GENERAL ORDER 12-6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

GENERAL ORDER AMENDING LOCAL RULES

It is hereby ORDERED that the following amendments to the Local Rules, having been approved by the judges of this court, are adopted for implementation subject to a reasonable period for public notice and comment to be determined by the clerk.[1] *See* 28 U.S.C. § 2071(b).

1. LOCAL RULE CV-5 Service and Filing of Pleadings and Other Papers

(a) **Electronic Filing Required.** Except as expressly provided or in exceptional circumstances preventing a Filing User from filing electronically, all documents filed with the court shall be electronically filed in compliance with the following procedures.

(1) **Exemptions from Electronic Filing Requirement.** The following are exempted from the requirement of electronic filing:

(A) In a criminal case, the charging documents, including the complaint, information, indictment, and any superseding indictment; petitions for revocation of probation or supervised release; affidavits in support of search and arrest warrants, pen registers, trap and trace requests, wiretaps, and other documentation related to these types of applications; and other matters filed *ex parte* in connection with ongoing criminal investigations;

(B) filing from *pro se* litigants (prisoner and non-prisoner);

[1]New language appears in redlined and underlined text; deleted language appears in ~~strikeout~~ text.

(C) return of the completed summons or waiver of service in a civil case;

Comment: The additional language memorializes existing practice, since the plaintiff typically sends the waiver of service to the clerk's office for the deputy clerk to docket and create a deadline.

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(2) **Registration for Electronic Filing.**

(A) The clerk shall register all attorneys admitted to the bar of this court, including those admitted *pro hac vice*, as Filing Users of the court's Electronic Filing System. Registration as a Filing User constitutes consent to electronic service of all documents as provided in these rules in accordance with the Federal Rules of Civil and Criminal Procedure. The clerk shall provide Filing Users with a user log-in and password once registration is completed. Filing Users agree to protect the security of their passwords and immediately notify the clerk if they learn that their password has been compromised. After registration, attorneys are required to maintain their own account information, including changes in e-mail address. Documents sent from the court will be deemed delivered if sent to the last known e-mail address given to the court.

~~(i) If the clerk's office receives a "bounce-back" notice from an e-mail account (i.e., an undeliverable e-mail), the Filing User will be promptly notified by the clerk's office via telephone or otherwise and given an opportunity to update his or her e-mail address within CM/ECF. If, after that notification and a reasonable passage of time, "bounce-backs" continue to occur in that account, the clerk's office is authorized to remove the defunct or undeliverable e-mail address from the CM/ECF database. The Filing User, not the clerk's office, has the primary responsibility of ensuring that his or her e-mail address is functional. *See* LOCAL RULE CV-5(a)(2)(A), above.~~

Comment: Subsection (i) has been deleted because Section (a)(2)(A) of the rule already requires counsel to maintain their own e-mail account information. Under the prior rule, court staff was spending an inordinate amount of time tracking down defunct "bounce-back" e-mail addresses. The new language in Section (a)(2)(A) mirrors that used in Civil Rule 5.4(a) from the United States District Court for the Western District of Oklahoma. That district's experience with this rule has been positive. The clerk's office's employees are not chasing down e-mail "bounce-backs," and most attorneys are keeping their e-mail addresses current.

* * * * *

(4) **File Size Limitations.** No single electronic file, whether containing a document or an attachment, may exceed ~~five~~ fifteen megabytes in size. Documents and/or attachments in excess of ~~five~~ fifteen megabytes must be divided into multiple files and accurately described to the court. *See* LOCAL RULE CV-7 (page requirements for motions and responses).

Comment: The court's capacity to handle larger electronic documents has increased. This change is not meant to encourage filers to include larger files or more voluminous attachments than otherwise required.

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(6) **Attachments and Exhibits.** Filing Users must submit and describe each exhibit or attachment with specificity as a separate PDF document, unless the court permits conventional filing. *See* LOCAL RULES CV-5(a)(4) ("File Size Limitations"), CV-7(b) ("Documents Supporting Motions"), and CV-56(d) ("Proper Summary Judgment Evidence"). Non-documentary exhibits ~~to motions~~ (e.g., CD-ROM disks) should be filed with the clerk's office with a copy to the presiding judge.

Comment: This language was stricken because the court sometimes receives non-documentary exhibits that were not attached to motions, e.g., non-documentary exhibits included with state court

records.

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(c) **Certificates of Service.** The certificate of service required by Fed. R. Civ. P. 5(d) shall indicate the date and method of service. In civil cases involving sealed documents, counsel must indicate that the sealed document(s) was/were promptly served by means other than the CM/ECF system, e.g., e-mail, conventional mail.

> (1) **Letter Briefs.** Letter briefs ordered filed by the court must be served on every party and shall contain a certificate of service as required by Fed. R. Civ. P. 5(d). The ordered time period for any response or reply to a letter brief shall be calculated from the date of service in accordance with Fed. R. Civ. P. 6 and Local Rule CV-6.

Comment: Some attorneys erroneously argue that a letter brief is like a letter, and, therefore, they do not need a certificate of service. Parties have also expressed confusion over whether response and reply times should be calculated from the date a letter brief is filed or the date the letter brief is served because of inconsistent language in some orders requiring the filing of letter briefs. This amendment makes the certificate of service requirement express and clarifies the calculation of response times for responses and replies to letter briefs.

2. **LOCAL RULE CV-7 Motions Practice**

Generally. All motions, unless made during a hearing or trial, shall be in writing, filed as a separate document, conform to the requirements of Local Rules CV-5 and CV-10, and shall be accompanied by a separate proposed order in searchable and editable PDF format for the judge's signature. The proposed order shall be endorsed with the style and number of the cause and shall not include a date or signature block. Motions, responses, replies, and proposed orders, if filed electronically, shall be submitted in "searchable PDF" format. All other documents, including attachments and exhibits,

should be in "searchable PDF" form whenever possible.

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(i) **Certificates of Conference.** Except as specified below, all motions must be accompanied by a "certificate of conference" at the end of the motion following the certificate of service. The certificate must state: (1) that counsel has complied with the meet and confer requirement in Local Rule CV-7(h); and (2) whether the motion is opposed or unopposed. Opposed motions shall include a statement in the certificate of conference, signed by the movant's attorney, that the personal conference or conferences required by this rule have been conducted or were attempted, the date and manner of such conference(s) or attempts, the names of the participants in the conference(s), an explanation of why no agreement could be reached, and a statement that discussions have conclusively ended in an impasse, leaving an open issue for the court to resolve. In discovery-related motions, the certificate of conference shall be signed by the lead attorney and any local counsel. In situations involving an unreasonable failure to meet and confer, the movant shall set forth in the certificate of conference the facts believed to constitute bad faith.

Neither the "meet and confer" nor the "certificate of conference" requirements are applicable to *pro se* litigants (prisoner or non-prisoner) or to the following motions:

(1) to dismiss;
(2) for judgment on the pleadings;
(3) for summary judgment, including motions for partial summary judgment;
(4) for judgment as a matter of law;
(5) for judgment of acquittal in a criminal case;
(6) motions to suppress in criminal cases;
(7) for new trial;
~~(8) any motion captioned as "joint," "agreed," or unopposed;~~"
(~~9~~ 8) issuance of letters rogatory;
(~~10~~ 9) objections to report and recommendations of magistrate judges or special masters;

(~~11~~ 10) for reconsideration~~; and~~

(~~12~~ 11) for sanctions under Fed. R. Civ. P. 11, provided the requirements of Fed. R. Civ. P. 11(c)(2) have been met; and

(12) for writs of garnishment.

Comment: Regarding Section (a), the additional language mirrors the current requirement in Local Rule CR-47(b) that a motion be accompanied by a separate proposed order. Proposed orders should be uploaded as an attachment to the motion using the "Text of Proposed Order" designation in the CM/ECF menu. To avoid unnecessarily cluttering the docket, proposed orders should not be filed independent of the motion as "Addition Attachments to Main Document." Filing proposed orders in this manner makes them easier for the judges to sign electronically.

Regarding Section (i),

(1) parties sometimes file documents that may be joined, agreed to, or unopposed by some parties, but not all, with the designation "joint," "agreed," or "unopposed." Requiring the inclusion of a certificate of conference with all such motions will eliminate confusion created by sometimes inaccurate use of these designations.

(2) motions for writ of garnishment were added to the list of items not requiring a certificate of conference at the suggestion of members of the United States Attorney's Office.

3. **LOCAL RULE CV-26 Provisions Governing Discovery; Duty of Disclosure**

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(e) **Discovery Hotline (903) 590-1198.** The court shall provide a judge on call during business hours to rule on discovery disputes and to enforce provisions of these rules. Counsel may contact the duty judge for that month by dialing the hotline number listed above for any case in the district and get ~~an immediate~~ a hearing on the record and ruling on the discovery dispute, including whether a particular discovery request falls within the applicable scope of discovery, or request to enforce or modify provisions of the rules as they relate to a particular case.

Comment: The language has been added to clarify the fact that there is a designated hotline judge each month, that litigants cannot choose the hotline judge, and that a hearing may not occur immediately depending on schedule constraints of the duty judge.

4. **LOCAL RULE CV-54 Judgments; Costs**

(a) A party awarded costs by final judgment or by judgment that a presiding judge directs be entered as final under Fed. R. Civ. P. 54(b) must apply to the clerk for taxation of such costs by filing a bill of costs. Unless otherwise provided by statute or by an order of the presiding judge, the bill of costs must be filed with the clerk and served on any party entitled to such service no later than fourteen days after the clerk enters the judgment on the docket.

(b) **Procedure for Contested Bill of Costs.** Before filing a bill of costs, a party must:

(1) submit the proposed bill of costs to opposing counsel for counsel's review in light of the applicable law; and

(A) if there are any areas of disagreement, meet and confer with opposing counsel in an effort to submit an agreed bill of costs to the court. If the parties have a legitimate dispute on which they cannot agree, ~~the party seeking costs~~ the parties have the option of filing ~~must file~~ either (A) a ~~bill of costs~~ joint motion indicating areas of agreement and the area(s) of disagreement to be resolved by the court, or (B) a motion by the party requesting costs that indicates areas of agreement and the areas of disagreement to be resolved by the court, to which the opposing party may file a response. ~~The bill~~ Either type of motion must contain a certificate ~~by the party seeking costs~~ certifying compliance with the ~~provisions~~ conference requirements of this rule.

Comment: When the parties have a legitimate dispute about costs, the revised rule requires either a traditional or joint motion be filed that specifies the area(s) of disagreement to be resolved by the court and certifies that the parties have met and conferred about the disputed areas.

5. **LOCAL RULE CV-72 Magistrate Judges**

(a) Powers and Duties of a United States Magistrate Judge in Civil Cases. The powers and duties of a United States magistrate judge serving within the Eastern District of Texas shall be governed by the Local Rules of Court for the Assignment of Duties to United States Magistrate Judges adopted by this court. *See* Appendix B. Nothing in this rule shall be construed to limit the jurisdiction of a United States magistrate judge serving in the Eastern District of Texas acting pursuant to powers directly conferred by act of Congress or applicable rule.

[NOTE: The changes below to CV-72 primarily consist of text relocated from current Appendix B. The redlining of sections 72(b)-(d) is altered to show all changes from the current text of Appendix B. All of sections 72(b)-(d) are new additions to CV-72.]

(~~A~~ b) Motion for Reconsideration of ~~Non-Dispositive~~ Nondispositive Matters — 28 U.S.C. ~~Section~~ § 636(b)(1)(A).

Any party may file a motion ~~for reconsideration by a~~ asking the district judge ~~of a magistrate judge's~~ to reconsider an order ~~determining a motion or~~ of the magistrate judge made on any nondispositive matter under Rule 1, Subsection ~~1~~(C) of Appendix B to these rules~~, *supra*,~~. The motion for reconsideration must be filed within fourteen days after ~~issuance~~ being served with a copy of the magistrate judge's order, unless a different time is prescribed by the magistrate judge or ~~a~~ the district judge. ~~Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, a~~ The motion for reconsideration ~~which~~ shall specifically designate the order, or part thereof, ~~for~~ on which reconsideration is requested, and provide the basis for ~~any~~ each objection ~~thereto. A~~ Any party may respond to another party's motion for reconsideration within seven days after being served with a copy of the motion. The district judge ~~of the court~~ shall consider the motion and ~~shall~~ set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. The district judge may also reconsider *sua sponte* any matter determined by a magistrate judge under this rule.

(~~B~~ c) Review of Case-Dispositive Motions and Prisoner Litigation—28 U.S.C. ~~Section~~ § 636(b)(1)(B).

Any party may ~~object~~ file objections to a magistrate judge's report containing proposed findings and recommendations ~~or report~~ issued under Rule 1, Subsections ~~1(d), (e), and (f~~ (D), (E), or (F) of Appendix B to these rules~~, *supra*~~,. The objections must be filed within fourteen days after being served with a copy ~~thereof~~. ~~Such party shall file with the clerk of court, and serve on~~ of the magistrate ~~judge and all parties, written~~ judge's report. The objections~~, which~~ shall specifically identify the portions of the proposed findings~~,~~ and recommendations ~~or report~~ to which objection is made and the basis for ~~such objections~~ each objection. Any party may respond to another party's objections within fourteen days after being served with a copy ~~thereof. A~~ of the objections. The district judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. ~~The~~ In making a determination, the district judge, however~~, need conduct a new hearing only in his~~ has discretion ~~or where~~ (unless otherwise required by law~~, and may~~) to consider the record as developed before the magistrate judge~~, making his own determination on the basis of that record. The district judge may also~~ or to conduct a new hearing, receive further evidence, recall witnesses, or recommit the matter to the magistrate judge with instructions.

(d) Special Master Reports—28 U.S.C. § 636(b)(2). Any party may seek review of, or action on, a special master report filed by a magistrate judge in accordance with the provisions of Fed. R. Civ. P. 53(3).

Comment: Local Rule CV-72 is revised to include text currently appearing in Appendix B. In the experience of the committee, many practitioners often overlook the requirements of Appendix B concerning the mechanics for review of a magistrate judge's orders by the district court. Accordingly, the committee believes these requirements will be more conspicuous and useful if included directly in the text of the rule. In addition, language is added to CV-72(a) to make clear the time for filing any response to a motion for reconsideration, a topic left open by Fed. R. Civ. P.

72, and to generally improve upon the language of the rule. A typographical error in the reference to Fed. R. Civ. P. 53 that existed in Appendix B is corrected in Subsection 72(d).

6. APPENDIX B

LOCAL RULES OF COURT FOR THE ASSIGNMENT OF DUTIES TO UNITED STATES MAGISTRATE JUDGES UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS

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RULE 4. ~~REVIEW AND~~ APPEAL

~~(A)~~ Motion for Reconsideration of Non-Dispositive Matters - 28 U.S.C. Section 636(b)(1)(A)~~.~~

~~Any party may file a motion for reconsideration by a district judge of a magistrate judge's order determining a motion or matter under Subsection 1(C) of these rules, *supra*, within 14 days after issuance of the magistrate judge's order, unless a different time is prescribed by the magistrate judge or a district judge. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, a motion for reconsideration, which shall specifically designate the order, or part thereof, for which reconsideration is requested, and the basis for any objection thereto. A district judge of the court shall consider the motion and shall set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. The district judge may also reconsider *sua sponte* any matter determined by a magistrate judge under this rule.~~

~~(B)~~ Review of Case-Dispositive Motions and Prisoner Litigation -28 U.S.C. Section 636(b)(1)(B)~~.~~

~~Any party may object to a magistrate judge's proposed findings, recommendations or report under Subsections 1(d), (e), and (f) of these rules, *supra*, within 14 days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections, which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Any party~~

~~may respond to another party's objections within 14 days after being served with a copy thereof. A district judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The district judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The district judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.~~

~~(C) Special Master Reports - 28 U.S.C. Section 636(b)(2).~~

~~Any party may seek review of, or action on, a special master report filed by a magistrate judge in accordance with the provisions of Rule 53(3) of the Federal Rules of Civil Procedure.~~

(~~D~~ A) Appeal from Judgments in Misdemeanor Cases - 18 U.S.C. § 3402.

A defendant may appeal a judgment of conviction by a magistrate judge in a misdemeanor case by filing a notice of appeal specifying the judgment from which the appeal is taken, with the clerk within 14 days after entry of the judgment, and must also serve a copy of the notice upon the United States attorney, personally or by mail, and provide a copy to the magistrate judge. The scope of appeal shall be the same as on an appeal from a judgment of the district court to the court of appeals. *See* FED. R. CIV. P. 58.

(~~E~~B) Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties - 28 U.S.C. § 636(c).

(1) Appeal to the Court of Appeals.

Upon the entry of judgment in any civil case disposed of by a magistrate judge on consent of the

parties under authority of 28 U.S.C. § 636(c) and Subsection 1(h) of these rules, *supra*, an aggrieved party shall appeal directly to the United States Court of Appeals for this circuit in the same manner as an appeal from any other judgment of this court.

(2) Appeal to a District Judge.[2]

(a) Notice of Appeal.

In accordance with 28 U.S.C. § 636(c)(4), the parties may consent to appeal any judgment in a civil case disposed of by a magistrate judge to a district judge of this court, rather than directly to the court of appeals. In such case, the appeal shall be taken by filing a notice of appeal with the clerk of court within 30 days after entry of the magistrate judge's judgment, but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of entry of the judgment. For good cause shown, the magistrate judge or a district judge may extend the time for filing the notice of appeal for an additional 20 days. Any request for such extension, however, must be made before the original time period for such appeal has expired. In the event a motion for a new trial under Fed. R. Civ. P. 59, is timely served, i.e. within 10 days after entry of the trial judgment, the time for appeal from the judgment of the magistrate judge shall be extended to 30 days from the date of the ruling on the motion for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure. A motion for new trial filed later than 10 days after entry of the final judgment is a Rule 60(b) motion and does not stop the time for a notice of appeal.

(b) Service of the Notice of Appeal.

The clerk of court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party

[2] Ordinarily there will be no appeal of a civil case tried by a magistrate judge by consent of the parties to a district judge, as it is the policy of this Court to only assign consent cases to the magistrate judge where the parties have opted for appeal to the court of appeals.

is not represented by counsel, to the party at his last known address. A certificate of service is not required with a notice of appeal.

(c) Record on Appeal.

The record on appeal to a district judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate judge, if any. Every effort shall be made by the parties, counsel, and the court to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. § 636(c)(4).

(d) Memoranda.

The appellant shall within 30 days of the filing of the notice of appeal file a typewritten memorandum with the clerk, together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellant shall also file a copy of the memorandum on the appellee or appellees. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.

(e) Disposition of the Appeal by a District Judge.

The district judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate judge's judgment, or remand with instructions for further proceedings. The district judge shall accept the magistrate judge's findings of fact, unless they are clearly erroneous, and shall give

due regard to the opportunity of the magistrate judge to assess the credibility of the witnesses.

(~~F~~ C) Appeals from other Orders of a Magistrate Judge.

Appeals from any other decisions and orders of a magistrate judge not provided for in this rule should be taken as provided by governing statute, rule, or decisional law.

Comment: Appendix B, Rule 4 is amended to reflect the relocation of certain portions of its text into Local Rule CV-72.

7. **LOCAL RULE CV-83 Rules by District Courts; Judge's Directives**

(a) **Docket Calls.** Traditional docket calls are abolished. Each judge shall endeavor to set early and firm trial dates which will eliminate the need for multiple-case docket calls.

(b) **Transferred or Remanded Cases.** Absent an order of the court to the contrary, no sooner than the twentieth day following an order of the court transferring the case to another district court or remanding it to the appropriate state court, the clerk shall transmit the case file to the directed court. There is no such waiting period for Multi-District Litigation ("MDL") transfers. Where a case has been remanded to state court, the clerk shall mail: (1) a certified copy of the court's order and docket sheet directing such action; and (2) all pleadings and other documents on file in the case. Where a case has been transferred to another federal district court, the electronic case file shall be transferred to the directed court. If a timely motion or reconsideration of the order of transfer or remand has been filed, the clerk shall delay mailing or transferring the file until the court has ruled on the motion for reconsideration.

Comment: The new language is self-explanatory.

8. APPENDIX P

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

_____ DIVISION

Plaintiff,	§	
	§	
v.	§	Case No. _____
	§	
Defendant.	§	

[MODEL] ORDER REGARDING E-DISCOVERY IN PATENT CASES

The Court ORDERS as follows:

1. This order supplements all other discovery rules and orders. It streamlines Electronically Stored Information ("ESI") production to promote a "just, speedy, and inexpensive determination" of this action, as required by Federal Rule of Civil Procedure 1.

2. This order may be modified in the court's discretion or by agreement of the parties. The parties shall jointly submit any proposed modifications within 30 days after the Federal Rule of Civil Procedure 16 conference. If the parties cannot resolve their disagreements regarding these modifications, the parties shall submit their competing proposals and a summary of their dispute.

3. A party's meaningful compliance with this order and efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations.

4. Absent a showing of good cause, general ESI production requests under Federal Rules of Civil Procedure 34 and 45, or compliance with a mandatory disclosure requirement of this Court, shall not include metadata. However, fields showing the date and time that the document was sent and received, as well as the complete distribution list, shall generally be included in the production if such fields exist.

5. Absent agreement of the parties or further order of this court, the following parameters shall apply to ESI production:

A. **General Document Image Format**. Each electronic document shall be produced in single-page Tagged Image File Format ("TIFF") format. TIFF files shall be single page and shall be named with a unique production number followed by the appropriate file extension. Load files shall be provided to indicate the location and unitization of the TIFF files. If a document is more than one page, the unitization of the document and any attachments and/or affixed notes shall be maintained as they existed in the original document.

B. **Text-Searchable Documents**. No party has an obligation to make its production text-searchable; however, if a party's documents already exist in text-searchable format independent of this litigation, or are converted to text-searchable format for use in this litigation, including for use by the producing party's counsel, then such documents shall be produced in the same text-searchable format at no cost to the receiving party.

C. **Footer**. Each document image shall contain a footer with a sequentially ascending production number.

D. **Native Files**. A party that receives a document produced in a format specified above may make a reasonable request to receive the document in its native format, and upon receipt of such a request, the producing party shall produce the document in its native format.

E. **No Backup Restoration Required.** Absent a showing of good cause, no party need restore any form of media upon which backup data is maintained in a party's normal or allowed processes, including but not limited to backup tapes, disks, SAN, and other forms of media, to comply with its discovery obligations in the present case.

F. **Voicemail and Mobile Devices.** Absent a showing of good cause, voicemails, PDAs and mobile phones are deemed not reasonably accessible and need not be collected and preserved.

6. General ESI production requests under Federal Rules of Civil Procedure 34 and 45, or compliance with a mandatory disclosure order of this court, shall not include e-mail or other forms of electronic correspondence (collectively "e-mail"). To obtain e-mail parties must propound specific e-mail production requests.

7. E-mail production requests shall be phased to occur timely after the parties have exchanged initial disclosures, a specific listing of likely e-mail custodians, a specific identification of the fifteen most significant listed e-mail custodians in view of the pleaded claims and defenses,[1] infringement contentions and accompanying documents pursuant to P.R. 3-1 and 3-2, invalidity contentions and accompanying documents pursuant to P.R. 3-3 and 3-4, and preliminary information relevant to

[1] A "specific identification" requires a short description of why the custodian is believed to be significant.

damages. The exchange of this information shall occur at the time required under the Federal Rules of Civil Procedure, Local Rules, or by order of the court. Each requesting party may also propound up to five written discovery requests and take one deposition per producing party to identify the proper custodians, proper search terms, and proper time frame for e-mail production requests. The court may allow additional discovery upon a showing of good cause.

8. E-mail production requests shall identify the custodian, search terms, and time frame. The parties shall cooperate to identify the proper custodians, proper search terms, and proper time frame. Each requesting party shall limit its e-mail production requests to a total of eight custodians per producing party for all such requests. The parties may jointly agree to modify this limit without the court's leave. The court shall consider contested requests for additional or fewer custodians per producing party, upon showing a distinct need based on the size, complexity, and issues of this specific case.

9. Each requesting party shall limit its e-mail production requests to a total of ten search terms per custodian per party. The parties may jointly agree to modify this limit without the court's leave. The court shall consider contested requests for additional or fewer search terms per custodian, upon showing a distinct need based on the size, complexity, and issues of this specific case. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as the producing company's name or its product name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive combination of multiple words or phrases (e.g., "computer" and "system") narrows the search and shall count as a single search term. A disjunctive combination of multiple words or phrases (e.g., "computer" or "system") broadens the search, and thus each word or phrase shall count as a separate search term unless they

are variants of the same word. Use of narrowing search criteria (e.g., "and," "but not," "w/x") is encouraged to limit the production and shall be considered when determining whether to shift costs for disproportionate discovery.

10. Pursuant to Federal Rule of Evidence 502(d), the inadvertent production of a privileged or work product protected ESI is not a waiver in the pending case or in any other federal or state proceeding.

11. The mere production of ESI in a litigation as part of a mass production shall not itself constitute a waiver for any purpose.

12. Except as expressly stated, nothing in this order affects the parties' discovery obligations under the Federal or Local Rules.

Comments: Based upon a request from the court, a working group of the Local Rules Advisory Committee undertook a review of the Model Order Regarding E-Discovery in Patent Cases (the "Model Order") presented by Federal Circuit Chief Judge Randall Rader to the Texas Eastern Bench Bar Conference in September 2011. The working group's goal was to determine whether the Model Order, or some portion or variation of it, should be recommended for inclusion in Texas Eastern's local rules. In addition to certain members of the Local Rules Advisory Committee, the working group included former Magistrate Judge Chad Everingham, who participated on the E-Discovery Committee that produced the Model Order.

After consideration, the working group determined that a variation of the Model Order could be helpful to practice in the district. However, rather than including that variation as an actual local rule, the working group recommended including the form order as an appendix to the local rules,

much like the current appendix forms for final pretrial or scheduling orders. This approach allows maximum flexibility for both litigants and the court as attempts are made to tailor e-discovery planning to differing facts, case to case. This approach also allows the court to decide questions parties may raise regarding the interpretation or application of the recommended requirements within each case without having to generally construe or interpret a local rule.

A redline/strikeout version that depicts and explains the specific changes made to Chief Judge Rader's Model Order is posted on the court's website, located at www.txed.uscourts.gov.

So ORDERED and SIGNED this 27th day of February, 2012.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE