

Summary of the Proposed Amendments to the Local Rules of Civil and Criminal Procedure of the Western District of New York to be Effective February 1, 2022

The Western District of New York's Local Rules Committee, which is comprised of Court personnel and members of the bar of this Court, convenes on an annual basis to ensure that the Local Rules conform to the Federal Rules amendments and current practices of this Court, as well as to address any Local Rule concerns raised by our bar. The committee proposes amendments to the Court for consideration. This year's proposed amendments to the Local Rules of Civil and Criminal Procedure are set forth below.

1. **L.R. Civ. P. 83.3 (Discipline of Attorneys).** The proposed amendment addresses the following issues: (1) what to do after an attorney has been disciplined; (2) whose obligation it is to notify clients in the event their attorney is suspended/disbarred; and (3) creating an amendment to facilitate information sharing from the federal courts with the state authorities. The proposed amendment adds language to subsection (b) to clarify that all grievances/complaints should be made to the Chief Judge. With respect to issues (1) & (2), above, the proposed amendment adds subparagraph (f). With respect to subsection (3), above, the proposed amendment adds a section (ii) under subsection (b):

RULE 83.3 DISCIPLINE OF ATTORNEYS

[Proposed additions in red; proposed deletions in ~~strikeout~~.]

- a. ...
- b. **All grievances and complaints about attorneys admitted to practice in this District shall be made to the Chief Judge of the District.**
- i) In addition to any other sanctions imposed under these Local rules, any person admitted to practice in this Court may be disbarred or otherwise disciplined, for cause, after a hearing. The Chief Judge of the District may appoint a Magistrate Judge or attorney(s) to

investigate, advise, or assist as to grievances or complaints from any source and as to applications by attorneys for relief from discipline. Other than provided by ~~subparagraphs~~ **subparagraph (b) and (c)** of this Rule, no censure, suspension, or disbarment shall be applied without notice and an opportunity to be heard and the approval of a majority of the District Judges of the Court in both active and senior service, except that any Judge of this Court may, for cause, revoke an admission *pro hac vice* that ~~he or she~~ **they** previously granted. Complaints or grievances, and any related documents, shall be treated as confidential. Discipline shall be imposed only upon suitable order of the Court, and the Court, in its discretion, shall determine whether the order will be made available to the public, or published, or circulated.

ii) **A duly constituted disciplinary authority of an Appellate Division of the Supreme Court of the State of New York may request expedited disclosure of records or documents that are confidential for use in an investigation or proceeding pending before the disciplinary authority. The request shall be made in writing and submitted to the Chief Judge of the District. The request should, to the extent practicable, identify the nature of the pending investigation or proceeding and the specific records or documents sought. The request may also seek deferral of notice of the request for so long as the matter is in the investigative stage before the disciplinary authority. Upon receipt of the request, the Chief Judge may take any appropriate action or may refer the request for a response by a majority of the District Judges of the Court in both active and senior service. Confidential records and documents disclosed to the disciplinary authority in response to the request shall not be used for any purpose other than the investigation or proceeding pending before the disciplinary authority.**

c. ...

d. ...

e. ...

f. **Within 10 days of the date of entry of an order of suspension or disbarment, the affected attorney shall notify, by certified mail and, where practical, electronic mail, each client of the attorney, counsel for each party in any pending matter, and the judge in any pending matter. The notice shall state that the attorney is unable to act as counsel due to disbarment or suspension. A notice to an attorney's client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action or to the judge shall include the name and address of the attorney's client. Within 45 days after the date of service of the order of disbarment or**

suspension, the attorney shall file with the Clerk of Court an affidavit showing a current mailing address for the attorney and that the attorney has complied with the order and these Rules.

2. L.R. Civ. P. 16 (Alternative Dispute Resolution and Pretrial Conferences) – amendment to conform with Local Rule 23 (Class Actions).

The proposed amendment reconciles the language in Rule 16 with that contained in Rule 23(c) regarding the issues to be addressed at the Rule 16 conference related to pre-certification discovery:

RULE 16

ALTERNATIVE DISPUTE RESOLUTION AND PRETRIAL CONFERENCES

[Proposed additions in red; proposed deletions in strikeout.]

...

(b) Initial Pretrial Conference

...

(3) Content of the Initial Conference. In addition to all of the matters in Fed.R.Civ.P. 16(c)(2), counsel and unrepresented parties shall be prepared to discuss meaningfully the following:

...

(E) the use of experts during discovery and at trial; ~~and~~

(F) if the case is referred automatically to ADR pursuant to the Court's Alternative Dispute Resolution Plan, selection of a neutral, and timing for ADR; if the case is not referred automatically to ADR, possible stipulation to the use of a confidential ADR process; any problems currently known and reasonably anticipated to arise in connection with discovery of ESI; proposed methods to limit and/or decrease the time and expense of discovery; the use of experts during discovery and at trial; and the possibility of consent to the Magistrate Judge conducting all or part of the proceedings in a case provided, however, that unless there is unanimous consent among the parties, no party shall discuss its position with the Court; ~~and~~

(G) for cases in which class claims are alleged,

- (i) the timing of the filing of a motion for class certification;
- (ii) the appointment of interim class counsel;
- (iii) the timing and scope of discovery, including discovery of Electronically Stored Information, prior to resolution of the motion for class certification, pursuant to L.R. Civ.P. 23(c); and
- (iv) a schedule for briefing a motion for class certification.

(4) **Scheduling Order.** After the initial pretrial conference, pursuant to Fed.R.Civ.P. 16(b), the Court shall issue an order providing:

- (A) deadlines for joinder of parties and amendment of pleadings;
- (B) a date for a first judicial settlement conference, or, if the case will proceed to ADR, deadlines for an initial ADR session and the conclusion of ADR;
- (C) if applicable, deadlines for the items described in L.R.Civ.P. 16(b)(3)(G);
- ~~(C)~~ (D) a discovery cut-off date;
- ~~(D)~~ (E) a deadline for filing dispositive motions;
- ~~(E)~~ (F) deadlines for the disclosure of expert witnesses, if applicable;
- ~~(F)~~ (G) any other matter decided or agreed upon at the initial pretrial conference.

A scheduling order cannot be modified except by Court order.

3. **L.R. Civ. P. 5.5(f) (Procedures in Social Security Cases).** The proposed amendment requires the plaintiff to include in the Equal Access to Justice Act fee application the efforts made to reach an agreement with the Commissioner prior to filing the motion for fees:

Rule 5.5
Procedures in Social Security Cases
 [Proposed additions in red.]

...

(f) **Petitions under the Equal Access to Justice Act ("EAJA").** Prior to the filing of a petition under 28 U.S.C. § 2412 in an action under this rule, plaintiff is encouraged to contact defendant to attempt to reach an agreement by stipulation. Unless stipulated, any petition for fees and expenses under 28 U.S.C. § 2412 in an action under this rule shall not be filed before the judgment at issue is final and not appealable **and shall contain an explanation of plaintiff's efforts to reach an agreement by stipulation.** Defendant shall have thirty (30) days to respond to a petition under 28 U.S.C. § 2412 in an action under this rule.

4. **L.R. Civ. P. 83.8(B)(3) (Pro Bono Service).** The proposed amendment reflects the new name of Volunteer Legal Services Project of Monroe County ("VLSP"):

Rule 83.8
Pro Bono Service
 [Proposed additions in red.]

...

(B) **Appointment of Counsel.**

...

(3) Because of their common goal of providing access to justice, the Erie County Bar Association Volunteer Lawyers Project and **JustCause, formerly the Volunteer Legal Services Project of Monroe County, Inc.**, have agreed that, when possible, attorneys appointed under this Rule shall be considered volunteers to those organizations and afforded all accompanying benefits. The parameters of involvement for those organizations will be detailed in the Order of Appointment.

5. **L. R. Civ. P. 83.8(E)(2) (Pro Bono Service).** The proposed amendment clarifies that limited scope appointments are self-executing and do not require a judge to “so order” the termination of the assignment:

Rule 83.8
Pro Bono Service
[Proposed additions in red.]

...
(E) Scope and Duration of the Appointment.

...
(2) Only in the case of a limited scope appointment, counsel shall file a notice of termination of limited representation, upon fulfillment of the appointment. Upon receipt of such notice, the Clerk of Court shall **automatically terminate pro bono counsel from the case and** terminate **pro bono** counsel’s receipt of ECF notifications related to the case. Any attorney appointed for a limited purpose may, with the concurrence of the litigant, apply at any time for an order expanding the appointment.

6. **L. R. Civ. P. 83.1(g) (Attorney Admission to Practice).** The proposed amendment meant to conform the language in this Rule to the new language contained in L. R. Civ. P. 83.2(d):

RULE 83.1
ATTORNEY ADMISSION TO PRACTICE
[Proposed additions in red; proposed deletions in strikeout.]

...
(g) Changes to Attorney Information. All attorneys admitted as a Member of the bar of this Court must advise the Clerk of Court in writing of any change in name, firm affiliation, office address, **email address** or telephone number within thirty (30) days of such change. Additionally, counsel must ~~identify all pending cases on which he or she will remain counsel of record.~~ **file a Notice of Change of Address with respect to each pending case.**

7. **Local Rule 7(a)(1) (Motion Practice) – Notice of Motion.** The proposed amendment adds notice of a potential sanction to encourage litigants to file the required Notice. It also notifies litigants that the Court may strike a reply filed without permission:

RULE 7
MOTION PRACTICE

[Proposed additions in red; proposed deletions in ~~strikeout.~~]

(a) Submissions

(1) Notice of Motion. A notice of motion is required for all motions, and must state: the relief sought, the grounds for the request, the papers submitted in support, and the return date for the motion, if known. A moving party who intends to file and serve reply papers must so state in the notice of motion. ~~Failure to comply with this requirement~~ **file or serve a notice of motion unless otherwise ordered or excused by the Court may be grounds for denial or for striking of the motion, without prejudice., or denial of leave to file and serve reply papers or striking any reply paper** **Reply papers filed without prior notice or authorization may be stricken.**

8. **L.R. Crim. P. 32 (Presentence Report).** The proposed amendment simplifies the process for accessing a defendant’s Presentence Report ("PSR") when a defendant files an appeal with the Second Circuit and has hired new counsel. The word “federal” was added to clarify that the current language is being interpreted as permitting redisclosure of the PSR to counsel only when there is a subsequent federal charge:

RULE 32
PRESENTENCE REPORT

[Proposed additions in red.]

(a) Disclosure of Prior Presentence Report to Counsel. Upon appearance of either retained or assigned counsel and the attorney for the government on a violation of probation or supervised release, the probation office shall be permitted to provide counsel with a copy of the presentence report and judgment with statement of reasons from the underlying offense. Further, where the defendant has been previously convicted of a federal offense, upon appearance of either retained or assigned counsel and the attorney for the government on a new **federal** charge, the probation office shall be permitted to provide counsel with a copy of the presentence report and

judgment with statement of reasons from any previous federal conviction. Finally, when the defendant is assigned new counsel or retains new counsel for the purpose of handling an appeal to the circuit court, the probation office shall be permitted to provide new counsel with a copy of the presentence report and judgment with statement of reasons filed on the district court docket for the case being appealed.