility of counsel to notice the clerk regarding disposition of funds at maturity of a timed instrument. In the absence of such notice funds invested in a timed

instrument subject to renewal will be reinvested for a like period of time at the prevailing interest rate. Funds invested in a timed instrument not subject to renewal will be re-deposited by the clerk into the Registry Account of the court which is a non-interest-bearing account.

_____ (gh) Service of notice by counsel as required by LCR 46-8(g) shall be made as provided in LCR 46-8(c) not later than fifteen (15) days prior to maturity of the timed instrument.

_____ (hi) Any change in terms or conditions of an investment shall be by court order only and counsel will be required to comply with LCR 46-8(b) and (c).

Commentary Note re LCR 46-8:

Changed to reflect that all funds on deposit in the Registry Account are invested in an interest bearing account established by the clerk.

LCR 12-1. Time for Filing Motions, Responses, and Replies.

(a) ~~In all criminal cases except as otherwise ordered by the court~~ **Unless otherwise specified by the court:**

(1) Each party shall have ~~fourteen (14)~~ **thirty (30)** calendar days from the time of arraignment within which to file and serve the pretrial motions and notices specified in subsection (b) of this rule;

(2) Responses to such motions shall be filed and served within eleven (11) calendar days from the date of service of the motion; and

(3) A reply brief may be filed ~~in connection with case dispositive motions only~~ and shall be served within three (3) calendar days from the date of service of the response. The reply brief shall only **address** ~~respond to~~ arguments **made** ~~in the responsive pleading.~~ **response to the motion.**

(b) The following pretrial motions and notices must be filed within the time period set forth in subsection (a) of this rule:

(1) Defenses and objections based upon defects in the institution of the prosecution except challenges to the composition of the grand or petit jury, which are governed by 28 U.S.C. §1867;

(2) Defenses and objections based upon defects in the indictment or information (other than failure to show jurisdiction in the court or to charge an offense, which shall be noticed by the court at any time during the pendency of the proceedings)

(3) Motion for bill of particulars, Fed. R. Crim. P. 7(f);

(4) Motion ~~for severance~~ **to sever**, Fed. R. Crim. P. 14;

~~(5) Motion to Take Deposition~~

~~(6) Motion to transfer to another district, Fed. R. Crim.P. 21~~

~~(7)~~ **(5)** Written demand by the attorney for the United States for **notice of an alibi defense**, pursuant to Fed. R. Crim. P. 12.1;

~~(8)~~ **(6)** Notice of insanity defense or expert ~~testimony~~ **evidence** of a defendant's mental condition, pursuant to Fed. R. Crim.P. 12.2;

~~(9)~~ **(7)** Notice of defense based upon public authority, ~~under~~ Fed. R. Crim.P. 12.3;
and

~~(10)~~ **(8)** Motion to suppress evidence, ~~under~~ Fed. R. Crim. P. 41(fh).

(c) Any party filing pretrial motions, responses to motions, or replies pursuant to the time schedule set forth in subsection (a) of this rule, or within any time period ordered by the court, shall provide a certification that the motion, response, or reply is being filed timely. The certification shall be so identified and shall be set forth separately as an opening paragraph on any such motion, response, or reply.

(d) Fed. R. Civ. P. 6 shall govern the computation of time.

Commentary Note re LRC 12-1:

The expansion of the pretrial motion deadline in Subsection (a)(1) from fourteen (14) to thirty (30) days after arraignment brings the rule into conformance with existing practice as set forth in the standard Order Regarding Pretrial Procedure.

Subsection (a)(3) previously allowed the filing of a reply only in connection with a case dispositive motion. The committee believes that the opportunity to file a reply can be as important in connection with nondispositive motions as it is in connection with dispositive motions. Providing the right to do so by rule eliminates the need for a party to file a motion for leave to do so.

Previously the rule required that a motion to take depositions and a motion to transfer a case to another district be filed within the deadline for the filing of pretrial motions. Old subsection (b)(5), relating to a motion to take deposition, and subsection (b)(6), relating to a motion to transfer, were removed from the list of motions required to be filed within 30 days of arraignment because the information needed for the filing of either of these motions is normally not available to the defendant early in the proceedings.