

PRO SE LITIGATION GUIDELINES



*United States District Court
Western District of New York
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FOREWORD**Read This Before Filing a Case****GUIDELINES FOR PRO SE LITIGANTS
IN THE WESTERN DISTRICT OF NEW YORK**

These guidelines are designed to help persons who represent themselves in lawsuits (known as pro se litigants) become familiar with the rules and procedures which must be followed in the United States District Court for the Western District of New York. Lawsuits in federal court go through a number of steps from the time they are filed until they are ultimately resolved by a judge, a jury or through settlement. These guidelines summarize the procedures concerning where and how to file the necessary legal papers, the exchange of information between opposing parties, trial preparation, and certain other legal procedures which you and your opponent may need to use before your case is finally resolved.

This summary is intended only as a general guide and is not exhaustive. Where applicable, the guidelines cite to the actual rules governing procedure in the federal courts generally and the local rules which are used in the Western District of New York. This summary does not take the place of or relieve a pro se litigant of the responsibility for complying with the Local Rules, the Federal Rules of Civil Procedure, or any other obligations imposed by the law.

The Local Rules of Civil Procedure and the various forms needed for filing a case pro se (these forms are discussed in detail below) may be obtained in person from the intake clerk in the Clerk's Office, by mail from the Court's Pro Se Office, and from the Western District Court web site at <<http://www.nywd.uscourts.gov>>. The Pro Se Office may be reached by telephone at (716) 263-6263 (Rochester Division) or (716) 551-5759 (Buffalo Division). The Clerk's Office telephone numbers are (716) 263-6263 (Rochester Division) and (716) 551-4211.

Beginning a Lawsuit

Jurisdiction of the United States District Court

In order for a federal court to hear a case, it must have jurisdiction over the particular action and the parties to the action. Federal court jurisdiction may be based on either (1) a federal question or (2) diversity of citizenship. A federal question case is one that alleges that a federal law, either a statute or a federal constitutional provision, has been violated. A case's federal jurisdiction is based on diversity of citizenship when the parties reside in different states. If there is no federal statute governing your situation, and you and the defendant are citizens of the same state, you should consider bringing your action in state court. In New York State, the Supreme Courts of the State of New York are courts of general jurisdiction -- they can hear and decide any kind of legal controversy between two parties.

Where to File

The United States District Court for the Western District of New York comprises two divisions: Buffalo and Rochester. Generally, a case must be filed in the division where the defendant resides or where the claim arose. In cases based on diversity of citizenship (i.e., when the plaintiff and defendant are residents of different states), suit may be brought in the division where the plaintiff resides. However, because pro se cases are randomly assigned, your case may be heard by a judge located in either division.

The Buffalo Division includes the counties of Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming.

The Rochester Division includes the counties of Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne and Yates.

The complaint and other pleadings filed must be delivered or mailed to the Clerk's office in the appropriate division at the addresses listed below. Do not send papers concerning your case directly to the judge.

Buffalo Division:
Office of the Clerk
304 United States Courthouse
68 Court Street
Buffalo, New York 14202
or deliver to the Intake Clerk located on
the 3rd floor.

Rochester Division:
Office of the Clerk
2120 United States Courthouse
100 State Street
Rochester, New York 14614-1387
or deliver to the Intake Clerk located on
the 2nd floor.

Filing Fees

In order to file the completed complaint and other necessary papers, you must pay a \$150.00 fee. If you pay in person, you may pay in cash. If you file by mail, you may send a money order or check made out to "Clerk, United States District Court." The court does not accept payment by credit card.

In Forma Pauperis

A plaintiff who cannot pay the filing fee may request to proceed in forma pauperis. The request must be submitted with the complaint and must be accompanied by an affidavit setting forth the plaintiff's financial resources. Form affidavits may be obtained in person from the intake clerk in the Clerk's Office, by mail from the Court's Pro Se Offices, and from the Western District Court web site at <<http://www.nywd.uscourts.gov>>..

Assignment of Cases

Civil cases are assigned at random to the judges of the district court. Assignments are made so that no party or lawyer may choose the judge to whom the case is assigned.

What to File

A **Civil Cover Sheet** (JS-44) must be filled out and submitted with your **complaint**, along with the **Summons in a Civil Action** form (AO-440) (one original and a copy for each defendant). Civil cover sheets may be obtained in person from the intake clerk in the Clerk's Office, by mail from the Court's Pro Se Offices, and from the Western District Court web site at <<http://www.nywd.uscourts.gov>>.. Instructions for filling them out are as follows:

- (1) Your name as the Plaintiff.
- (2) The names of the people you are suing are the defendants. (Use a second sheet if necessary).
- (3) Fill in your county and one defendant's county.
- (4) Under "Plaintiff's Attorney" put "Pro Se," your name, prisoner's number if applicable, and address.
- (5) Leave "Defendant's Attorney" blank.
- (6) Under "Basis of Jurisdiction," check the appropriate block.

- (7) Under "Cause of Action," put the statute you cited in your complaint's jurisdictional statement.
- (8) Under "Nature of Suit" check the appropriate box.
- (9) Under "Origin," check box 1: "Original Proceeding."
- (10) Under "Citizenship of Principal Parties," fill in the appropriate information.
- (11) Under "Requested in Complaint," write in the amount of money you are suing for, and check the appropriate box after "jury demand."
- (12) List all related cases, using a separate sheet if necessary.
- (13) Date the form, and sign your name, followed by "Pro Se" on the last line.

The Complaint

A civil lawsuit is begun by filing a complaint in the office of the Clerk of the Court. Complaint forms may be obtained in person from the intake clerk in the Clerk's Office, by mail from the Court's Pro Se Offices, and from the Western District Court web site at <http://www.nywd.uscourts.gov>.

"Filing" a document means to deliver it to the Clerk of Court either in person or by mail to have it file-stamped. The purpose of the complaint is to give notice to the persons being sued and to the court as to the nature of the lawsuit. The complaint should contain:

(1) A caption specifying the court in which the case is filed and the names of the parties. Every document you file should have a caption at the top of the first page. The complaint and all other pleadings must be on 8 1/2' x 11" paper. The Court allows double spacing or 1-1/2 spacing. Following is a sample caption:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Your Name,

Plaintiff,

-CV-

LEAVE THIS BLANK FOR NOW. THE CLERK
OF THE COURT WILL ASSIGN A 'DOCKET
NUMBER' TO YOUR ACTION WHICH THEY
WILL WRITE ONTO YOUR COMPLAINT, AND
WHICH YOU SHOULD PUT IN THIS POSITION
ON EVERY DOCUMENT YOU FILE AFTER THE
COMPLAINT

v.

COMPLAINT (This is the title.)

Defendants' Names,

Defendant(s).

You should list the names of all the defendants you wish to sue in the caption. Do not use phrases like 'et al.' or 'etc.' in your caption. Do not use 'John or Jane Doe' unless you do not know the defendant's name. If you know only a nickname, use that in the caption. You will need to describe the defendants more fully in another part of the complaint; if you don't know their names, be prepared to describe them by their titles or positions. It is your obligation as plaintiff to identify the people who allegedly injured you.

(2) A short and plain statement of why the court has jurisdiction. Your complaint should be written in short, numbered paragraphs, each of which contains a single idea. The first paragraph should identify the basis of the Court's jurisdiction. You should include in your jurisdictional statement a statement of venue, that is, a statement why you are filing suit in the Western District of New York.

Generally speaking, you must bring a federal action in the district in which the defendants reside, or in which the events giving rise to your claim occurred. If your claim arises in or the defendants live in the 17 western-most counties of New York State, then it is properly venued in the Western District of New York. In a separate paragraph for each individual party, you should identify each party by name, title or some other unique characteristic. You should also indicate where the party lives or maintains a business. The location of a defendant's residence or place of business is important for determining venue.

(3) A short and plain statement of the claim showing why you, the plaintiff, are entitled to relief, including a concise statement of the facts. Generally, each statement of the claim should be made in separately numbered paragraphs, with each paragraph limited as far as possible to a statement of a single set of factual circumstances. In short, clear, numbered paragraphs describe the actions or omissions of the defendant that you believe violated your rights, and identify the legal rights you believe the defendants violated. If the statute under which you are bringing your case requires you to exhaust administrative remedies before filing a federal action, describe your efforts to exhaust those administrative avenues.

(4) A statement of the particular relief sought. Tell the Court what you want to require the defendant to do, whether it is to stop doing something, to start doing something, or to pay you damages.

Sign and date your complaint, if possible in the presence of a notary public. If you do not have access to a notary public, write the following above your signature: "I declare under penalty of perjury that the foregoing is true and correct. Executed on <insert the date you sign the complaint>." The complaint, as well as all subsequent pleadings filed in the case, should be simple and direct; no technical legal jargon is required. The complaint and all subsequent pleadings must include your address and telephone number, and must be signed by you. See Rules 8-11, Federal Rules of Civil Procedure. It is mandatory that you keep the Clerk of Court informed of your current address and telephone number during the entire lawsuit. Failure to do so is grounds for dismissal of the case. See Local Rule of Civil Procedure 5.3(d).

The Summons

A summons is an official court document, signed by the Clerk, directing a defendant to respond to a complaint. A summons for each defendant must be completed and submitted to the Clerk of Court with the complaint. Summonses may be obtained in person from the intake clerk in the Clerk's Office, by mail from the Court's Pro Se Offices, and from the Western District Court web site at <<http://www.nywd.uscourts.gov>>.

The summons must show the date by which the defendant is required to respond to the complaint. Defendants generally have twenty (20) days to file an answer after they are served with the complaint; United States defendants have sixty (60) days. Defendants in cases seeking review of decisions under the Social Security Act have ninety (90) days to answer. Defendants in cases brought under the Freedom of Information Act have thirty (30) days to answer. Failure to include the response date on the summons is grounds for dismissal of the case. You should also submit to the Clerk a copy of the complaint which you intend to serve on each defendant so that the Clerk can stamp the copies as filed and write on them the case number and judge assigned.

Instructions for Completing the Summons Form:

- (a) Write your name above the "v" as plaintiff; write in the names of all the people you are suing as defendants below the "v."
- (b) Write the name and address of one defendant after the "To." You must make a separate summons for each defendant.
- (c) Because you do not have an attorney, in the space after "plaintiff's attorney" fill in your own name and your address. Cross out "Plaintiff's Attorney" and write "Pro Se" after your name.
- (d) Put the proper number in the space before "days after service of this summons..."

The summons will be signed and sealed by the Clerk and returned to you along with the service copies of the complaint.

Service of Process in Federal Court

Service of process is the actual delivery of the summons and complaint to the defendant in your case. Service of process in federal court is governed by Rule 4 of the Federal Rules of Civil Procedure. You are responsible for having a summons and a copy of the complaint “served” upon each party to the lawsuit, and for returning proof of the service to the Court. The summons and complaint must be served within 120 days of filing the complaint or the case may be dismissed. A party who cannot complete service within 120 days may request the Court to extend the time to serve the summons and complaint.

Anyone who is over 18 years old and is not a party to the action may serve the summons and complaint. If the Court has granted you permission to proceed in forma pauperis, the United States Marshal will serve process at no charge. Parties who have not been granted in forma pauperis status must make arrangements for service at their own expense (or request the defendant to waive service -- see below). Professional process servers are listed in the telephone directory yellow pages and will serve a summons and complaint for a fee. Any other person who is at least 18 years of age and who is not a party to the lawsuit, such as an employee, family member or friend, may serve the summons and complaint, but they must be careful to follow the service procedures exactly or the case may be dismissed for improper service. The United States Marshal can also serve process on behalf of a party who has not been granted permission to proceed in forma pauperis, but the party must first obtain an order of the Court directing service by the Marshal (forms for doing so may be obtained in person from the intake clerk of the Clerk’s Office, by mail from the Pro Se Office, and from the Western District Court web site at <<http://www.nywd.uscourts.gov>>). There is a small fee per complaint served for this service.

If the Marshal fails to complete service upon the first attempt, it is your responsibility to require the Marshal to try to serve again, or to move the Court for an order directing the Marshal to make a second attempt.

The procedures for serving process differ depending on whether the defendant is an individual within the United States (including territories), in a foreign country, under the age of 18 or incompetent, or is a corporation, the United States (or a government agency), or a foreign, state or local government. It is important to follow the rules for service on these different persons and entities to the letter. The methods of serving process upon individuals within the United States and its territories are contained in Federal Rule of Civil Procedure 4(e) and in state law.

Waiver of Service of Summons and Complaint

You can avoid the cost of service by requesting a defendant to waive service of the summons and complaint. Procedures for making this request are set forth in Federal Rule of Civil Procedure 4(d) and forms (AO 398 and AO 399) are available in the Clerk's office. If a defendant refuses to waive service of the summons and complaint, you must arrange for service and the Court may require the defendant to pay for the cost of this subsequent service.

Proof of Service

Finally, you must return to the court the appropriate proof that the defendants have been served. Where service is made by mail, proof of service must be made by filing with the Court the completed AO 399 form(s) that you sent to the defendant or defendants. Where service is made other than by mail, proof of service can be made by completing and returning to the Clerk of Court a civil process return form. It is the responsibility of the person serving process to prepare and submit the forms showing proof of service. Plaintiffs should read Federal Rule of Civil Procedure 4 to become thoroughly familiar with the procedures governing service of process.

Responses to the Complaint

The Answer

Once the complaint and summons is served, the defendant, in an ordinary civil case, will have twenty (20) days from the date of service of the complaint to file an "answer." The United States or a federal official will have sixty (60) days (except the Social Security Administration, which has 90 days). Just as the plaintiff in the complaint must make a short and plain statement of the claim, the defendant in the answer must state the defenses to the claim and either admit or deny the specific allegations contained in the complaint. As with the complaint and all other pleadings, a defendant must file the answer with the Clerk of Court and serve a copy on the opposing party. Failure to answer or otherwise defend in a timely fashion is grounds for judgment by default against the defendant (see Federal Rule of Civil Procedure 55).

Motions Against the Complaint

Although most defenses to a complaint must be asserted in the answer, a defendant has the option of asserting certain defenses in the form of a motion to dismiss the complaint before filing the answer. A motion is an application to the Court asking that the Court take some particular action in the case. Motions to dismiss the complaint typically make the following arguments: (1) the Court lacks the power to decide the subject matter of the case or to compel a defendant to appear; (2) service of process was not sufficient; or (3) the complaint fails to state a claim which the law will recognize as enforceable.

If such a motion is made by a defendant in your case, you will have ten (10) days after it is served in which to file a response. It is very important to respond to such motions to dismiss; otherwise, the case may be dismissed without your having an opportunity to present an argument to the Court.

Motions

A motion is an application to the Court asking that the Court take certain action (for example, to dismiss or to extend time) with respect to the conduct of the case. Unless made orally during a hearing or trial, motions should be in writing, should state the order or action sought, and should be accompanied by a memorandum setting forth the facts and legal authority supporting the motion. Motions are the primary way for litigants to ask the Court to take action in a case. They must be filed with the Clerk of Court and served on the opposing party. Written motions should not be made directly to the judges. Each party opposing a motion has ten (10) days to respond after service of the motion, except that twenty (20) days is allowed for response to a motion for summary judgment. (Summary judgment is discussed in a later section). If a party fails to file a response to a motion, the Court will assume that the motion is not opposed.

The proper form for motion papers requires you to present the Court with three separate documents which all become part of your motion papers. You may obtain forms for bringing a motion in person from the intake clerk in the Clerk's Office, by mail from the Pro Se Office, and from the Western District Court web site at <<http://www.nywd.uscourts.gov>>.

The first document is a **Notice of Motion**. The Notice of Motion is addressed to your opponent.

In the upper left hand corner of your Notice of Motion, copy the caption of your case as it appears on an official document (for example on the order granting or denying you permission to proceed in forma pauperis). In the upper right hand corner, at the same height on the paper as the caption, write the docket number of your case (for example 89-CV-1234C). Below the docket number write "Notice of Motion."

Directly beneath the caption write "To" and the name of the party to whom the motion is addressed. On the next line write "Please take notice that the undersigned will move this Court on _____, at a term of this Court to be held at 100 State Street, Rochester New York (or 68 Court Street, Buffalo New York) for an order. . . ," and then insert the relief you want the Court to give. For example you might say "for an order appointing counsel to represent the plaintiff;" or ". . . for an order compelling defendants to respond to plaintiff's interrogatories;" or ". . . for an order compelling discovery pursuant to Federal Rules of Civil Procedure Rule 37"; or ". . . for an order granting summary judgment." Leave the blank empty; the Court will fill it in later.

Sign your Notice of Motion. The judge's courtroom deputy will schedule your motion according to the judge's calendar, and you will be notified.

The second document that is part of your motion papers is an **Affidavit in Support** of your Motion. The caption and index number on your affidavit should be written out just as on the Notice of Motion, but instead of writing "Notice of Motion," you should write "Affidavit in Support of Motion" below the docket number.

Your affidavit should briefly re-state the relief you want the Court to grant, and then should explain in short numbered paragraphs the reasons you believe you are entitled to that relief. For example, in moving for Appointment of Counsel, you should describe your inability to continue the action without legal assistance, you should explain to the Court why you believe your lawsuit has merit, and you should tell the Court what efforts you made to secure counsel on your own.

***Note:** These instructions assume that you have access to a Notary Public, and can get your papers notarized. An affidavit is a statement that a person swears is true before a Notary Public, and is witnessed by that Notary. If you do not have access to a Notary Public, you may use an affirmation. The difference between an Affidavit and an Affirmation is that, instead of a Notary's seal, the party who signs the affirmation must include a short statement affirming that the statement is true.*

The third document that is part of your motion papers is a **Memorandum of Law**. A Memorandum of Law is required, and it should be captioned and titled as are the other motion papers. It should contain a statement of facts on which the motion is based; a discussion of the cases, statutes and/or regulations relevant to a favorable ruling; and a statement describing the relief sought. It must be signed.

You are required to serve a copy of any motion papers you file in your lawsuit on your opponents, or their lawyers if they have lawyers. The only exception to this rule is when you are filing a motion before your opponents have answered your complaint. In many cases, your motion will be addressed to the other party because you are trying to get the Court to order the other party to do something. However, even when you are simply asking the Court to take some action on its own, you must send a copy of your motion papers to your opponent.

You must notify the Court that you have served a copy of your motion on your opponents by enclosing with your motion papers an Affidavit (or Affirmation) of Service. Like the Affidavit in Support of your motion, your affidavit of service must be signed and notarized, or, if it is an affirmation, signed under penalty of perjury.

Do not complete your affidavit of service until after you have prepared the copies of your motion papers for your opponent and placed them in an envelope.

Send a copy of your motion with an original signature to the Clerk's office in the city where the judge who is hearing your case is located. Judges Larimer, Siragusa and Telesca, and Magistrate Judges Feldman and Bauer are located in Rochester, New York. Judges Arcara, Skretny, Curtin, and Elfvin and Magistrate Judges Foschio, Scott, Schroeder, and Maxwell are located in Buffalo, New York. Addresses for the Clerk's office in those cities are on page 1 of these guidelines.

Do not send your motion papers directly to the judge's chambers. The motion must be recorded in the official record of your case (the docket sheet) by the Clerk's office before the judge takes any action on it. If you mail your papers directly to the judge, you will only delay the time it takes for your papers to be considered. Do not send extra copies of your papers to the judge. Sending extra copies of your motion papers only creates confusion, and will cause you unneeded expense and effort.

Local Rule of Civil Procedure 7.1 governs service and filing of papers, and in paragraph (f) contains some page number restrictions for memoranda and briefs. Be sure to follow this rule very carefully.

Please be assured that every motion that is mailed to the Clerk's office is entered in the docket sheet of your case and given to the judge for consideration. However, if your papers do not comply to the form described above, they may not be included in the docket sheet, and the judge may not act on your correspondence.

Dismissals for Failure to Pursue the Lawsuit

Once a case has been filed, it is extremely important for a plaintiff to be diligent in pursuing the case. A plaintiff has an obligation to attempt to make the case ready for trial, and all parties must make their best efforts to complete discovery into the facts of the case within the time limits and according to the procedures discussed in the next section of these guidelines. In addition, a plaintiff must obey all orders of the Court that may issue in the case, and must appear for all conferences or hearings which a judge may schedule. If a plaintiff fails to prosecute the case diligently, the Court may dismiss the action under Rule 41(b) of the Federal Rules of Civil Procedure.

Discovery

Discovery is the exchange of information between opposing parties. Rules 26 through 37 of the Federal Rules of Civil Procedure provide for pretrial discovery. In addition, each judge has his or her own set of discovery procedures which are contained in pretrial instructions. The Local and Federal Rules are followed in every judge's court.

There are five devices for conducting discovery: (1) depositions (Federal Rules 27-32); (2) interrogatories to parties (Federal Rule 33); (3) production for inspection of documents and other tangibles (Federal Rule 34); (4) physical or mental examinations (Federal Rule 35); and (5) requests for admission (Federal Rule 36). The Federal Rules also define the scope of discovery, as well as set forth both the means for compelling disclosure and protection from overreaching.

Federal Rule 26(b) states that the matter sought must be “relevant to the subject matter involved in the pending action.” However, the Federal Rules grant immunity from discovery to privileged information, i.e., communication between attorneys and clients, patient and physicians, information that may be self-incriminatory, information involving state or military secrets, etc. Discovery is also limited by the right of any person from whom discovery is sought to seek a court order protecting him or her from “annoyance, embarrassment, oppression, or undue burden or expense.” (See Federal Rule 26(c).)

Depositions (Federal Rules of Civil Procedure 27-32)

After commencement of a civil action, a deposition may be taken of any witness, whether or not a party. The witness, called the deponent, is examined under oath by the discovering party; adverse parties may cross-examine. A question and answer format is used, and the testimony is recorded. The party that requests the deposition be taken is responsible for having a court reporter present.

The discovering party initiates the process by notifying the other parties of the time and place of taking the deposition and of the name and address of the deponent. (Where information is sought from an organization, such as a corporation, and the discovering party does not know what person in the organization has the desired information, the organization may be named as the deponent and the matter on which examination is sought specified. The organization then designates the person to testify on that subject.) The deponent, if a nonparty, must be subpoenaed to compel his attendance. This may require taking the deposition at a place other than where the action is pending. Subpoena forms are available in the Clerk's office.

The deposition is taken before one authorized to administer oaths. But that officer is not a judge and has no power to rule on objections that arise during the course of taking the deposition. Some objections simply raise questions of admissibility at trial. As to those the objection can be noted, the answer given and resolution deferred until the deposition is offered in evidence at trial. Other objections may require judicial intervention before the deposition can proceed further.

After the discovery period has ended, depositions may be taken only pursuant to court order or with the consent of all other parties. The Court will allow post-discovery depositions to be taken if the purpose of the deposition is to perpetuate the testimony of a witness who will not be and/or cannot be made to appear at trial.

Please note that under Federal Rules of Civil Procedure 30(a)(2)(A) and 31(a)(2)(A), depositions are limited to ten per side (not per party), unless the Court grants permission otherwise.

A deposition is used at trial to contradict or impeach testimony of the deponent given as a witness, or when the deponent is not available to testify at trial. A party may use the deposition of an adverse party at any time for any purpose.

Interrogatories to Parties (Federal Rule of Civil Procedure 33)

Any party may serve on any other party written interrogatories (questions) each of which must be answered in writing under oath unless it is objected to and the reasons for objection are stated in lieu of an answer. Interrogatories are confined to parties. Parties usually require that the interrogatories be supplemented as the information becomes available. Local Rule 5.2(c) sets forth the form you must use for papers containing responses to written questions or demands. Federal Rule of Civil Procedure 33(ali) limit the number of interrogatories to 25, unless the Court grants permission otherwise.

Production for Inspection of Documents (Federal Rule of Civil Procedure 34)

A request for the production of tangible items for inspection may be served on any other party. The request should designate the tangible item sought, usually a document, and specify a time, place, and manner of making the inspection.

The party on whom the request is served is required to respond either acquiescing to the request or stating the reasons for objection to production. The requesting party may seek a court order requiring production.

Document discovery is limited to parties and to items in their possession or control. The requesting party's legal right to obtain possession is the central inquiry, and the requested party may not avoid discovery simply by divesting himself of possession. Moreover, documents in the possession of nonparties may be discovered by including in the subpoena addressed to a deponent a requirement that he produce such documents at his deposition.

Physical or Mental Examinations (Federal Rule of Civil Procedure 35)

Federal Rule of Civil Procedure 35 provides that, when the physical or mental condition of a party or a nonparty over whom a party has custody or legal control is in controversy, on motion the Court may order a physical or mental examination. A showing of good cause is a prerequisite. The order defines the circumstances of the examination. The party against whom the order is made is entitled to request a copy of the examining physician's report. Such a request, however, obligates that party, in turn, to make available his own, similar reports of examinations previously or thereafter made. Moreover, by making such a request, the party examined waives any privilege (e.g., the patient-physician privilege) regarding the testimony of one making similar examinations. Usually, but not necessarily, the examination is conducted by a physician designated by the party seeking the examination. The examined party's own physician may -- but need not -- be present.

Requests for Admissions (Federal Rule of Civil Procedure 36)

Under Rule 36 a party may serve on another party requests for admission of the genuineness of documents or of facts or of the application of law to fact. The party served is obligated to make reasonable inquiry before responding. Failure to answer constitutes an admission. In the answer the party served may admit, deny, state that he or she lacks knowledge or information sufficient to permit admission or denial (only after making inquiry), or object to the request. An admission is for the purpose of the pending action only; but it is conclusive, rather than evidentiary, unless leave is obtained to withdraw or amend it. The post-trial sanction for improper failure to admit is payment of the requesting party's expenses of the proof of that fact. Additionally, the requesting party may seek pretrial judicial scrutiny of the sufficiency of answers or objections; the Court may order an answer, amendments to answers given, or even that the matter be deemed admitted.

Ending the Case Without a Trial

A trial is necessary only when there are disputed issues of fact. After the discovery period has ended, it may become apparent that the facts in the case are not in dispute, and one or more parties may file a motion for summary judgment. A motion for summary judgment can be filed at any time after the answer is filed. Each judge in this district states in his or her pretrial instructions when a motion for summary judgment may be filed; therefore, it is important to read these instructions carefully. Local Rule of Civil Procedure 56 sets forth the procedure for filing a motion for summary judgment. The party filing a motion for summary judgment must: (1) state that he is entitled to prevail on some or all of the issues in the case; (2) state on a separate piece of paper all of the facts in the case that are not in dispute; and (3) state the reasons why he should prevail on some or all of the issues in the case.

Please note that when submitting motions for summary judgment you are required to attach a separate short and concise statement of the material facts which you believe are undisputed in your action. See Local Rule of Civil Procedure 56.

The opposing party has twenty (20) days to respond to a motion for summary judgment. If the opposing party does not respond, the version of the facts stated by the party that filed the motion will be accepted. In responding to a motion for summary judgment, a party must: (1) state what issues are in dispute; (2) state on a separate piece of paper what facts are in dispute; and (3) state the reasons why summary judgment is not appropriate. It is not enough for a responding party to merely negate the other party's motion; the responding party must present to the Court evidence that shows the facts are in dispute and that a trial must be held. A responding party must file with the Court all depositions, answers to interrogatories, documents and other items that show the facts are in dispute. A responding party must have evidence that indicates that a dispute does in fact exist or no trial will be held.

After the motion for summary judgment and the response have been filed, the Court, without conducting a hearing, will decide whether or not to grant the motion. If the Court grants the motion in whole, the case will be over and judgment will be entered in favor of the party who moved for summary judgment. If the Court grants the motion in part, the issues that are in dispute will be tried and those issues on which summary judgment was granted will not be. If the Court denies the motion, the case will be set for trial.

Pretrial Procedures

Once the discovery period has ended and discovery is completed, the judge to whom the case is assigned will conduct final pretrial activity in accordance with the pretrial instructions which the judge has mailed to the parties. Usually, pretrial activity will include a conference between the judge and the parties at which they discuss the issues which will be tried and the evidence that is to be used at trial. The judge usually will also require that a pretrial order be submitted by the parties in which the trial plans of the parties are set forth in writing. The purpose of these pretrial activities is to help the judge and the parties understand exactly what issues will be important at the trial, and to work out possible solutions to problems before the trial. The parties may wish to discuss settling their case during this final pretrial phase.

Finally, at the pretrial phase the judge may instruct the parties as to particular procedures which the judge will use at the trial itself. As with all other aspects of a lawsuit in federal court, it is important to obey the instructions of the judge at the pretrial phase and at the trial itself.

Trial

If a case is not resolved by summary judgment or dismissed by the court, and if the parties to an action do not agree to settle a case, the case will proceed to trial. During the trial you, the plaintiff, will attempt to prove that you are entitled to the relief sought in your complaint. The defendant will attempt to prove that he/she has not committed any wrong, or if he/she has committed a wrong, that there is an affirmative defense which limits or prevents your recovery. Fundamentals of Trial Techniques by Thomas Mauet (published by Little, Brown and Company) is an excellent reference book.

Function of Judge and Jury

Under Federal Rule of Civil Procedure 38, both the plaintiff and the defendant have the right to request a jury trial within a certain time period (generally until 10 days after service of the defendant's answer). Both a judge and a jury are present at a "jury trial." The jury determines the facts of the case after listening to the accounts of both parties and examining the evidence. The role of the judge in a jury trial is to preside over the proceedings, keep order, determine what evidence is admissible (the evidence that the jury may consider), and to "instruct" the jury on the law to apply to the facts of the case. If both parties choose not to have a jury trial, then they will have a "bench trial" in which the judge determines the facts of the case and applies the law to it; no jury is present.

If you have a "jury trial," the people on the jury will be selected by the methods described in Local Rule of Civil Procedure 47.1. Jury selection, that is determining who is qualified to sit on the jury, is also known as "voir dire." Local Rule of Civil Procedure 47.1 provides in part:

- (a) The jury in a civil case shall consist of no fewer than six and not more than twelve members. All verdicts shall be by unanimous vote of the jurors. (b) Challenges shall be permitted as provided in 28 U.S.C. § 1870 and Fed. R. Civ. P. 47(b).... (c) Unless otherwise ordered, interrogation of prospective jurors on voir dire examination shall be conducted by the Court ...

Opening Statements

The trial begins with the opening statements of the plaintiff (or his/her attorney) and the defendant(s)' attorney(s). The purpose of an opening statement is to describe the issues in the case and the facts a party intends to prove in support of his/her claim.

Direct and Cross Examination of Witnesses

After the opening statements have been completed, the plaintiff presents his/her case by calling his/her witnesses and questioning them. When an attorney or pro se litigant questions his/her own witness (a witness he/she has called), it is called "direct examination."

Once the plaintiff has presented and questioned a witness, the defendant's attorney is entitled to question the plaintiff's witness about the matters that have been testified to on direct examination. Such questioning is called "cross-examination." On cross-examination, the defendant will attempt to discredit the testimony given by the plaintiff's witnesses. If, after cross-examination has been completed, the plaintiff has additional questions raised by the cross-examination, he/she may ask them on "redirect examination." Following redirect, the defendant's attorney may ask additional questions of the same witness on "recross-examination." This procedure is repeated for all of the witnesses called by the plaintiff.

Once the plaintiff's last witness has testified, the plaintiff rests his/her case. At this point, the defendant may, but is not required to, make a motion for a "directed verdict." This means that the defendant will try to establish that the plaintiff has failed to prove one or more of the essential elements of his/her claim for relief and that therefore the defendant is entitled to judgment in his favor as a matter of law. If this motion is not granted, the defendant will present his/her case by calling and questioning defense witnesses. The plaintiff will have the opportunity to cross-examine the defendant's witnesses and further questioning of each defense witness will take place as described above.

During the questioning of witnesses by the pro se litigant and the defense attorney, exhibits such as documents or other items may be introduced and witnesses may be asked to answer questions about them.

Federal Rules of Evidence

Certain rules have been established which must be followed in court in order to prohibit illegal or improper evidence from being admitted at trial. These rules are contained in the Federal Rules of Evidence ("Fed. R. Evid.") which are set forth in Title 28 of the US Code. You must refer to these rules to determine whether certain evidence is admissible. The rules of evidence are designed to ensure that the most reliable evidence is presented at the trial. Generally, all relevant evidence is admissible unless its potential for prejudice outweighs its usefulness in determining facts. For example, a court might not

admit the fact that a defendant in a brutality case committed domestic violence. Such a fact might be relevant, but might so prejudice the jury against the defendant that the court might keep it out.

There are many rules of evidence, and many books have been written explaining them. An example of an evidentiary rule is the "hearsay" rule which prohibits certain unreliable testimony. (Fed. R. Evid. 801-806.) Under the hearsay rule, a witness is generally not permitted to testify about anything that he/she does not have personal knowledge of. To illustrate, a witness may not testify that a friend told her that the friend saw the defendant beat up the plaintiff. That statement would be considered inadmissible because the witness in the example is only able to repeat what the *friend* said he saw. Because the friend is the person with personal knowledge of what happened, that friend should testify as to what he saw. The friend must be on the stand in order for the opposing party to be able to cross-examine him as to exactly what he saw. There are several exceptions to the hearsay rule found in the Federal Rules of Evidence. As noted above, this brief description of the hearsay rule is provided simply to illustrate one of the many rules of evidence. Before trial of your case, you should carefully study the Federal Rules of Evidence and any specialized books on evidence which may be in the library.

Objections

If you believe that the defense attorney is attempting to introduce improper evidence or is asking improper questions of a witness, you must object and state the reasons for the objection. Stating the basis for an objection is generally important in preserving that issue for appeal. The judge may either "overrule" the objection (disagree with the objection and tell the witness to answer the question) or "sustain" the objection (direct the witness not to answer). Whether or not evidence is admissible is a decision made solely by the trial judge. Often, in order to determine the admissibility of a certain disputed point of evidence, the judge will have a conference with the parties' attorneys (or the pro se party) to discuss why the particular evidence may or may not be admissible. This conference is referred to as a sidebar or a bench conference. It is conducted out of the hearing of the jury, so they will not be prejudiced. A record is made of the proceeding by the court reporter.

Closing Statements

After all the evidence has been presented, both the plaintiff and the defendant may make closing statements. During a closing, you should summarize the evidence presented, explain how the evidence is

relevant to the issues in the case, and state why, based on all the evidence, the case should be decided in your favor.

Jury Instructions

After closing statements in a jury trial, the judge will instruct the jury as to the relevant law, how such law must be applied to the facts of the case, and the specific questions which the jury must decide. Jury instructions may also include applicable burdens of proof which must be met, and any other relevant information. Before trial, each party generally prepares suggested jury instructions for the judge's consideration. Many reference books are available which provide sample jury instructions, including Modern Federal Jury Instructions, Civil, published by Matthew Bender.

After the judge instructs the jury, the jury then "deliberates" (decides the case). The jury must evaluate the evidence and draw conclusions in reaching a verdict (decision). The verdict is announced in court. If a party believes the verdict is incorrect, he/she may appeal the decision or file a motion for new trial pursuant to Fed. R. Civ. P. 59.

Appeals

The plaintiff and/or the defendant may appeal a decision rendered by the United States District Court for the Western District of New York to the United States Court of Appeals for the Second Circuit. You must refer to the appeal procedures detailed in the Federal Rules of Appellate Procedure (Fed. R. App. P.) which are set forth in Title 28 of the US Code. If you plan to appeal a decision you should very carefully read the Appellate Rules.

Proper grounds for an appeal often involve allegations that the judge made an error either in his/her interpretation of the law or in a procedural ruling during the course of the trial. For example, a procedural error may exist if the trial judge improperly admitted evidence. However, the fact that an error occurred at the District Court level may not by itself be sufficient to justify reversal of the court's decision. The error must have been sufficiently important so that the judge or jury reached an incorrect decision as a result of the error.

Although there are exceptions, usually only final orders or judgments from the District Court may be appealed to the U.S. Circuit Court. (28 U.S.C. § 1291). The exceptions permitting certain specified "interlocutory appeals" are set forth in 28 U.S.C. § 1292.

Appeals courts differ from trial courts in that there are no jurors or witnesses. Testimony is not heard, and the parties themselves may not even be present at the appeal. Usually, a panel of three judges is assigned to hear the appeal of a case. The appellate court will only consider issues the District Court considered. Generally, a party may not submit additional documents to the appellate court that were not part of the record in the District Court. In addition to the record which will be transmitted from the District Court, the appellate court will consider a party's position as set forth in his/her appellate brief. After the appeal is submitted or argued, the panel will usually notify the parties of the decision by mail.

Initiating an Appeal

In appeals of right, such as an appeal of a final order or judgment, a party initiates the appeal process by requesting a notice of appeal form and civil appeals information packet from the Clerk of the District Court or downloading the appeals information and forms from the Western District Court web site at <http://www.nywd.uscourts.gov>. Generally, a notice of appeal must name the party taking the appeal, describe the judgment or order, or the portion of the judgment or order appealed from, and name the court to which the appeal is taken. (Fed. R. App. P. 3).

The notice of appeal in a civil case must be filed with the Clerk of the District Court within 30 days after the date of entry of the judgment or order appealed from. (Fed. R. App. P. 4 (a)(1)). If the United States government or an officer or agency of the United States is a party to the action, the notice of appeal may be filed within 60 days after the date of the entry of the judgment or order. The date of entry signifies the entry of the judgment on the district court's docket sheet. The date an order or opinion is signed is not necessarily the same day that it will be reduced to a judgment or entered on to the court's docket. It is not advisable to wait until the last moment to file a notice of appeal. Only upon a showing of "excusable neglect" or "good cause," the District Court has limited discretion to extend the time for filing a notice of appeal. (Fed. R. App. P. 4(a)(5)).

At the time of publication of this manual, the filing fee for a notice of appeal is \$5.00 and the appellate docket fee is \$100.00, both payable to the Clerk of the District Court. However, pursuant to Fed. R. App. P. 24, a party who has been permitted to proceed in an action in the district court in forma pauperis may generally proceed on appeal in forma pauperis without further authorization, unless the District Court certifies that the appeal is not taken in good faith.

If a party wants to vacate and/or request reconsideration of the judgment or order of the District Court pursuant to a motion filed under Fed. R. Civ. P. 60(b), the time for appeal runs from the entry of the order disposing of such motion, if the 60(b) motion is served within 10 days after the entry of judgment. (Fed. R. App. P. 4 (a)(4)).

General Information

1. Except for your complaint, you must send a copy of every legal paper that you send to the Court to the defendant's attorney as well. If you are proceeding in forma pauperis, the Marshal will serve only your Summons and Complaint on the defendants. You must mail all subsequent papers to defendants or their attorney(s) yourself. **The District Court will not make or mail copies for you.** If you are unable to make photocopies or carbon copies, you may submit identical handwritten copies.
2. Requests for assigned counsel may be made if you are granted permission to proceed in forma pauperis. However, assignment of counsel is within the discretion of the judge and will generally only be made when the judge believes that your case has made a threshold showing of merit and a lawyer is necessary. Do not initiate an action you are not prepared to pursue on your own.
3. You must notify the Clerk's Office and all defendants (or their attorneys) immediately of any address changes. Failure to do so may result in dismissal of your action.
4. After your complaint has been filed, all documents submitted to the Court in your case must include your case number and a signed statement that you have sent a copy of the document to each defendant or the defendant's attorney(s).
5. If there is more than one plaintiff, each and every plaintiff must sign the complaint individually and must apply separately for permission to proceed in forma pauperis, if applicable.
6. You must file original papers with the Clerk of Court. The requirement that you file original papers has been interpreted to mean that the signature on the papers must be original. If you sign all of your papers before photocopying them, make sure to send the one with the original signature to the Court. If you use carbon paper, make sure the Court receives a copy (or the original) that has an original signature on it. Do not send original of exhibits to the Court, and do not send any exhibits to the Court unless you have included them as attachments to an affidavit or affirmation which references each exhibit and explains its relevance to your case. (Generally, exhibits are used either in the context of a summary judgment motion or as evidence at trial, but not before.)

Social Security Appeals

The special packet for Social Security Appeals may be obtained in person from the intake clerk in the Clerk's Office, by mail from the Pro Se Office, and from the Western District Court web site at <<http://www.nywd.uscourts.gov>>.

Fill out the complaint form completely, supplying all requested information in the spaces provided. You will need to submit a total of four copies of the complaint: one for the Court, one for the defendant, one for the United States Attorney, and one for the United States Attorney General. Be sure to sign the complaint. Keep one copy for your own personal file.

Attach copies of the Social Security Appeals Council decision and the Office of Hearings and Appeals decision to each copy of the complaint. Be sure to provide all docket numbers and courts of any prior federal cases.

Fill out the "Summons for a Civil Action" (one original and four copies) as follows:

- (a) Print your name as plaintiff;
- (b) Print "Secretary of Department of Health and Human Services" as defendant;
- (c) Since you do not have an attorney, print: (1) your own name; (2) "Pro Se" and (3) your address in the line following, "You are hereby summoned and requested to serve upon . . ."
- (d) Cross out "Plaintiff's Attorney"; and
- (e) Put "90" in the space before "days after service of this summons".

Fill out the "Civil Cover Sheet" according to these instructions:

- (a) Print your name as Plaintiff;
- (b) Print "Secretary of Health and Human Services" as Defendant;
- (c) Print "Pro Se" under Plaintiff's Attorney;
- (d) Put "United States Attorney, Buffalo, New York" as Defendant's Attorney;
- (e) Basis for Jurisdiction: check Box No. 2: U.S. Defendant;
- (f) Citizenship of Principal Parties: leave blank;
- (g) Cause of Action: "42 U.S.C. § 405(g)" and "Judicial Review of Social Security Administrative Decision";
- (h) Nature of Suit:
 - (1) if your claim is for Social Security Disability, check Box No. 863: DIWW;
 - (2) if your claim is for Supplemental Security Income, check Box No. 864: SSID Title XVI.
- (i) Origin: check Box No. 1: Original Proceeding;
- (j) Requested in Complaint: leave blank;
- (k) Related Case(s) if any: if you have ever filed another federal lawsuit relating to social security benefits, write the name of the court and the docket number; and
- (l) Date and sign your name followed by "Pro Se" on the last line.

Fill out the three United States Marshal's forms according to these instructions. Do not make any entries other than those indicated below:

- (a) Do not detach or remove any of the copies from this form;
- (b) Plaintiff: print or type your name;
- (c) Defendant: print or type "Secretary of Department of Health and Human Services";
- (d) Court number: leave blank
- (e) To the right of the large black arrow:
 - (1) on one form, print or type "Office of General Counsel, Social Security Administration, Room 611 Altmeyer, 6401 Security Boulevard, Baltimore, MD 21235"
 - (2) on the second form, print or type "Attorney General of the United States, Main Justice Building, 10th and Constitution Avenues NW, Washington, DC 20530"
 - (3) on the third form, print or type "United States Attorney, 138 Delaware Avenue, Buffalo, NY 14202";
- (f) Type of writ: print or type "Summons and Complaint";
- (g) In block marked "Send Notice of Service Copy to Name and Address below", print or type your name and address; and
- (h) In block marked "Name and Signature of Attorney or Other Originator", sign your name, followed by "Pro Se", provide your telephone number and date the form.

IMPORTANT: If you cannot pay the \$150.00 filing fee and are applying for permission to proceed as a poor person, no papers will be served upon the defendants until the District Judge has granted you permission to proceed as a poor person and directed the United States Marshal to serve the complaint.

Title VII Employment Discrimination Cases

The special packet for Title VII Employment Discrimination Cases may be obtained in person from the intake clerk in the Clerk's Office, by mail from the Pro Se Office, and from the Western District Court web site at <<http://www.nywd.uscourts.gov>>. To start an action you must file an original and one copy of your complaint for each defendant you name. For example, if you name two defendants, you must file the original and two copies of the complaint. You should keep an additional copy of the complaint for your records.

Attach to the back of each complaint one copy each of the following documents:

- a) Original complaint filed with the EEOC
- b) Notice of Right to Sue letter from the EEOC
- c) Determination made by the EEOC on your charge filed there

Fill out the "Civil Cover Sheet" according to these instructions:

- (a) Print your name as Plaintiff
- (b) Print all defendants as Defendants
- (c) Print "Pro Se" under Plaintiff's Attorney
- (d) Leave Defendant's Attorney blank
- (e) Basis for Jurisdiction: Check Box No. 3: Federal Question
- (f) Cause of Action: "42 U.S.C. § 2000e-5" and "Title VII Action"
- (g) Nature of Suit, check Box No. 442: Civil Rights Employment.
- (h) Origin: check Box No. 1: Original Proceeding
- (i) Under "Citizenship of Principal Parties," leave blank
- (j) Date, and sign your name, followed by "Pro Se" on the last line.

It is not requested that you attach "exhibits," other than those required above. If you do, however, you must submit enough copies for all the complaint copies. Otherwise, they will not be served on the defendants.

Requests for assigned counsel may be made pursuant to 42 U.S.C. Section 2000e-5(f)(1). However, assignment of counsel is within the discretion of the judge and will generally only be made where the judge believes a lawyer is necessary.