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Via Regular Mail and Email

Fernando Galindo
Clerk of Court
U.S. District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510
localrulecomment@vaed.uscourts.gov

Re: Comment on change proposed to Local Civil Rule 5

Dear Mr. Galindo:

I write to comment on the proposed change to Local Civil Rule 5. Thank you for the opportunity to review and comment on these proposed changes.

I write to ask that certain aspects of the proposed change to Local Civil Rule 5(B) and (C) not be adopted; or if the proposed changes are adopted, I strongly suggest edits to address the concerns in this letter. I also wish to point out a housekeeping matter raised by the proposed edits to Local Civil Rule 5(E).

I. LOCAL CIVIL RULE 5(B)

My concerns relate to qui tam practice under the federal False Claims Act. Simply stated, the proposed changes to Local Civil Rule 5(B) could be disastrous for qui tam practice under the federal False Claims Act in the Eastern District of Virginia. I refer specifically to the proposed amendment to Local Civil Rule 5(B), which would be problematic because it requires the filing party to provide a description of any document filed under seal. The description would then be posted to the docket and available to the public.

The federal False Claims Act is the primary tool used by the federal government to combat fraud and false claims against the United States. The government may bring a civil FCA action, or a private person – known as a qui tam relator – may bring a civil FCA action under the qui tam provisions of the Act. 31 U.S.C. § 3730(b)(1). If a relator initiates a case, 31 U.S.C. §3730(b)(2) requires that the Complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the Court so orders."

The mandatory seal provision was originally added to the FCA at the request of the United States Department of Justice to address concerns that a qui tam complaint could alert the target of an on-going Government investigation. The qui tam relator, through counsel, is required to file his or her Complaint under seal and the penalties for failing to do so are potentially severe. A failure to properly file under seal can, in some instances, completely disqualify the relator from bringing the case.

As currently written, Local Civil Rule 5 is fine because it contemplates filings under seal where those filings are required by statute. Subsection (B) of Local Rule 5, as currently in effect, has two simple requirements. First the filing party must note on the face of the document the statute requiring a filing under seal; like most lawyers representing qui tam relators, I include this information in the caption of every document I file while the case is under seal.

The second requirement of current Local Civil Rule 5(B) is that the Clerk provide public notice by noting on the docket that the filing contains sealed material. As I understand it, the Clerk usually accomplishes this second requirement by noting on the docket [UNDER SEAL v. UNDER SEAL] with the case number when a new case is filed.

The proposed change to Local Civil Rule 5(B) requires the filer to provide public notice "describing what information is being filed under seal." This requirement is problematic because if the description provides too much information, it could be considered a breach of the seal, which has dire ramifications for the qui tam relator.

Also, the new Local Rule seems to make docketing information for a sealed qui tam cases public while the case is under seal. This is problematic because only Government entities and the qui tam relator file documents during the seal period. As a result, even if only the dates of the filing and the filing party are noted publicly, defendants may in some circumstances be able to glean information about whether they are the target of a qui tam case, the status of the case, the names of the lawyers representing the parties, and other information by carefully observing the dates documents are filed.

And make no mistake about it – defendants (and their counsel) in qui tam cases often use a variety of sophisticated tactics to try to discern whether a case is under seal somewhere and if so the posture of the sealed case.

II. LOCAL CIVIL RULE 5(C)

The proposed change to Local Civil Rule 5(C) could be problematic because it addresses new requirements for a Motion to Seal. Counsel for qui tam relators file a Motion to Seal the case along with the initial Complaint. The new requirements found in this subsection would appear to complicate the process of filing a qui tam case by imposing new standards on anyone filing a Motion to Seal.

Subsection 5(C) seems to indicate that that subsection does not apply to filings under Local Civil Rule 5(B) but I find the proposed rule a bit ambiguous. Moreover, the proposed new rule would suffer from all of the problems associated with subsection (B) of the proposed rule.

III. LOCAL CIVIL RULE 5(E)

The proposed amendments to Local Civil Rule 5(E) poses a problem because in my experience any sealed envelope is opened and inspected by the Marshals as a person enters the Court. This has been my experience in Alexandria Division of the Eastern District; I cannot recall if I had the same experience in other divisions but I suspect the Marshalls would exercise the same precautions.

There are of course sound reasons for the Marshals to open every envelope, I simply wish to point out that it most likely impossible to enter the Court with a sealed envelope.

IV. CONCLUSION

In closing, I would like to make clear that my concerns are addressed only to the initial stages of a qui tam case when the case is under seal. Ultimately, after the Government makes its determination, I believe qui tam cases should be unsealed and treated just like any other civil litigation. I do not, under most circumstances, believe that qui tam cases should remain sealed after they are declined by the Government.

To be fair, I am not certain what other kinds of circumstances arise that cause parties to seek to file matters under seal. I believe strongly in our system of open laws and government, and I agree with the general principle that court records should be open to the furthest extent possible. However, as Judge O'Grady noted several years ago, the processes protected by the seal provisions—the government's investigation and evaluation of the relator's allegations—are not the type of processes that historically have been open to the public. *Am. Civil Liberties Union v. Holder*, 652 F. Supp. 2d 654, 662 (E.D. Va. 2009) aff'd, 673 F.3d 245 (4th Cir. 2011).

Thank you for your attention to the issues pointed out in this letter. I would be happy to assist in any manner I can to address these perceived problems with the proposed local rule changes.

Very Sincerely,

Zachary A. Ritts

cc: AUSA Gerard Mene