WHAT YOU NEED TO KNOW ABOUT THE RECENT FEDERAL CIRCUIT RULE CHANGES

Date: 29 April 2016

IP Litigation Alert

By: Jason A. Engel

The U.S. Court of Appeals for the Federal Circuit recently implemented significant amendments to its Rules of Practice ("Rules"). The changes apply to all cases docked on or after April 1, 2016. In large part, the amendments were made to comport existing practices or requirements for electronic case filing with the Rules. Other changes, such as those relating to confidentiality, reflect a wholesale shift in Federal Circuit practice. This alert provides a brief overview of some of the more significant amendments.

CONFIDENTIALITY

One of the biggest changes to the Rules is how the Federal Circuit will handle confidential material. Rules 11, 17, 27, 28, and 30 were amended to place strict limits on the amount of confidential material subject to protection on appeal. In particular, the Rules now limit the amount of redacted confidential material in a motion or brief to just 15 words, absent a motion with a justification to exceed that limit. Fed. Cir. R. 27(m)(1)(A); 28(d)(1)(A) (note that if your case arises under 19 U.S.C. § 1516(a) or 28 U.S.C. § 1491(b), the limit on the number of confidential material is increased to 50 words). Further, if any material appears without being marked confidential in a motion or brief, that material loses its protected status. Fed. Cir. R. 11(c); 17(e). Once material loses its protected status, that material may not be marked as confidential in the appendix. Fed. Cir. R. 30(h)(1)(A). The parties must also attempt to reach an agreement on any protected material and file a certificate of compliance stating it did so under Rule 30(h)(1)(B).

CALCULATION OF DEADLINES

The Federal Circuit also amended the Rules regarding the calculation of time to file a responsive document. Importantly, "[t]hree additional days are NOT added to the time to file a responsive document, when the original document was filed through CM/ECF, because the court considers service by email through CM/ECF to be delivered when transmitted." Fed. Cir. R. 26(c).

APPEALS FROM THE PATENT OFFICE

The Circuit also made several changes to the rules governing appeals from the Patent Office. Rule 15(a)(1), related to review of agency decisions, was amended to reduce the number of required copies of a petition for review or notice of appeal from three to one. The payment of fees is now required within 14 days after filing. Fed.

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Cir. R. 15(a)(2)(A). Rule 15(a) further sets the period for payment of fees to 14 days after filing and requires attorneys to include an e-mail address with the petition for review or notice of appeal.
Rule 15(b)(1) has been amended to provide for "docketing upon receipt" of any appeal from an agency, including the Patent Office. Despite this change, the timing for filing the opening brief on an appeal from the Patent Office remains 60 days after the Patent Office serves the certified list under Rule 17(c), rather than from the date of docketing. Fed. Cir. R. 31(a)(1)(B). Thus, while the deadline for initial filing documents, such as the docketing statement and certificate of interest, will now be 40 days earlier, the timeline for filing of the opening brief in an appeal from the Patent Office will likely remain consistent.

OTHER MISCELLANEOUS CHANGES OF NOTE

- The Practice Notes to Rule 28 were amended to allow any party to place the language of a patent or claim at issue on the inside of the front cover of the brief, without adding to the word count of the brief.
- Rule 30(b)(4)(E) now requires the use of Bates numbering for all pages of an appendix or supplemental appendix. Similarly, Rule 28(a)(11) requires appendices, supplemental appendices, and addendum material to be numbered using the abbreviation "Appx" or "SAppx" followed by the page number and to be referenced in the briefs accordingly.
- Rules 47.4(a) and (b) were amended to require further information on potential conflicts, including parent/subsidiaries owning more than 10 percent of a company. Also, under amended Rule 47.4(b), a party is required to file an amended certificate of interest within seven days of any change in the information required under Rule 47.4(a).

A full summary of the amendments is available on the Federal Circuit's website, found here.

The full set of the amended Rules can be found here.

KEY CONTACTS



JASON A. ENGEL
LEAD PRACTICE AREA LEADER -
INTELLECTUAL PROPERTY

CHICAGO
+1.312.807.4236
JASON.ENGEL@KLGATES.COM

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