

April 1, 2016

What You Need to Know About Changes to the Federal Circuit Rules of Practice

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On March 29, 2016, the Federal Circuit announced significant amendments to the Federal Circuit Rules of Practice. The revised rules will apply to all appeals docketed on or after **April 1, 2016**. This alert provides a general overview of the changes and explains how they are likely to impact appellate practice. This alert also provides a focused discussion of how these changes are likely to impact appeals from the Patent Trial and Appeal Board to the Federal Circuit.

The most extensive amendments are updates reflecting the current mandatory use of electronic filing. Various revisions have been made to conform the rules to current norms for electronic filing by eliminating certain paper filing requirements, updating payment procedures, and removing outdated references to "docket cards." Others are new requirements governing the use of confidential markings. The most significant changes are summarized in the list below:

- Rule 15(b)(1) has been amended to provide for "docketing upon receipt" of any appeal from an agency, including the Patent Office. The clerk will now docket the appeal without waiting to receive the certified list from the Patent Office. This period previously spanned up to 40 days, as allowed by Rule 17(c).
- Rule 31(a)(1)(B) changes the due date for an appellant's brief on appeal from the Patent Office. The due date is now 60 days after the Patent Office serves the certified list under Rule 17(c). The previous deadline was 60 days from the docketing date, which (as stated above) has been altered under Rule 15(b)(1).
- Rule 25 has been extensively re-written to include key provisions of the Court's May 17, 2012, Administrative Order on Electronic Filing. Rule 25 now includes formal procedures and requirements relevant to registered electronic filers.
- New rule 26(c) states that an additional three days is NOT added to the time to file a responsive pleading to a paper submitted via CM/ECF. The court considers service by e-mail through CM/ECF to be delivered when transmitted.
- The rules now "tightly limit" confidential material. Specifically, Rule 27(m)(1) governing motions and Rule 28(d)(1) governing briefs now include a 15-word limit on confidentiality markings, absent a motion providing justification.
- New rule 28(d)(5) requires parties to attempt to agree on confidential markings. Consistent with this, revisions to Rule 11(c) and Rule 17(e) allow parties to wait until filing of the joint appendix to certify that such discussions took place.
- Material subject to a protective order will now automatically lose its protected status if it appears without confidential markings in a motion or brief. This again reflects a stricter position on gratuitous confidentiality designations.
- Rule 47.4(a)(3) has been amended to require further information on potential conflicts, such that parties must now additionally disclose on their certificates of interest all parent and subsidiaries that own more than 10% of a party.

The Court has revised, updated, and clarified many other rules. While in some instances the changes have already gone into effect or are clarifications of existing policies (e.g., how to properly request expedited briefing), others are new (e.g., how to change representation after a case is assigned to a panel). Still more changes impact cases involving pro se litigants.

While the electronic filing system has been around for some time, with procedures forth in the Court's existing administrative orders, practitioners should note the codification of various aspects of electronic filing practice (e.g., when and how service is effectuated, when and how fees are paid, when paper copies are still required, how electronic signatures are used).

Finally, appeals from the Patent Trial and Appeal Board to the Federal Circuit arise in large numbers and will be directly impacted by the "docketing upon receipt" amendment. For example, notices of appeal filed in post-grant proceedings will be docketed without waiting 40 days for the Patent Office to serve the certified list. Due to the high rate of consolidation that is occurring within the first few days of docketing, parties should be aware that the clerk's office may make such decisions almost immediately after a notice of appeal has been filed.

Despite being "docket[ed] upon receipt" under Rule 15(b)(1), the concurrent amendment to Rule 31(a)(1)(B) means there will be little impact on the due date of the appellant's opening brief, *unless* the Patent Office modifies its practice of waiting nearly 40 days to serve the certified list. But, the initial due dates associated with docketing (e.g., entries of appearance, docketing statement, certificate of interest), as well as the timelines associated with designating materials for the joint appendix, still flow from notice of docketing. Accordingly, parties should be prepared to perform these tasks within the first two weeks of filing a notice of appeal.

This alert is intended to provide an overview of the changes and is not exhaustive. We will keep you abreast of other significant impacts on appellate and Patent Office practice.

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