

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA**

NOTICE OF AMENDMENTS TO SPECIFIC LOCAL RULES

PLEASE TAKE NOTICE that the Court intends to amend Local Rule 4, Social Security Cases; Local Rule 7, Service and Filing of Pleadings and Other Papers; Local Rule 9, Sealed Documents; Local Rule 54, Fees and Costs; and Local Rule 56, Summary Judgment—Time of Filing, as follows:

Title I—General

Rule 4. Social Security Cases.

Local Rule 4(b)(5) currently states that it is the responsibility of a claimant who is found entitled to some measure of back benefits to pay the statutory filing fee, the prepayment of which was initially waived by the court. This provision will be deleted from Local Rule 4.

Rule 7. Service and Filing of Pleadings and Other Papers.

Local Rule 7(j) addresses the three-day mailing rule referenced in Rule 6(e) Federal Rules of Civil Procedure. In 2009, FRCP 6(e) was deleted and replaced with FRCP Rule 6(d). The amendment to Local Rule 7(j) changes the reference to FRCP 6(d).

Rule 9. Sealed Documents.

Local Rule 9 describes the procedures in criminal and civil cases relating to sealed documents. The law protects generally the right of public access to documents filed in court, both under the First Amendment and the common law. The proposed amended Local Rule 9 reorganizes the current rule, clarifies the types of documents for which no motion or order to seal is required, and provides for automatic unsealing of documents, unless otherwise ordered by the court.

Title II—Civil Rules

Rule 54. Fees and Costs.

Local Rule 54 addresses the time for filing motions for attorneys' fees and the elements that the parties must include in such motion. The proposed amendments to this rule pertain only to those portions of Rule 54(a) which fix the time for filing and responding to a motion for attorneys' fees increase the time from 14 to 21 days.

Rule 56. Summary Judgment--Time of Filing

Local Rule 56 directs parties who file a summary judgment motion to also set that motion for a hearing. The proposed amendment retains the language of Rule 56 but adds a provision

requiring the moving party to set forth in a separately-captioned section of the motion precise identification of material undisputed facts, with a citation to the record in support.

The proposed amendments will take effect on August 1, 2013. Interested parties may submit comments on or before July 29, 2013, to

Julia C. Dudley, Clerk
United States District Court
Western District of Virginia
210 Franklin Rd., SW, Suite 540
Roanoke, VA 24011

Or via email at:
Local_rules@vawd.uscourts.gov

June 27, 2013

Date

s/Julia C. Dudley

Clerk of Court

Rule 4. Social Security Cases

- (a) **Applications to Proceed without Prepayment of Funds in Disability Insurance and Supplemental Security Income Appeals.** Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b), all applications to proceed without prepayment of funds in Social Security disability insurance or supplemental security income appeals may be referred to a United States magistrate judge for consideration. Pursuant to Federal Rule of Civil Procedure 72(b), the petitioner may object to any order entered by the magistrate judge denying in forma pauperis status and may seek review by the district judge to whom the case would be assigned by filing a written objection to the order with the court within 14 days of notice thereof.
- (b) **Social Security Disability Filings.** Pursuant to the provisions of 42 U.S.C. § 405(g) on judicial review of decisions by the Commissioner of Social Security, the following rules apply:
- (1) The parties may use the form [Social Security Complaint](#) and [Social Security Answer](#) which are hyperlinked here and also available on the Court's website under the "Forms" tab.
 - (2) The Commissioner must respond to Social Security disability complaints within 120 days after service of the complaint on the United States Attorney;
 - (3) In all cases in which the Court has entered a judgment affirming, modifying, or reversing the decision of the Commissioner and remands the cause for a rehearing, the order of remand shall be deemed a final order

for all purposes, including a petition for approval of attorneys' fees, and the claimant must file a new complaint pursuant to the terms of 42 U.S.C. § 405(g) to obtain further judicial review, and in such cases, the Court shall waive prepayment of any statutory filing fee;

(4) The Court shall retain jurisdiction in all cases in which the Court remands the case to the Commissioner for consideration of new evidence which is material and for which good cause is shown for failure to incorporate the evidence in prior proceedings. Claimants dissatisfied with the Commissioner's decision upon remand may petition the Court to reinstate the case on the active docket for review of the decision; if all parties are satisfied with the decision upon remand, the prevailing party shall petition the Court for entry of a final order adopting and ratifying the decision; and

(c) **Briefing of Social Security Cases.** In all cases seeking judicial review of decisions by the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g), the following procedures are applicable, unless changed by the presiding judge:

(1) The plaintiff must file, within 30 days of service of a copy of the administrative record, a brief addressing why the Commissioner's decision is not supported by substantial evidence or why the decision otherwise should be reversed or the case remanded;

(2) If the plaintiff desires oral argument, it must be requested in writing at the time the plaintiff's brief is filed. Whether to allow oral argument is at the discretion of the Court. If oral argument is allowed, a party may participate either telephonically or in person;

- (3) If the Commissioner desires to file a brief in response, such brief must be filed within 30 days after service of the plaintiff's brief. No further briefs by the parties will be submitted unless requested by the Court; and
- (4) In the event that the Commissioner files a motion to remand the case to the Commissioner for further proceedings, the motion must set forth whether or not the plaintiff consents to such remand. If no such consent is indicated, the plaintiff must file the grounds of any objection to remand within 14 days of service of the motion to remand, or it will be assumed that plaintiff consents to remand.

Rule 7. Service and Filing of Pleadings and Other Papers

- (j) **Three-day Mailing Rule.** The three-day mailing rule of the Federal Rules of Criminal Procedure 45 and Federal Rules of Civil Procedure 6(d) for service by mail also applies to service by electronic means.

Rule 9. Sealed Documents

The following procedures govern documents under seal in criminal and civil cases in this Court.

- (a) **General.** A “sealed document” is a document in the form of a pleading, exhibit or other paper access to which is prohibited or restricted other than by the Court or its authorized personnel. Portions of a document cannot be filed or placed under seal—only the entire document may be sealed. No sealed document may be disclosed except upon order of the Court.
- (b) **Procedures for Filing a Sealed Document.**

- (1) **Format.** Any sealed document must be tendered to the Clerk and conspicuously labeled “SEALED.”
- (2) **Motion to Seal.** To obtain a sealing order a party must file an unsealed written motion containing:
 - a. a generic, non-confidential identification of the document to be sealed;
 - b. the bases upon which the party seeks the order, including the reasons why alternatives to sealing are inadequate; and
 - c. the duration for which sealing is requested.

The moving party also must file with the motion a proposed unsealed order granting the motion and setting forth the bases for the Court’s action. If it already has not been tendered, the moving party also must tender to the court, *in camera*, the document proposed to be sealed. The document will be kept under seal by the Clerk pending a decision by the Court on the motion. If the motion to seal is denied, the document will be returned by the Clerk to the party tendering it, unless the Court orders otherwise.

- (3) **Public Notice of Motion to Seal or Sealing Order.** A motion to seal and any order to seal must to be docketed according to the administrative procedures of the Court.
- (4) **Objection to Sealing.** Any person or entity, whether a party or not, may object to a motion to seal a document or may file a motion to unseal a document previously sealed.

- (5) **Agreement by Parties.** These provisions do not limit the ability of the parties by agreement to restrict access to documents that are not filed with the Court. Any agreement calling for the sealing of any document to be filed with the Court will be deemed to have incorporated the provisions of this rule.
- (6) **Extension of Sealing.** No order to seal will be extended except upon a subsequent order of the Court obtained in accordance with this rule.
- (7) **Sealed Case.** No case may be sealed in its entirety except by order of the Court for cause shown, obtained in accordance with this rule.

(c) **Exceptions.**

- (1) No motion or order is required to file the following under seal:
 - a. An unredacted version of a pleading, paper, exhibit, a reference list or other document containing personal data identifiers, in compliance with these rules, the federal rules of procedure, or the E-Government Act;
 - b. An ex parte motion or application where sealing is permitted or required by law;
 - c. Presentence investigation reports, pretrial services reports, psychiatric or psychological evaluations in criminal cases, including documents incorporating the content of the foregoing documents;
 - d. Affidavits submitted in support of a motion for in forma pauperis status;

- e. Motions, orders, notices, and other matters occurring before the grand jury, subject to the provisions of Fed. R. Cr. P. 6;
 - f. Applications and orders for the disclosure of tax information (26 U.S.C. § 6103);
 - g. Motions and orders involving the Classified Information Procedures Act (18 U.S.C. app 3 §§1 – 16) or Foreign Intelligence Surveillance Act (50 U.S.C. § 1801);
 - h. Pleadings and documents involving the Juvenile Delinquency Act;
 - i. Requests and orders for authorization of investigative, expert, or other services pursuant to the Criminal Justice Act;
 - j. Other documents required by law to be filed under seal.
- (2) No publicly filed motion and order under this rule is required for sealing the following:
- a. Motion by the United States for a downward departure or reduction of sentence in a criminal case, with leave of court upon a showing of particular need in an individual case to prevent serious harm;
 - b. Search, seizure and arrest warrants and affidavits;
- (3) A publicly filed motion and order citing only the statutory authority for sealing is required for the following:
- a. Applications and orders for pen/trap devices (18 U.S.C. §2703)
 - b. Applications and orders for wire, oral, or electronic communication interception (18 U.S.C. § 2516).

(d) **Unsealing.** Unless the Court orders otherwise, the Clerk will unseal the following sealed documents when indicated:

(1) **Search Warrant.** After the search is executed and the warrant is returned to the Clerk;

(2) **Arrest Warrant, and In a Violation Case, Any Violation Report.**
After the arrest is made;

(3) **Indictment.** Upon the arrest or appearance of a single defendant. In multi-defendant cases, and unless the court orders otherwise, upon the earliest of any of the following:

a. 10 days following the arrest of any defendant;

b. 30 days after return of the indictment; or

c. when all defendants have been arrested or summoned.

In criminal cases, each defendant must be provided with a copy of the charges against that defendant (with other portions redacted, if necessary), even if the indictment or complaint is otherwise sealed. In multi-defendant cases in which the indictment is to remain sealed, the government is responsible for submitting to the magistrate judge for approval, reasonably in advance of the initial appearance, an appropriately redacted indictment for disclosure to the defendant and to the public.

(4) **Criminal Complaint.** 30 days after issuance or when all defendants named are in custody or have been summoned, whichever is the earliest.

(5) As for any other sealed documents, the documents will be unsealed 120 days from the date of entry of the sealing order, unless the sealing order provides otherwise.

Commentary

This rule describes the procedures in criminal and civil cases relating to sealed documents, including pleadings, motions, exhibits, and other material. Case law protects generally the right of public access to documents filed in court, both under the First Amendment and the common law. *See, e.g., Va. Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004).

Questions relating to sealed documents are presented in varying circumstances. For example, a party to a case may desire to file an exhibit to a brief containing confidential business information that has been disclosed to the opposing party under an agreement of confidentiality, but which the parties do not wish the public to see. The procedure to be followed is to file a motion not under seal that describes in a non-confidential way the document that the party desires to file under seal (in this hypothetical example, the exhibit). The motion must also state, in a generic, non-confidential way, the reasons why sealing is requested (in this case, the fact that the exhibit contains confidential trade secrets whose disclosure would be harmful to the business of the party) and why alternatives to sealing are inadequate. Finally, the motion must also state the length of time that the party desires the document to be sealed. The motion must be accompanied by the document desired to be sealed (the exhibit, in this example) for review by the presiding judge, as well as a proposed unsealed order allowing the document to be sealed, which order recites the necessary findings.

Often the parties to a case will enter into a confidentiality agreement that provides that certain information exchanged between them in the course of discovery will remain confidential. The procedures described in this rule do not affect the ability of the parties to enter into such an agreement. However, the parties cannot agree to the sealing of documents filed in court without following the mandatory procedures set forth in this rule.

In other words, the parties cannot seal documents filed in court merely by agreement or by labeling them “sealed.”

There are certain exceptions to the rule that any document to be sealed must be accompanied by an unsealed motion. Where the sealed document is an unredacted version of a document required to be redacted by these rules, the federal rules of procedure, or the E-Government Act, or a reference list of personal data identifiers, then no motion or order is required. Like all sealed documents, however, the unredacted version or the reference list must be clearly labeled “SEALED.”

The government, a defendant or other party may have a basis for a confidential communication to the court that is permitted or required by law. There is no need for an unsealed motion or order in those circumstances, but the motion must be clearly labeled “EX PARTE AND SEALED.”

This rule provides that unless the Court orders otherwise, all documents in a case will be unsealed at the conclusion of the case. The rule does not flatly prohibit the continued sealing of a document, but leaves that decision to the presiding judge. As an alternative, the judge may

order a sealed document in paper form returned to the party submitting it at the conclusion of the case. If a document is ordered sealed for a particular period of time, the period may be extended by a later order, obtained by following the procedures set forth.

Rule 54. Fees and Costs

(a) Attorneys' Fees

- (1) Time for Filing.** Unless otherwise provided by statute, or in Social Security cases, or as otherwise ordered by the Court, any motion requesting the award of attorneys' fees must be filed no later than 21 days after the entry of judgment. Any opposition must be filed within 21 days of service of the motion.

Rule 56. Summary Judgment – Time of Filing

- (a) Except for good cause shown, no motion for summary judgment or other dispositive motion will be considered unless it is filed and set for hearing, or submitted without hearing, within the time fixed by the Court, or if no time is fixed by the Court, within a reasonable time before the date of trial, thus permitting adequate time for the Court to consider the motion.
- (b) Any motion for summary judgment or any other dispositive motion must contain a separately captioned section setting forth with specificity the material facts claimed to be undisputed together with specific record citations in support thereof.