

**INDIVIDUAL MOTION PRACTICE AND RULES OF
JUDGE ERIC N. VITALIANO**

United States District
Court Eastern District of
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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 of Court'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, non-dispositive 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. Emails and Faxes.** Emails to Chambers are permitted only for time-sensitive requests and where prior authorization from Chambers is obtained.

Conference requests may not be submitted via email. Any document 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. Faxes are discouraged.

- 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. For matters requiring judicial approval, such as the settlement or voluntary dismissal of Fair Labor Standards Act or certified class claims, or for claims involving a minor, the parties must 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.
 4. Especially voluminous filings shall be split into multiple ECF entries as needed, in consultation with the ECF Help Desk.
- B. Orders.** Orders will be posted electronically.
- C. OCR Readable Format.** All PDF electronic filings must be in OCR-readable format.
- D. Courtesy Copies.** Courtesy copies are not desired and should not be sent to Chambers. If required, parties will be specifically advised of the need to send courtesy copies via the docket.
1. Parties filing non-text exhibits may request pre-approval to file a hard copy with the Clerk of Court and to securely transmit copies to Chambers via electronic means. 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 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

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; or
- (ii) for a change of venue.

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

Service of the letter by the moving party within the time requirements of FRCP 12(a) shall constitute timely service of a motion made pursuant to FRCP 12(b).

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 or a magistrate judge, or where the Court determines that a pre-motion conference is unnecessary. For discovery motions, parties should follow Local Civil Rules 6.4 and 37.3.

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 of the schedule. No changes to the approved schedule may be made without court order.

C. Memoranda of Law

Counsel are expected to exercise their professional judgment as to the length of memoranda of law, and page limits may be imposed if that expectation is not met. All memoranda shall use Times New Roman twelve-point font, and shall have the date of service plainly visible on the front cover. Memoranda of ten pages or more shall contain tables of contents and authorities. 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. 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 file on ECF 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 non-moving 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;
- Motions for relief from judgment pursuant to FRCP 60;
- Motions for reconsideration (Local Civil Rule 6.3);
- Motions requesting an order to show cause;
- Motions pursuant to Federal Rule of Appellate Procedure 4(a)(5);

- Motions for admission *pro hac vice*;
- Motions to proceed *in forma pauperis*; and
- Motions in criminal matters.

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

E. Exceptions to the Pre-Motion Conference, Motion Scheduling, and Bundling Rules

As indicated above, these individual practices do not require a pre-motion conference or that a motion be fully briefed before it is filed when strictly enforced time limits must be met to preserve rights. Regardless, if any party concludes in good faith that delaying the filing of a motion, in order to comply with any aspect of these individual practices, will deprive the party of a substantive right, the party may file the motion within the time required by the Federal Rules of Civil and/or Appellate Procedure, together with an explanation of the basis for the conclusion.

F. Motions for Default Judgment

Motions for default judgment will not be considered absent a prior issuance of a certificate of default by the Clerk of Court in accordance with Local Civil Rule 55.1. To wit, a movant must have submitted an affidavit showing (i) that the party against whom a notation of default is sought is not an infant, in the military, or an incompetent person; (ii) that the party has failed to plead or otherwise defend the action; and (iii) that the pleading to which no response has been made was properly served. Additionally, where service was made solely on the Secretary of State or other agent designated for service of process, counsel must certify that it is unaware of any other address where the defaulting party may be found.

After an entry of default by the Clerk of Court, a motion 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©, which, notwithstanding service on any other person, must include service at the last known address of the defaulting party. Additionally, the movant for default judgment must append to its motion an affidavit containing facts to support a finding that an investigation into whether the defaulting party is in the military was conducted *after* entry of default by the Clerk of Court. Certification of a defendant's military status can be obtained from the Department of Defense's Servicemembers Civil Relief Act website: <https://scra.dmdc.osd.mil>. Notwithstanding any other rule, and unless otherwise ordered, all motions for

default judgment shall be returnable 14 days after service of the motion.

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. Bail Modification

Any bail modification requests must state the positions of the government and the pretrial or probation officer supervising the defendant, and include the name of such officer in the request. If the position of any of these parties is not stated, the letter must indicate why.

C. Filing and Scheduling of Motions

Except for sentencing motions, follow the rules for civil motions, unless otherwise directed by the Court. The Bundling Rule does not apply to criminal matters.

D. 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.

E. Oral Argument on Motions

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

F. Sentencing

Applications regarding sentencing shall be made in writing by defense counsel least two weeks before the scheduled sentencing date. The government's response, if any, shall be made in writing at least one week before the scheduled sentencing date.

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

V. PRE-TRIAL PROCEDURES

A. Joint Pre-trial 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 pre-trial 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 bases 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 pre-trial 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 five 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 these materials to Chambers via email in Microsoft Word format.
3. A detailed statement regarding damages and other relief sought for each claim.
4. In non-injury 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 pre-trial memorandum in any case where a party believes such would be useful.

All exhibits must be pre-marked for trial and exchanged with the other parties at least ten 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 and scheduling shall be followed:

1. Motions *in limine* addressing evidentiary or other trial management issues in dispute must be filed no later than 14 days before the date fixed for commencement of jury selection. Responses, if any, shall be due five days later. Oral arguments shall be scheduled at the convenience of the Court.
2. Lists of potential witnesses and any other individuals and entities that may be mentioned at trial shall be submitted at least seven days before

jury selection.

3. Requests to charge and proposed verdict sheets shall be submitted via email in Microsoft Word format at least seven days before trial.
4. A pre-trial memorandum in any case where a party believes such would be useful shall be submitted at least seven days before trial.

VI. PROCEDURE FOLLOWING NON-JURY TRIAL

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

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