

INDIVIDUAL MOTION PRACTICE AND RULES OF
JUDGE ERIC N. VITALIANO

United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

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Unless otherwise ordered in a specific case, matters before the Court shall be conducted in accordance with the following practices:

I. COMMUNICATIONS WITH CHAMBERS

- A. Appearances before the Court.** At every appearance before the Court, it is expected that counsel will be fully familiar with the case and, in civil matters, authorized to enter into settlement or disposition agreements.
- B. Letters.** Communications with chambers shall be in writing and filed on ECF or, in the case of *pro se* litigants, with the Clerk's office.
1. A copy will be simultaneously delivered to any *pro se* litigant or counsel who does not receive notification by ECF. In such cases, an affidavit of service must be filed.
 2. Copies of correspondence between counsel and/or *pro se* litigants, except where formally annexed to pleadings or motion papers, shall not be sent to the Court or filed on the Court's docket.
- C. Pre-trial matters.** Letters and motions regarding pre-trial, nondispositive matters, such as discovery, should be addressed to the magistrate judge assigned to the case.
- D. Docketing, Scheduling, and Calendar Matters.** All docketing, scheduling, and calendar matters are administered by, and any inquiries regarding them should be addressed to, Case Manager William Villanueva.
- E. Telephone Calls.** Telephone calls to chambers for general information unrelated to docketing, scheduling or a calendar matter are not permitted.
- F. Faxes and Emails.** Faxes and emails to chambers are permitted only for time-sensitive requests and where prior authorization from chambers is obtained. Any document faxed or emailed to chambers must be simultaneously filed and delivered to all counsel in accordance with Individual Rule I.B. Do not follow with a hard copy, unless otherwise directed by the Court.

G. Requests for Adjournment of Court Appearance. A request for an adjournment of a court appearance shall be filed as a “Motion to Adjourn Conference” at least 48 hours prior to the appearance. Emergency requests for adjournment made within 48 hours prior to the scheduled court appearance shall be initiated by a phone call to the Case Manager. The Case Manager will advise the applicant of any written submission necessary beyond that required by the ordinary rule.

H. Requests for Extension of Time Unrelated to a Court Appearance. All requests for extensions of time to comply with any rule or order must be filed as a “Motion for Extension of Time” and state (1) the original compliance date, (2) the number of previous requests for extension, (3) whether those previous requests were granted or denied, (4) the reason for the extension, and (5) whether the adversary consents, and, if not, the reasons given by the adversary for refusing to consent. Requests for extensions will not be considered unless submitted on 48 hours’ notice, absent good cause shown. If the requested extension affects any other scheduled dates, a proposed revised scheduling order must be provided, and it must indicate whether the proposed revised dates are on consent.

I. Notification of Settlement or Voluntary Dismissal. Any time a settlement or voluntary dismissal is reached, the parties are required to notify the Court immediately via ECF. As soon as practicable, the parties shall file a formally executed notice or stipulation in accordance with Federal Rule of Civil Procedure (“FRCP”) 41, and provide chambers with a courtesy copy. For matters requiring judicial approval, such as the settlement or voluntary dismissal of FLSA or certified class claims, or for claims involving a minor, the parties must first file the appropriate motion.

II. ELECTRONIC CASE FILING

A. Filing. All documents must be filed electronically, except that *pro se* parties are automatically exempt from mandatory electronic filing and must file their documents with the Clerk of Court, not chambers. All filings must be simultaneously served on *pro se* parties and/or counsel who do not receive ECF notifications. In such cases, an affidavit of service must be filed.

1. Requests by attorneys for an exemption to the mandatory electronic filing policy will be considered for good cause hardship reasons only and will be reviewed on an individual basis by the assigned magistrate judge. However, no request will be granted until the attorney has registered for ECF and sought ECF training.
2. Technical questions related to electronic filing should be directed to the ECF Help Desk at (718) 613-2610.
3. All electronic filings must be redacted in accordance with FRCP 5.2.

B. Orders. Orders will be posted electronically.

C. OCR Readable Format. All PDF e-filings must be in OCR-readable format.

D. Courtesy Copies. Courtesy copies of all motion papers and stipulations filed electronically, including any documents attached thereto, must be provided to chambers.

1. All such papers must be clearly marked “Courtesy Copy” and, where the document has been filed on ECF, it should bear the ECF watermark which shows the case and docket number across the top of the document. All hard copies provided to chambers shall be in a form that can be laid flat when open.
2. Parties filing voluminous or non-text exhibits may request pre-approval to file only hard copies of those exhibits when electronic filing is impracticable. If approval is granted, one copy must be clearly marked “Original” and a second copy must be marked “Courtesy Copy.” Related papers that are electronically filed must clearly indicate that exhibits have been filed by hard copy.

E. Filing under seal. Parties wishing to file a document under seal must submit the request on ECF as a “Motion for Leave to Electronically File Document Under Seal.” The motion should state the factual and legal basis for the request and must attach the document proposed to be filed under seal. At the same time, the party must publicly file, as a “Redacted Document,” a redacted copy of the motion and attached document. If the moving party believes that electronic filing is impractical or inappropriate in a specific situation, the filing party may seek permission of the Court to file the material in hard copy only and label it “Sealed/Sensitive.” Counsel are directed to the cm/ECF Users’ Guide, which is available on the Court’s website, for more information about filing documents under seal.

III. CIVIL MOTIONS

A. Pre-Motion Conferences.

For discovery motions, follow Local Civil Rules 6.4 and 37.3.

In cases where all parties are represented by counsel, a pre-motion conference with the Court must be requested before making any motion:

- (i) pursuant to FRCP 12 or 56;
- (ii) for a change of venue; or
- (iii) to amend a pleading pursuant to FRCP 15 where leave of the Court is required.

To request a pre-motion conference, the moving party shall file, as a “Motion for a Pre Motion Conference,” a letter not exceeding 3 pages in length setting forth the factual and legal basis for the anticipated motion. All parties so served shall file and serve a letter response, not to exceed 3 pages, within 5 business days from service of the notification letter.

Any request for a pre-motion conference concerning a FRCP 56 motion for summary judgment must be made within 30 days of the certification of the close of discovery, unless otherwise ordered, or for good cause shown.

No pre-motion conference shall be required where any party is *pro se*, or for post-trial motions, habeas corpus/prisoner petitions, Social Security appeals, bankruptcy appeals, objections to a report and recommendation of a magistrate judge, or where the Court determines that a pre-motion conference is unnecessary.

B. Scheduling of Motions

Where permission to file a motion is granted, or where permission is not needed, the parties are to jointly file a letter proposing a briefing schedule for Court approval. If the moving party is unable to obtain the adversary's consent to the proposed briefing schedule, the moving party must state the reasons consent was not obtained, including describing any unsuccessful efforts to reach the adversary.

No party is to serve any motion paper prior to obtaining court approval for the schedule. No changes to the approved schedule may be made without court order.

C. Memoranda of Law

Unless prior permission has been granted, memoranda of law in support of and in opposition to motions are limited to 25 double-spaced pages, using Times New Roman 12 point font, and reply memoranda are limited to 10 pages. Page limits do not include tables, appendices, or attachments. Memoranda of 10 pages or more shall contain tables of contents and authorities. All memoranda must have the date of service plainly visible on the front cover. No letter briefs shall be permitted, unless requested by the Court.

D. Service and Filing of Motions

Except as described below, no motion paper shall be filed until the motion has been fully briefed (the "Bundling Rule").

Parties must serve each motion paper on the other parties, along with a cover letter setting forth whom the movant represents and the papers being served. When the motion is fully briefed, the movant must electronically file all motion papers and deliver a courtesy copy directly to chambers. The courtesy copy shall not be filed with the Clerk of Court.

Upon completion of briefing, the original moving party shall be responsible for immediately filing all motion papers on ECF. Such party is further obligated to furnish to chambers a cover letter specifying each document in the bundle filed by the original moving party. A copy of the cover letter shall be sent to the assigned magistrate judge and to all other opposing counsel of record. Where the moving party is *pro se*, the nonmoving party, if represented, is responsible for compliance with this rule. Any papers served in hard copy shall be converted to electronic format by the party responsible for filing the bundled motion papers. If neither party is represented, all papers will be filed in hard copy by the party serving them.

The Bundling Rule does not apply to the following motions:

- Motions for default judgment;
- Post-trial motions pursuant to FRCP 50, 52, and 59;
- Relief from judgment motions (FRCP 60);
- Motions for reconsideration (Local Civil Rule 6.3);
- Motions requesting an order to show cause;
- Motions pursuant to Fed. R. App. P. 4(a)(5);
- Motions for admission *pro hac vice*; and
- Motions to proceed *in forma pauperis*.

Electronic filings must comply with Individual Rule II, including that all PDF filings are to be in OCR-readable format.

E. Motions for Default Judgment

Motions for default judgment shall be made in accordance with Local Civil Rules 7.1 and 55.2 and must include proof of service in accordance with Local Civil Rule 55.2(c). Motions for default judgment will not be considered absent prior issuance of a certificate of default by the Clerk of Court in accordance with Local Civil Rule 55.1.

Additionally, where service on the defaulting party is made solely on the Secretary of State, counsel must certify that it is unaware of any other address where the defaulting party may be found. If the Servicemembers Civil Relief Act applies to the defaulting party, a compliant non-military affidavit must have been filed.

Notwithstanding any other rule and unless otherwise ordered, all motions for default judgment shall be filed within 30 days after the Clerk of Court has docketed the certificate of default and shall be returnable 20 days after the date the notice of motion shall have been served.

F. Exceptions To The Pre-Motion Conference, Motion Scheduling and Bundling Rules

In accordance with Weitzner v. Cynosure, Inc., 802 F.3d 307, 314 (2d Cir. 2015), any party with a good faith belief that compliance with the Court's Individual Rules would result in the loss of a right may immediately file the motion along with a letter explaining the need for an exception to the Court's Individual Rules. The Court will administratively terminate, without prejudice, any motion so filed without good cause.

G. Oral Argument on Motions

When the parties are represented by counsel, oral argument on motions will be heard at the Court's discretion. The notice of motion shall state that oral argument will be on a date and at a time to be designated by the Court. If necessary, the Court will contact the parties to set the specific date and time for oral argument.

H. Cases Involving *Pro Se* Litigants

Counsel in cases involving *pro se* litigants are required to comply with Local Civil Rules 7.2, 12.1, 33.2, and 56.2, and to file affidavits confirming that they have done so.

IV. CRIMINAL MOTIONS

A. Pre-Motion Conferences in Criminal Cases

Counsel shall advise the Court of any contemplated motion at a status conference scheduled by the Court. If no status conference is scheduled, counsel shall request a pre-motion conference in writing and briefly state the grounds for such motion before filing any motion.

B. Filing and Scheduling of Motions

Except for sentencing motions, follow the rules for civil motions unless otherwise directed by the Court.

C. Memoranda of Law

Unless otherwise directed by the Court, follow the rule for civil motions, except that the Bundling Rule shall not apply to any criminal motion.

D. Oral Argument on Motions

Oral argument on all criminal motions will be heard on a date set by the Court.

E. Sentencing

Applications regarding sentencing shall be made in writing by defense counsel at least 5 business days prior to the date of sentencing. The Government's response, if any, shall be made in writing at least 2 business days prior to the date of sentencing.

All sentencing memoranda must be in OCR-readable PDF format.

V. PRETRIAL PROCEDURES

A. Joint Pretrial Orders in Civil Cases

Unless otherwise ordered or when permission to file a motion under FRCP 56 has been granted, within 60 days from the date discovery in a civil case is certified as complete, the parties shall electronically file and provide to chambers a joint pretrial order for the Court's approval, which shall include the following:

1. The full caption of the action.
2. The names, addresses (including firm names), telephone, fax numbers and email addresses of trial counsel and *pro se* parties.

3. A brief statement by plaintiff as to the basis of subject matter jurisdiction, and a brief statement by each other party as to the presence or absence of subject matter jurisdiction. Such statements shall include citations to all statutes relied on and relevant facts as to citizenship and jurisdictional amount.
4. A brief summary by each party of the claims and defenses that party has asserted that remain to be tried, without recital of evidentiary matters, but including citations to all statutes relied on. Such summaries shall identify all claims and defenses previously asserted which are not to be tried.
5. A statement by each party as to whether the case is to be tried with or without a jury, and the number of trial days needed.
6. A statement as to whether all parties have consented to trial of the case by a magistrate judge (without identifying which parties have or have not so consented).
7. Any stipulations or agreed statements of fact or law that have been agreed to by all parties.
8. A list of the names and addresses of all witnesses, including expert witnesses and possible witnesses who will be called only for impeachment or rebuttal purposes and so designated, together with a brief statement of the expected testimony of each witness. Only listed witnesses will be permitted to testify except when prompt notice has been given and good cause shown.
9. A designation by each party of deposition testimony to be offered in its case in chief, with any cross-designations and objections by any other party.
10. (a) A statement of stipulated facts, if any;

(b) A schedule listing exhibits to be offered in evidence and, if not admitted by stipulation, the party or parties that will be offering them. The schedule will also include possible impeachment documents and/or exhibits, as well as exhibits that will be offered only on rebuttal. The parties will list and briefly describe the basis for any objections that they have to the admissibility of any exhibits to be offered by any other party. Only exhibits listed will be received in evidence except for good cause shown.

B. Filings Prior to Trial in Civil Cases

Jury selection for all trials will be referred to a magistrate judge who will set a schedule for proposed *voir dire* questions.

Unless otherwise ordered by the Court, 15 days before the date of commencement of the trial, if such a date has been fixed, or 30 days after the filing of the final pretrial order if no trial date has been fixed, the parties shall file:

1. Motions *in limine* addressing evidentiary or other trial management issues in dispute. Responses, if any, shall be due 5 days later. Oral argument, if necessary, shall be scheduled at the convenience of the Court.
2. In jury cases, proposed jury instructions and a verdict sheet. Requests to charge should be limited to elements of the claims, the damages sought and defenses. General instructions will be prepared by the Court. Parties shall submit a hard-copy of such materials and a copy on CD in Microsoft Word format. In lieu of submitting a CD, counsel may contact chambers to obtain an email address to send the electronic versions of the documents.
3. A detailed statement regarding damages and other relief sought for each claim.
4. In non-jury cases, a statement of the elements of each claim or defense involving each party, together with a summary of the facts relied upon to establish each element.
5. A pretrial memorandum in any case where a party believes such would be useful.

All exhibits must be pre-marked for the trial and exchanged with the other parties at least 10 days before trial. Where exhibits are voluminous, they should be placed in binders with tabs.

C. Filings Prior to Trial in Criminal Cases

Where the parties have consented to having a magistrate judge select the jury, jury selection will be referred to a magistrate judge. The judge presiding over jury selection will set a schedule for proposed *voir dire* questions.

Unless otherwise directed by the Court, the following procedures shall be followed:

1. Motions *in limine* addressing evidentiary or other trial management issues in dispute must be filed no later than 10 days before the date fixed for commencement of jury selection. Responses, if any, shall be due 5 days later. Oral argument shall be scheduled at the convenience of the Court.
2. Lists of all potential witnesses and any other individuals and entities that may be mentioned at trial, shall be submitted at least 7 days before jury selection.

3. Requests to charge shall be submitted at least 7 days before trial in hard copy and on a CD in Microsoft Word format. In lieu of submitting a CD, counsel may contact chambers to obtain an email address to send the electronic versions of the documents.
4. A pretrial memorandum in any case where a party believes such would be useful.

VI. PROCEDURE FOLLOWING NON-JURY TRIAL

In non-jury trials, parties shall file proposed findings of fact and conclusions of law no later than 10 days after the conclusion of trial unless otherwise ordered by the Court. No responses to such submissions shall be permitted.

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