

## 2021 Proposed Amendments to Local Rules

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### All Rules

- The Local Rules currently use “smart quotes,” which, when copied-and-pasted into a Word document, do not render properly. The Committee recommends the Rules be reformatted to allow for easier copying-and-pasting into other documents.
- Correct hyperlinks in the following rules:

NEGenR 1.2(h), (i); 1.3(a); 1.7(g)  
NECivR 7.2; 10.1(a)(2)(D); 16.2(a)(2)

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### General Rules

- No proposed amendments.
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### Civil Rules

- **NECivR 10.1(b):** Amend to add new subsection as NECivR 10.1(b)(5) to require exhibits not filed electronically to be submitted on physical media that can be kept in the custody and control of the Clerk’s Office.

#### **NECivR 10.1(b)(5) Physical Media Required**

Electronic documents filed nonelectronically, such as audio or video files, must be provided to the Clerk of the Court and parties entitled to service in the case by a commonly used physical media format, such as an optical disc or flash drive. Providing a document only by linking to a cloud storage service such as Dropbox or OneDrive is not sufficient.

- **NECivR 39.3(d):** Modify to add a sentence to require that exhibit stickers include the case number and exhibit number.

#### **NECivR 39.3(d) Numbering Exhibits.**

Each party shall affix/add an exhibit sticker and each exhibit sticker shall include the case number and exhibit number. Each party is responsible for numbering that party's intended trial exhibits. In a casewith one plaintiff and one defendant, the defendant numbers exhibits with the next 100 series after the plaintiff's last exhibit number (e.g., Ex. 201 where the plaintiff's last exhibit was Ex. 154). In a case with multiple plaintiffs with separate attorneys and one defendant, each plaintiff numbers exhibits with a separate 100 series (e.g., Exs. 1-100 for the first plaintiff, Exs. 101-200 for the second plaintiff,

and so on); the defendant numbers exhibits with the next 100 series after the final plaintiff's last exhibit number (e.g., Ex. 501 where the fourth plaintiff's last exhibit was Ex. 475). In cases with multiple defendants with separate attorneys and one plaintiff, the first defendant numbers exhibits with the next 100 series after the plaintiff's last exhibit number (e.g., Ex. 201 where the plaintiff's last exhibit was Ex. 154); each defendant numbers exhibits with a subsequent, separate 100 series (e.g., Ex. 501 for the fourth defendant where the third defendant's final exhibit was Ex. 417).

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## Criminal Rules

- **NECrimR 12.3:** Modify to explicitly state that a brief supporting a motion must be filed separately from the motion. This amendment would make the criminal rule consistent with the civil rule governing motions—NECivR 7.1.

### 12.3 Forms and Deadlines for Pleadings and Motions.

#### (a) Deadlines Set.

At the arraignment, the magistrate judge sets discovery and pretrial motion deadlines. These dates are strictly enforced. Motions for an extension of time to file pretrial motions are only granted for good cause shown, and absent good cause shown they must be filed within the pretrial motion filing deadline.

#### (b) Form of Motion.

Unless the pretrial motion is unopposed, see NECrimR 12.2, or does not raise a substantial issue of law, the motion must be filed as provided in this rule.

#### (1) Supporting Briefs.

**A motion raising a substantial issue of law must be supported by a brief filed and served together with the motion. The brief must be separate from, and not attached to or incorporated in, the motion.** The court may treat a party's failure to simultaneously file a brief as an abandonment of the motion. The brief must (A) concisely state the basis for the motion, (B) cite relevant legal authority, and (C) cite to the pertinent pages of the record, affidavit, discovery material, or other evidence on which the moving party relies. A party's failure to brief an issue raised in a motion may be considered a waiver of that issue.

- **NECrimR 12.7:** Modify to add a sentence to require that exhibit stickers include the case number and exhibit number.

## NECrimR 12.7 Numbering Exhibits for Hearing or Trial.

Each party shall affix/add an exhibit sticker and each exhibit sticker shall include the case number and exhibit number. In a criminal case with only one defendant, the defendant numbers exhibits with the next 100 series following the government's last exhibit number (e.g., Ex. 201 where the government's last exhibit was Ex. 154). In cases with multiple defendants with separate attorneys, the first defendant numbers exhibits with the next 100 series following the government's last exhibit number (e.g., Ex. 201 where the government's last exhibit was Ex. 154); each defendant numbers exhibits with a subsequent, separate 100 series (e.g., Ex. 501 for the fourth defendant where the third defendant's final exhibit was Ex. 417).

- **NECrimR 32.1(b)(8):** See the Other Matters section below for information about the following proposed amendment to NECrimR 32.1(b)(8).
  - (8) A probation and pretrial services officer must submit a sentencing recommendation to the sentencing judge no later than seven days before the sentencing hearing. ~~The probation and pretrial services officer is directed to provide copies of any sentencing recommendation to counsel for the government and counsel for the defendant at the time the recommendation is submitted to the sentencing judge. Each sentencing judge may, within his or her discretion, direct the probation and pretrial services office to disclose or not disclose sentencing recommendations to all parties.~~
- **NECrimR 49.2(b):** Amend to add new subsection as NECrimR 49.2(b)(5) to require exhibits not filed electronically to be submitted on physical media that can be kept in the custody and control of the Clerk's Office.

### (5) Physical Media Required

Electronic documents filed nonelectronically, such as audio or video files, must be provided to the Clerk of the Court and parties entitled to service in the case by a commonly used physical media format, such as an optical disc or flash drive. Providing a document only by linking to a cloud storage service such as Dropbox or OneDrive is not sufficient.

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## Other Matters

- Judge Buescher suggests an amendment to NECrimR 32.1(b)(8) to provide each judge within our district the discretion to disclose or not disclose the sentencing recommendation provided by the probation office to the parties in each open criminal case in accordance with what is allowed by Fed. R. Crim. P. 32(e)(3). Judge Buescher's memorandum explaining his proposed amendment is attached. The Court expects many sentencing judges to continue to provide probation sentencing recommendations to all parties even with this rule change.

- The Local Rules Committee has appointed a subcommittee to discuss revisions to NECivR 56.1. Rule 56.1 sets out the Court's summary judgment procedures. The subcommittee will be chaired by David Dirgo. Any changes to Rule 56.1 deemed appropriate by the Local Rules Committee and subcommittee will be proposed during the next rule revision cycle.

## MEMORANDUM

To: District of Nebraska Local Rules Committee  
From: Brian C. Buescher, District Judge  
Date: June 18, 2021  
Re: NECrimR 32.1(b)(8)

Re: Memorandum Regarding Updating NECrimR 32.1(b)(8)

I write to propose updating NECrimR 32.1(b)(8) to provide each judge within our district the discretion to disclose or not disclose the sentencing recommendation provided by the probation office to the parties in each open criminal case.

Fed. R. Crim. P. 32(e)(3) provides that, “[b]y local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer’s recommendation on the sentence.” As currently in effect, NECrimR 32.1(b)(8) states as follows:

A probation and pretrial services officer must submit a sentencing recommendation to the sentencing judge no later than seven days before the sentencing hearing. The probation and pretrial services officer is directed to provide copies of any sentencing recommendation to counsel for the government and counsel for the defendant at the time the recommendation is submitted to the sentencing judge.

According to research conducted by the Eighth Circuit Library Department, of the ninety-four federal district court jurisdictions reviewed, approximately fifty-one federal district courts prohibit by local rule or general order providing the sentencing recommendation to the parties and thus only allow disclosure to the presiding judge. Approximately twenty-nine districts have no local rule on the matter, but through informal inquiries, along with a survey conducted by the courts around three years ago, I have discovered that it appears the vast majority of the judges in these districts likewise keep the sentencing recommendations confidential.

As to those federal district courts that contemplate in their local rules the disclosure of the sentencing recommendation, it appears nine districts have local rules explicitly leaving the decision of disclosure to the discretion of the presiding judge. Only three other jurisdictions have a local rule requiring the sentencing recommendation to be provided to all parties: the District of Guam, and the Eastern and Northern Districts of California.<sup>1</sup> These courts appear by the language of each rule to include the recommendation in the presentence investigation report (PSR) or include the recommendation at the time the PSR is issued.

Although I have not taken the time to thoroughly investigate every local rule on this subject or call to investigate individual district procedures, it appears from the research conducted by the Eighth Circuit Library Department that Nebraska may be the only jurisdiction in the United States where local rules require disclosure of recommendations that are separately drafted and submitted under a separate deadline with no contemplation that an individual judge might order otherwise.

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<sup>1</sup> The Eastern District of Texas also has a local rule that provides for part, but not all, of the items in the sentencing recommendation to be provided to the parties in each case.

Within the ten federal district court jurisdictions in the Eighth Circuit, seven follow the majority rule nationally which prohibits the dissemination of the sentencing recommendation, although four of those seven specifically allow for dissemination if the judge so directs. Based on the research provided and aside from Nebraska, the remaining two districts, North Dakota and South Dakota, lack a rule addressing the matter. After my informal inquiries, I have not yet found a judge within the Eighth Circuit outside of Nebraska that provides the recommendations to the parties as a matter of policy, but there certainly might be some.

Accordingly, to align the District of Nebraska's procedure that those of the vast majority of other districts, and given my belief that this discretion is essential for my handling of criminal sentencings as a district judge, I propose amending NECrimR 32.1(b)(8) to allow each presiding judge discretion to allow or not allow the sentencing recommendations to be provided to the parties. I propose the following language:

A probation and pretrial services officer must submit a sentencing recommendation to the sentencing judge no later than seven days before the sentencing hearing. Each sentencing judge may, within his or her discretion, direct the probation and pretrial services office to disclose or not disclose sentencing recommendations to all parties.

This proposed rule would provide each judge with the discretion to a) continue to provide sentencing recommendations to all parties as has been the tradition in this district; or b) order nondisclosure like the vast majority of other federal judges in the United States.

My current belief is that the only change necessitated by this amendment would be moving the recommended conditions of supervised release from the sentencing recommendation to the PSR, as is standard practice in many jurisdictions. An advantage of moving recommended conditions of supervised release to the PSR would be that parties would be able to discuss any issues or objections they have with regard to the proposed conditions prior to the sentencing hearing. The parties could utilize the same process of evaluation and informal discussion that is currently used for the other provisions in the PSR.

I have provided this draft language to the probation office, the Federal Public Defender, and the U.S. Attorney's office for comment on the workability of the language. Although I am committed to proposing a change to the rule, I am more than willing to entertain amendments to this proposed language in order to make it easier for all involved to make the needed changes if this rule were enacted.

Thank you for your consideration and I look forward to a discussion on this topic.