

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
DANIEL PATRICK MOYNIHAN COURTHOUSE
500 PEARL STREET, COURTROOM 17B
NEW YORK, NY 10007
(212) 805-6715

RICHARD M. BERMAN
United States District Judge

NOVEMBER 2020

INDIVIDUAL PRACTICES OF HON. RICHARD M. BERMAN

Matters before Judge Berman shall be conducted in accordance with the following practices unless otherwise ordered by the Court.

1. Communications with Chambers

A. Letters. Communications with Chambers shall be by letter. Letters should be file electronically on ECF. Copies of correspondence between counsel shall **not** be filed on ECF or otherwise sent to the Court.

B. Telephone Calls. Telephone calls to Chambers are **not** permitted except in emergency situations. Any calls to Chambers must include counsel for both sides to the litigation and may not be ex parte.

C. Faxes. Faxes to Chambers are **not** permitted unless specifically authorized.

D. Emails. Emails to Chambers are **not** permitted unless specifically authorized.

E. Requests for Adjournments or Extensions of Time. Requests for adjournments or extensions of time shall be by letter and shall be made at least 48 hours prior to the scheduled date. Requests shall state (1) the original date, (2) the number of previous requests for adjournment or extension, (3) whether previous requests were granted or denied, and (4) whether the adversary consents and, if not, the reasons given by the adversary for refusing to consent. If the requested adjournment or extension affects any other scheduled dates, a proposed scheduling order (reflecting only business days) must be attached.

2. Motions

A. Pre-Motion Conferences in Civil Cases. A pre-motion conference with the Court is required before making any motion, except: (1) motions that are required by Federal Rule of Appellate Procedure 4(a)(4)(A) to be made by a date certain; and (2) pro hac vice motions. To arrange a pre-motion conference, the moving party shall submit a letter not to exceed **three** pages (double-spaced) in length setting forth the bases for the anticipated

motion. The opposing party may respond with a letter not to exceed **three** pages (double spaced) within three business days of receiving the pre-motion letter.

Any application presented by order to show cause must include a written explanation (with case and statutory authority) why ordinary motion practice is not available and why the matter is appropriately treated as an order to show cause.

B. Courtesy Copies of Documents in Excess of 25 Pages.

1. Pleadings. Courtesy copies of pleadings (including Fed. R. Civ. P. 7.1 Statements), marked as such, shall be submitted to Chambers as soon as possible after filing.

2. Motion Papers. Courtesy copies of all motion papers and any accompanying affidavits or exhibits, marked as such, shall be submitted to Chambers at the time the papers are served. Courtesy copies of any accompanying affidavits or exhibits shall be bound, labeled, tabbed, and indexed.

C. Memoranda of Law. Memoranda of law in support of and in opposition to motions may be up to 25 pages (double-spaced), and reply memoranda may be up to 10 pages (double-spaced). All memoranda of 10 pages or more shall contain a table of contents and a table of authorities. Use double spacing, one-inch margins, and 12-point font for text and footnotes (footnotes may be single-spaced).

1. Opening Memoranda. All motions shall be filed **jointly** if there is more than one movant on a side (i.e., plaintiffs or defendants) unless the Court provides otherwise.

2. Opposition/Cross-Motion. All parties opposing a motion shall file a joint opposition.

Any cross-motion shall be included in the opposition brief.

3. Reply. One joint reply may be filed in support of a motion. Replies shall include any opposition to a cross-motion.

D. Affidavits and Exhibits. The Court does not generally perceive the need for extensive affidavits or exhibits in support of or in opposition to a motion.

E. Filing of Motion Papers. Motion papers shall be filed promptly after service.

F. Oral Argument on Motions. Most motions are resolved “on submission.” Parties may request oral argument at a pre-motion conference.

G. Motions for Final Approval of Class Settlement and Attorneys’ Fees. Parties moving for final approval of a class settlement and for class counsel’s fees should include

in their motion papers, (1) class counsel's contemporaneous time sheets, which may be submitted for in camera review; (2) invoices documenting class counsel's requested expenses; (3) the claims administrator's requested fees and expenses, and contemporaneous time sheets (which should include an estimated amount of fees and expenses to administer the settlement fund after final approval of the settlement and approval of any final distribution plan); (4) the claims administrator's contemporaneous time sheets may be submitted for in camera review; and (5) invoices documenting the claims administrator's requested expenses.

Any subsequent motion for an award of claims administrator's fees and expenses should include contemporaneous time sheets and invoices documenting the fees and expenses incurred after the filing of the motion for final approval of settlement and for class counsel's fees.

Neither attorneys' fees or expenses nor the claims administrator's fees or expenses are to be paid until at least 80% of the settlement fund has been distributed, i.e. checks have been mailed, to the class.

3. Confidentiality Orders

Litigants should assume that all pleadings and documents will appear on the public docket, with very limited exceptions.

Proposed confidentiality orders submitted to the Court shall include the following language:

“The Court retains discretion whether to afford confidential treatment to any confidential document or information contained in any confidential document submitted to the Court in connection with any motion, application, or proceeding that may result in an order and/or decision by the Court.”

4. Sealing

A. Filing Under Seal in Civil and Miscellaneous Cases

1. **Sealing/Redactions Not Requiring Court Approval.** Federal Rule of Civil Procedure 5.2 describes sensitive information that must be redacted from public court filings without seeking prior permission from the Court.
2. **Sealing/Redaction Requiring Court Approval.** Motions or Letter Motions for approval of sealed or redacted filings in civil and miscellaneous cases and the subject documents, including the proposed sealed document(s), must be filed electronically through the court's ECF system in conformity with the court's standing order, 19-mc-00583, and ECF Rules & Instructions, section 6.

B. Filing Under Seal in Criminal Cases

1. No pleadings, motions, or other documents may be filed under seal without prior authorization from the Court. When specifically authorized, counsel may email to bermannysdchambers@nysd.uscourts.gov an unredacted submission with a request to file under seal. If authorized to file under seal, counsel shall thereafter file a redacted version on the public docket.

5. Pre-trial Procedures

After the completion of discovery, the Court shall hold a conference to schedule the submission of pre-trial documents. No submissions other than those scheduled by the Court will be considered.

A. Joint Pre-trial Orders in Civil Cases. The parties shall submit to the Court for its approval a **joint** pre-trial order that includes the information required under Federal Rule of Civil Procedure 26(a)(3) and the following:

1. The full caption of the action;
2. The names, addresses (including firm names), and telephone and fax numbers of trial counsel;
3. A brief statement by the plaintiff(s) of the basis of subject matter jurisdiction, and a brief joint statement by other parties as to the presence or absence of subject matter jurisdiction. Such statements shall include citations to authorities relied upon and relevant facts as to, for example, citizenship and jurisdictional amount;
4. A brief summary by each party of the claims (including counterclaims and cross-claims) and defenses each party has asserted that remain to be tried, including citations to all authorities relied upon. Such summaries shall also identify all claims (including counterclaims and cross-claims) and defenses previously asserted that are not going to be tried;
5. A statement by each party as to whether the case is to be tried with or without a jury, the number of trial days needed, and the estimated time needed for direct and cross-examination of each witness;
6. A statement as to whether or not all parties have consented to trial of the case by a magistrate judge (without identifying which parties have or have not consented);
7. All stipulations and/or agreed statements of fact or law;
8. A list of witnesses each party intends to call in its case-in-chief, in the order of appearance, indicating whether each witness will testify in person or by deposition and a brief description of the testimony of each witness (including the qualifications of any expert witnesses);

9. A list and brief explanation of all exhibits to be offered by each party. Any objections, and the basis for each objection, shall be noted following the exhibit objected to; and

10. A brief statement of the damages claimed, including dollar amounts, for each claim, counterclaim, and cross-claim.

Expert testimony will not be admitted at trial unless the party calling such expert has complied with Federal Rule of Civil Procedure 26(a)(2).

B. Filings Prior to Trial in Civil Cases. The parties shall file at the time of the filing of any joint pre-trial order, the following:

1. In jury cases—joint jury instructions, joint proposed voir dire questions, a joint verdict sheet, and any motions in limine. Submissions that are not joint will be rejected. Responses to motions in limine shall be due 7 days after filing of the motion(s).

Any objections to a party’s proposed jury instruction shall be noted following the instruction objected to, and an alternative instruction shall be proposed in the same document. In addition to the courtesy copies required under Paragraph 2.B, proposed jury instructions shall be submitted to the Court in electronic format;

2. In non-jury cases—an affidavit for each witness (of up to 10 pages double-spaced) shall suffice (and serve) as that witness’s direct testimony. Live cross-examination and re-direct only will occur at trial; and

A statement of the elements of each claim, counterclaim, cross-claim, or defense, together with a summary of the facts relied upon to establish each element.

C. Prior to Trial in Criminal Cases. The parties shall file in accordance with the schedule set by the Court and the parties, the following:

1. Joint jury instructions, joint proposed voir dire questions, a joint verdict sheet, and any motions in limine. Submissions (other than motions in limine) that are not joint will be rejected. Responses to motions in limine shall be due 7 days after filing of the motion(s) unless otherwise ordered by the Court.

Any objections to a party’s proposed jury instructions shall be noted following the instruction objected to, and an alternative instruction shall be proposed in the same document. In addition to the courtesy copies required under Paragraph 2.B, proposed jury instructions shall be submitted to the Court in electronic format.

2. “Brady” Material. Materials and information required to be disclosed pursuant to Brady v. Maryland and its progeny (“Brady Material”) – whether in written or recorded format, or otherwise – must be disclosed to defense counsel according to the following schedule:

a. Brady Material known to the Government at the time of Indictment – other than purely impeachment materials and information required to be produced pursuant to Giglio v. United States and its progeny (“Giglio Material”) – must be produced to defense counsel no later than two weeks following the date of the filing of the indictment, regardless of whether or not the parties are engaged in plea discussions. Such Brady Material includes, by way of example, not only information that tends to exculpate a Defendant or support a potential defense to the charged offense(s), but also information that tends to mitigate the degree of the defendant’s culpability or to mitigate punishment. This requirement applies regardless of whether the Government “credits” the Brady Material.

b. Brady Material (other than Giglio Material) that becomes known to the Government following filing of the Indictment must be disclosed, absent exceptional circumstances, approved by the Court, within two weeks of when it becomes known and, in any event, no later than four weeks prior to any trial or guilty plea.

c. Absent exceptional circumstances, approved by the Court, Giglio Material must be disclosed four weeks prior to the date of the start of trial or guilty plea. Such material includes, by way of example) a witness’s prior inconsistent statements, written or oral; benefits given and promises made to the witness; information that tends to show that the witness has a personal motive to inculpate the defendant; and information that tends to show that the witness has a physical or mental impairment that could affect the witness’s ability to perceive, recall, or recount relevant events. Giglio Material developed less than four weeks before trial (e.g., as a result of further interviews of witnesses) must be disclosed immediately.

d. To achieve adequate compliance with the foregoing rules, the Government has a continuing, good faith obligation to seek Brady Material and Giglio Material from law enforcement and regulatory agencies that are or have been involved in the prosecution of the defendant or in parallel proceedings or investigations involving the defendant.

e. The Section C. time-tables, being necessary to fulfill the constitutional obligations imposed by Brady v. Maryland, Giglio v. United States, and their progeny, apply regardless of whether the Brady Material and Giglio Material also are required to be produced pursuant to the Federal Rules of Criminal Procedure or the Jencks Act and the time-tables applicable thereto.

f. For good cause shown, in exceptional circumstances, the Government may seek a protective order delaying disclosure of materials and information.

g. If the Government fails to comply with these obligations, the Court, in addition to ordering production of the information, may: (1) specify the terms and conditions of such production; (2) grant a continuance; (3) impose evidentiary sanctions; (4) impose sanctions on any responsible lawyer for the Government; (5) dismiss charges before trial or vacate a conviction after trial or a guilty plea; or (6) enter any other order that is just under the circumstances.

6. Default Judgment Procedure

A. Prepare an Order to Show cause for default judgment and make the Order returnable at a conference before the Court. Leave blank the date, time, and room of the conference. (Please note: Service of all Orders to Show Cause shall be made in the same manner required to commence the action.) The Court will set the date, time, and room when he signs the Order.

B. The following papers must be provided in support of the Order to Show Cause:

1. an attorney's affidavit stating why a default judgment is appropriate and providing legal authority why an inquest is unnecessary;
2. a proposed default judgment;
3. a copy of the affidavit of service of the original summons and complaint;
4. a Certificate from the Orders and Judgments Clerk (500 Pearl Street) stating that no answer has been filed;

C. File the Order to Show Cause and supporting documents on ECF, following the Clerk's Office Electronic Case Filing Rule 16.3.

D. Appear at the conference on the return date with the proposed default judgment separately backed. The proposed judgment must be approved by the Orders and Judgments Clerk prior to the conference. The default judgment must include a recital of service of the Order to Show Cause and Affidavit in support upon the defaulting party, including the date of service.

7. Criminal Case Sentencing Submissions

Sentencing submissions, including any letters, are to be filed electronically via ECF. Letters must be filed together as attachments to a single document marked SENTENCING MEMORANDUM with the caption and docket number clearly indicated.

If a party seeks to redact or seal information (beyond the (eleven) categories of information identified in the Southern District of New York's ECF Privacy Policy), an application to do so must be served and filed with the Court at the time the sentencing memorandum is served. The application should clearly identify the proposed redaction and explain the reasons for the redaction or sealing and state whether opposing counsel agrees to the redaction or sealing. The redacted version must be filed on ECF. The unredacted version shall be submitted to Chambers for the Court's determination as to whether sealing of such document is appropriate.

A defendant's sentencing memorandum and the Government's sentencing memorandum are due in accordance with the schedule set by the Court.

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