PRO SE HANDBOOK

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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CHAPTER I – INTRODUCTION

Welcome to the United States District Court for the Northern District of New York.

We have prepared this handbook specifically for the person who is representing him- or herself as a party to a lawsuit: the *pro se* litigant. This handbook is a practical and informative means of providing assistance to those individuals who are litigating claims *pro se* in a federal forum. **It is important that you read this entire manual before you ask the Clerk's Office specific questions about your potential lawsuit; many of your questions will undoubtedly be answered in the chapters of this handbook.**

While this handbook should be helpful for any person who is involved in litigation without the aid of an attorney, much of it is intended to inform the *pro se plaintiff*, i.e. the person who files the complaint. There are, however, *pro se defendants*, i.e. people being sued, who will also find some important information in this handbook.

The early chapters of this handbook provide information that you should consider before filing your own lawsuit. If, after considering this information, you decide to file a case in federal court, additional information has been provided to assist you in filing your case and utilizing the appropriate rules of procedure for the United States District Court for the Northern District of New York. We have also provided you with an overview of the "ins and outs" of legal research.

This handbook should not be considered the last word, nor should it be your only resource. Rather, this handbook should be considered a procedural aid to help you should you choose to file and litigate a lawsuit in federal court.

If, after reading this manual, you still have questions about your case, you may contact the Clerk's Office. Our office is willing to assist you with certain questions you may have regarding the Local Rules of Practice ("Local Rules" or "L.R.") as well as the Federal Rules of Civil Procedure ("Federal Rules" or "Fed. R. Civ. P."). Please do not hesitate to contact us regarding

a procedural matter. However, **employees of the Court cannot give legal advice.**

For your convenience, the Clerk's Office for the Northern District of New York has offices in the following locations:

James T. Foley U.S. Courthouse
445 Broadway, Room 509
Albany, NY 12207-2924
(518) 257-1800

U.S. Courthouse & Federal Building
15 Henry Street
Binghamton, NY 13902-2723
(607) 773-2893

U.S. Courthouse & Federal Building
P.O. Box 7367,100 S. Clinton St.
Syracuse, NY 13261-7367
(315) 234-8500

Alexander Pirnie Federal Building
10 Broad Street
Utica, NY 13501-1233
(315) 793-8151

Additionally, this manual, together with blank forms for the most common types of actions and a glossary of common legal terms, is available on the Internet at the following address:

http://www.nynd.uscourts.gov

CHAPTER II – THE *PRO SE* ASSISTANCE PROGRAM

The Northern District of New York Federal Court Bar Association, Inc. established the *Pro Se* Assistance Program to assist litigants who are representing themselves in federal court with preparing and drafting their papers in support or defense of a **civil** action filed, or to be filed, in the Northern District of New York. The *Pro Se* Assistance Program serves *pro se* litigants in Syracuse, Albany, Binghamton, Utica, Plattsburgh and Watertown.

The services that the *Pro Se* Assistance Program offers, and that the *Pro Se* Coordinator renders, are free of charge. There are certain court costs associated with filing or defending a lawsuit in Federal Court. The *Pro Se* Assistance Program will not pay any of these costs.

Use of the *Pro Se* Assistance Program is totally separate from, and does not guarantee, appointment of counsel by the Court. Appointment of counsel is within the Court's discretion, upon a separate application by the *pro se* litigant. **Moreover, although the *Pro Se* Coordinator is a**

qualified attorney, he/she is not *your* attorney.

The contact information for the *Pro Se* Assistance Program is as follows:

Pro Se Assistance Program
P.O. Box 7067
Syracuse, New York 13261-7067
1-(877)-422-1011 (toll free)

CHAPTER III – REPRESENTATION BY AN ATTORNEY

This handbook was developed to address the needs of the litigant who is filing a lawsuit without the aid of an attorney. However, there may be alternatives to representing yourself if you are unable to afford to hire counsel.

A. OBTAINING AN ATTORNEY ON A CONTINGENCY BASIS OR PRO BONO

Some attorneys may be willing to accept your case on what is called a contingency basis, which means the attorney would receive a fee based upon a percentage of your recovery if you win your case, and the attorney would get nothing if you do not prevail. You should note that attorneys are careful when screening cases before agreeing to accept them on a contingency basis, and may reject your case. However, if you would like assistance finding an attorney who may consider taking your case on a contingency basis, there are lawyer referral services that may be willing to help you. For a list of the Lawyer Referral Services located within the Northern District of New York, visit http://www.nynd.uscourts.gov/representing-yourself-federal-court. In addition, there are attorneys and organizations, such as legal aid societies, that may be willing to represent you "pro bono," that is, free of charge. For a list of the Legal Aid Offices located within the Northern District of New York, visit http://www.nynd.uscourts.gov/representing-yourself-federal-court.

B. APPOINTMENT OF COUNSEL BY THE COURT

If a *pro se* litigant's income and financial resources are low enough, the Court may determine that the person is "indigent." Typically the Court would recognize that a litigant is indigent by granting the litigant's *in forma pauperis* application. For more information regarding the *in forma pauperis* application and the effects of being permitted to proceed *in forma pauperis*, please refer to Chapter VI, Section B on page 17 of this handbook.

A litigant who has been granted *in forma pauperis* status may request, by submitting a written motion, that the Court appoint counsel on his or her behalf **if he or she is otherwise unable to obtain counsel**. Before you submit such a motion, you must try to obtain counsel on your own. You should know that there are many more litigants seeking the appointment of counsel than there are attorneys willing to volunteer their services. Furthermore, while in a **criminal** case, a defendant is **entitled** to legal counsel by the United States Constitution and one is provided if the criminal defendant is indigent, a party to a **civil** case is **not entitled** to an attorney, even if he or she is indigent.

The Court considers requests for counsel in light of a number of factors set forth by the Second Circuit Court of Appeals. First, the Court must determine whether the party's legal position in the lawsuit is of substance. If so, the Court will then consider several other factors, including how complex the legal issues are in the particular case, and the indigent party's ability to investigate and present his or her case. *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1341 (2d Cir. 1994); L.R. 83.3 (c).

If you are granted permission to proceed *in forma pauperis* and you decide to make a motion for the appointment of counsel, you must include with your motion details of your efforts to obtain counsel by means other than court appointment. In addition, you must include letters you received from the attorneys that you contacted regarding your case. **Failure to include documentation that substantiates your attempts to obtain counsel on your own will result**

in the denial of your motion for appointment of counsel.

You should also know that an attorney may be appointed to serve in any number of different capacities. For example, an attorney may be appointed for the limited purpose of preparing a confidential report analyzing the merits of the claim(s) raised by the plaintiff. If a case proceeds to trial, an attorney may be appointed as trial counsel to conduct the trial of an action, as support counsel to assist another attorney, or merely as standby trial counsel to assist the *pro se* party in conducting the trial. In some cases, an attorney may be appointed as the *pro se* party's attorney for both pre-trial matters as well as the actual trial of the lawsuit. The capacity in which an attorney is appointed for a party is entirely within the discretion of the Court.

CHAPTER IV – BEFORE FILING A LAWSUIT

There are seven (7) important questions you should consider *before* you file a case in federal court. This list is not exhaustive – there may well be other important considerations that are not listed here. However, these seven (7) questions are essential to every lawsuit filed in federal court.

You should also be aware that even if you answer "yes" to all seven (7) of these questions, and you believe you should prevail in your lawsuit, there is always a possibility that you may not ultimately prevail.

A. SEVEN QUESTIONS TO ANSWER

1. Have I suffered a real injury or wrong?
2. Does the federal district court have jurisdiction to hear my claim?
3. Is the Northern District the proper venue for my action?
4. Will my claim be timely if I file it now?
5. Am I able to name the proper defendants for my action?
6. Will I be able to establish sufficient facts to support my claims?
7. Have I exhausted all other available remedies?

1. Have I suffered a real injury or wrong?

You cannot sue someone just because you are angry at him or her, nor can you sue someone simply because he or she has committed some illegal act. In order to maintain a lawsuit against someone, the person you are suing must have caused you to be harmed or wronged in some real, concrete way.

A plaintiff must be asserting his or her own personal legal interests. Typically a person may not sue to assert the rights of a third party. In other words, a litigant normally must assert that he himself has suffered the injury, or that a distinct group of which he is a part has suffered the injury. A court generally will not address a "generalized grievance," which is an injury that is shared in "substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see U.S. v. Hays*, 515 U.S. 737, 743 (1995).

Finally, the plaintiff must have actually suffered the harm already, or else the plaintiff must be about to suffer the harm "imminently," meaning the plaintiff will actually suffer the harm in the immediate future.

2. Does the federal district court have jurisdiction to hear my claim?

In general, a court must have the power to decide a particular case; this is called jurisdiction.

There are two court systems in the United States: the state court system and the federal court system. In New York State, the Supreme Courts are the courts of "general jurisdiction," which means they can hear and decide almost any kind of legal controversy between two parties.

Federal courts, on the other hand, only have jurisdiction over certain limited types of cases and controversies. A federal court has jurisdiction when the United States is a defendant in the action. Additionally, federal court jurisdiction may be based on either a federal question or diversity of citizenship. A federal question case is one that alleges that a federal law (either a statute or a provision of the United States Constitution) has been violated. Examples of claims

that fall under the court's federal question jurisdiction are civil rights claims under 42 U.S.C. § 1983 and employment discrimination claims under Title VII of the Civil Rights Act of 1964. A case's federal jurisdiction is based on diversity of citizenship when the parties reside in different states, or a state and a foreign country. In order for a federal court to exercise jurisdiction over a case based on diversity of citizenship, the amount that the parties are disputing must be more than $75,000.

If there is no federal statute governing your situation, and you and any of the defendants are citizens of the same state and/or the amount in controversy is less than $75,000, a state court may be the proper place to bring your case.

3. Is the Northern District the proper venue for my action?

If you decide that your claim may be brought in a federal court because there is either a federal question, or there is diversity of citizenship and the amount in controversy is more than $75,000, you must then determine in *which* federal court to file. In order to decide a case, a court must have some logical relationship either to the litigants or to the subject matter of the dispute; this is called venue.

There are four (4) United States District Courts in New York State: Eastern, Southern, Western and Northern. Generally, you may only file an action in the Northern District of New York if the actions or inactions that you believe violated your rights occurred within the boundaries of this District. Below is a list of the counties that are located within the Northern District to help you determine whether you should file your lawsuit in this District or another District Court.

COUNTIES WITHIN THE NORTHERN DISTRICT OF NEW YORK

Albany	Essex	Madison	Saratoga
Broome	Franklin	Montgomery	Schenectady
Cayuga	Fulton	Oneida	Schoharie
Chenango	Greene	Onondaga	Tioga
Clinton	Hamilton	Oswego	Tompkins
Columbia	Herkimer	Otsego	Ulster
Cortland	Jefferson	Rensselaer	Warren
Delaware	Lewis	St. Lawrence	Washington

4. Will my claim be timely if I file it now?

Usually a claim must be filed within a certain period of time after an injury occurs or is discovered. This time bar is called the statute of limitations, and the length of the statute of limitations varies depending on the type of claim. Some examples are as follows:

(a) Civil rights claims brought under 42 U.S.C. § 1983: 3 years
(b) Car accident or other personal injury: 3 years
(c) Contract dispute: 6 years

Some federal and state statutes set forth a specific limitations period that may differ from those listed above. Whether your claim is barred by the statute of limitations is a legal question which may require you to do some legal research. You should make sure your claim is not time barred before you file a lawsuit.

5. Am I able to name the proper defendants for my action?

When determining whom you should name as a defendant in your lawsuit, there are several factors you should consider.

First, you must allege that **each** person or entity you are suing engaged in wrongful conduct that caused you harm. Thus, you should only name a defendant if you are able to describe his or her actions or inactions that you believe were wrongful and how you believe those actions harmed you.

Second, you must list individuals by their names whenever possible. Avoid suing groups

of people such as "the personnel department" or "the medical staff." Also, you should know that service of process cannot be effectuated on "John Doe" or "Jane Doe" defendants[1]. If one of your defendants cannot be served, you will not be able to prevail in your lawsuit against that person. It is your responsibility, and not the duty of the Court, to ascertain the identities and addresses of those individuals whom you believe caused you to be injured.

Third, you should be aware that some people cannot be held liable for actions they take while performing the duties of their jobs. This is called immunity. For example, when a Judge decides a case, he or she is immune from lawsuits for actions taken in the process of deciding that case. Similarly, prosecutors are immune from liability for actions they take in prosecuting or failing to prosecute individuals.

There may also be other legal defenses that a person can assert which will protect him or her from liability.

6. Will I be able to establish sufficient facts to support my claims?

In a lawsuit, the burden is on the plaintiff to prove that the defendants violated the plaintiff's rights. Therefore, in order to win a case, a plaintiff must be able to present facts that support his or her claims. Asserting the mere conclusion that the defendant(s) caused you harm or violated your rights will be insufficient.

Before you begin a lawsuit, be sure you can allege sufficient facts to support your claim that the defendant(s) violated your rights. Such facts should include who each defendant is, specifically what he or she did or did not do that you believe was wrongful, when the incident took place, and where the incident happened. You should also be able to identify how each defendant's actions or inactions caused you harm.

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[1] The Clerk of Court will not issue a summons for any party who is not identified by name.

In order to prove your case, you must be able to provide evidence that supports the facts you allege. In addition, you need to be able to identify any witnesses whom you believe observed the incident. You may also be called upon to present actual articles of evidence such as a memorandum, police report, medical records or other proof.

7. Have I exhausted all other available remedies?

You should be aware that, in some instances, it is necessary for you to pursue certain remedies **before** you can properly pursue a claim in federal court. Two common instances are discussed below.

Administrative Grievance Procedures: People frequently want to appeal the decision of a governmental agency that affects them. For example, a person may want to appeal the decision of the Social Security Administration to deny him or her social security benefits.

If you want to appeal the denial of a benefit that is provided through an agency of the United States government, you must pursue **all** of the administrative procedures established by the agency for appealing its rulings **before** you file a lawsuit. **Only after** you have exhausted your administrative remedies, and you still believe you are entitled to a benefit that you have not received, may you initiate a lawsuit.

Employment Discrimination Claims: A person who believes he or she has been illegally discriminated against by an employer may wish to bring a lawsuit against that employer under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act. However, before a person can bring such a lawsuit, he or she must first file a complaint with either the Equal Employment Opportunity Commission ("EEOC") or the New York State Division of Human Rights ("NYSDHR"), and obtain from the EEOC or NYSDHR what is called a "right-to-sue letter." Only if a person properly files a complaint with the EEOC or

NYSDHR, and receives a right-to-sue letter from the agency, may he or she then file a complaint in federal court based on the allegations the person has made in their complaint to the EEOC or NYSDHR. A copy of the right-to-sue letter should be attached to the complaint the person files with the court.

In conclusion, it is important that you consider all of these questions before you file a case. After all of these factors have been considered, you must still follow the procedures set out by the particular court with which you decide to file your case. Many of the specific procedural rules for the Northern District of New York are set forth in the Local Rules, and in Chapter V of this handbook we will discuss the rules and procedures for filing lawsuits in the United States District Court for the Northern District of New York. If your case needs to be filed in any other court, you should contact the Clerk's Office of that court for information regarding local rules and procedures for filing your case.

CHAPTER V – RULES AND PROCEDURES FOR FILING A CASE IN THE NORTHERN DISTRICT OF NEW YORK

If you are a party to a lawsuit, you are subject to the specific rules of procedure for the Court in which your case is filed. Federal courts are governed by the Federal Rules of Civil Procedure as well as other rules of procedure regarding specific areas such as evidence, appeals, etc. In the United States District Court for the Northern District of New York, all procedures are governed not only by the Federal Rules but also by the Local Rules of Practice and the District's General Orders. The numbering system of the Northern District's Local Rules coincides with the numbering system of the Federal Rules for easy reference.

Copies of the Federal and Local Rules of Civil Procedure can be found at County Court House libraries and law schools throughout the state. The Federal Rules of Civil Procedure are also available at http://www.law.cornell.edu/rules/frcp/index.html, and the Local Rules for

the Northern District of New York are available at http://www.nynd.uscourts.gov/local-rules-general-orders. You can also obtain a personal copy of the Northern District's Local Rules, or of this handbook, if you come in person to any of the Clerk's Offices listed in Chapter I of this handbook. The Clerk's Office can also mail you free copies of these materials.

The Court may penalize a party or attorney for failing to comply with a law, rule or order at any point while a lawsuit is pending. Such penalties are called sanctions, and *pro se* litigants are subject to the same sanctions as licensed attorneys. For example, when a party to a lawsuit presents a document to the Court, that party is verifying the accuracy and reasonableness of that document. Federal Rule of Civil Procedure 11 states that if such a submission is false, improper or frivolous, the party may be liable for monetary or other sanctions (which could include an award of the prevailing party's attorney fees). The Court may also prevent or "enjoin" a party from filing any future lawsuits until sanctions from an earlier lawsuit have been paid.

It is important to remember that, as a *pro se* litigant, **you are responsible for becoming familiar with and following the Court's Local Rules and procedures.** Therefore, before you begin drafting your complaint or take any other action, you should read the Federal and Local Rules and become familiar with them. Not only may you be subject to sanctions for failing to follow the Rules, but the Rules will also help answer many questions that you may have as you begin and proceed with a lawsuit.

CHAPTER VI – GETTING STARTED: THE COMPLAINT AND HOW TO FILE IT

In order to begin a lawsuit in federal court, a plaintiff must submit to the Clerk of the Court the following documents:

1. A civil cover sheet;
2. A signed copy of your complaint, and additional copies as directed by the Clerk;

3. Either a filing fee or an application to proceed *in forma pauperis*;

4. One or more summonses as directed by the Clerk; and

5. If you are seeking permission to proceed *in forma pauperis* and you wish the U.S. Marshals Service to serve your summons and complaint for you, you must also submit one or more completed USM-285 forms as directed by the Clerk.

Each of these items will be discussed in more detail in this Chapter. This list is not exhaustive; you should be aware that certain types of actions may require the plaintiff to submit additional documents before the action may proceed.

All papers filed with the Court must meet the requirements that are set forth in Federal Rules 8 and 10, and Local Rule 10.1. Local Rule 10.1 requires, among other things, that the paper be 8 ½ x 11 inches, and of good quality. It also requires that **all documents be plainly and legibly written, typewritten, printed or reproduced**, in black or blue ink. If the papers are typewritten, they must be in at least 12 point font, with any footnotes in at least 12 point font, and the text must be double-spaced. The pages must be single-sided, consecutively numbered, and must be fastened together.

Please review the full text of Local Rule 10.1 and Federal Rules 8 and 10 before you start drafting your complaint. The Clerk's Office has prepared form complaints for civil rights claims under 42 U.S.C. § 1983, and employment discrimination claims. The form complaints can be found on the Court's website, and can also be obtained at the Clerk's Office. You may wish to use a form in preparing your complaint.

A. THE COMPLAINT

1. Caption: Every document that you file with the Court, including the complaint, should have a caption at the top of the first page. The format for a caption is as follows:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

(YOUR FULL NAME)

Plaintiff,

v.

(LIST EACH AND EVERY PERSON YOU WISH TO SUE, BY NAME)

Defendant(s).

Civil Action No._____
(Judge's initials)

Complaint

When you first submit a complaint you will not know the civil action number or the names of the assigned Judges, so you can leave those spaces blank in the caption. The Clerk will assign your case a number when your complaint is accepted for filing. Once your action is assigned a civil action number, that number must appear on each and every document pertaining to your lawsuit that you file with the Court. Likewise, if your complaint is accepted for filing, the Clerk will typically assign one District Judge and one Magistrate Judge to your case. All documents must include the initials of both Judges, once they have been assigned.

2. Jury Demand: In certain kinds of cases, the parties are entitled to a jury trial. Generally, you may demand a jury trial in writing up until fourteen (14) days after service of the defendants' answer to your complaint. Fed. R. Civ. P. 38. The failure to timely demand a jury trial results in the waiver of that right. The best way to ensure your right to a jury trial is to make the demand when you file your complaint by either writing the words "jury trial demanded" on the first page of your complaint or, if you are using a form complaint available from the Clerk's Office, by checking the option for a jury trial on the first page of the form complaint.

3. Body: The main portion of your complaint is called the "body." Federal Rule of Civil Procedure 10 requires that **each paragraph in the body of the complaint be consecutively**

numbered. Your first paragraph should state the basis for the Court's jurisdiction over your claim. *See* Chapter IV, Section A, question 2 on page 6. Your second paragraph should state why the Northern District is the proper venue for your action. *See* Chapter IV, Section A, question 3 on page 7.

Next you should include one paragraph for each party to the action; in each of those paragraphs you should state the name, title and address of each party. **If at any time your own address changes you must immediately notify the Court in writing. If your complaint has been accepted by the Court and served on the defendant(s), you must also immediately serve the defendant(s) with a written notice of your change of address.**

Once you have completed the above paragraphs, you should state your claim against the defendant(s). Federal Rule of Civil Procedure 8 requires that a complaint be a "**short and plain** statement of the claim **showing that the pleader is entitled to relief**." In other words, in short, clear, numbered paragraphs you should (i) describe the actions or inactions of the defendant(s) that you believe violated your rights, and (ii) state which of your legal rights you believe the defendant(s) violated (also called your "claims" or your "causes of action"). *See* Chapter IV, Section A, question 6 on page 9.

It is critical to state facts sufficient to support your causes of action. Thus, if you claim that your legal rights were violated by more than one defendant, or on more than one occasion, your complaint should include a corresponding number of paragraphs for each claim. Each paragraph should specify to the greatest extent possible (i) the alleged act of misconduct; (ii) the date on which the misconduct occurred; (iii) the names of each and every individual who participated in that misconduct; (iv) the location where the alleged misconduct occurred; and (v) the connection between the misconduct and your causes of action.

Your complaint should be limited to a statement of facts; it should not contain legal

citations or legal arguments. It is inappropriate to include legal citations or arguments in your complaint because "it is the court's function to analyze the law." *See Jochnowitz v. Russell Sage College*, No. 90-CV-1101, 1992 WL 106813, at *3 (N.D.N.Y. May 13, 1992) (Munson, J.).

4. Statement of Relief Sought: After you have stated your claims as clearly and concisely as possible, you should briefly state what "relief" you are seeking. In other words, you must state what it is that you wish the Court to do. For example, a plaintiff could be seeking monetary compensation ("damages"), or a court order directing that the defendant stop or start doing something ("injunctive relief").

5. Signing the Complaint: Federal Rule of Civil Procedure 11 requires that **every plaintiff must sign and date his or her complaint**. If possible, the complaint should be signed and dated in the presence of a notary public. A complaint that is not signed will be dismissed by the Court unless the plaintiff promptly corrects the omission by submitting a signed copy of the complaint.

Remember that by signing or filing your complaint you are certifying to the Court that the statements you have made in the complaint are true, and that you are not filing the complaint for an improper purpose such as to harass the defendant(s). See Chapter V for a discussion of the sanctions that may apply if your complaint is false or submitted for an improper purpose.

6. Exhibits: While you may choose to submit one or more exhibits along with your complaint, you must set forth your complete claims in the body of your complaint and may not incorporate the exhibits by reference as a means of setting forth your claims. You do **not** need to submit as exhibits all papers that might be relevant to your complaint and/or used at trial. If you do choose to submit exhibits you must reference those exhibits, by page number, in the body of your complaint. Also, you should only submit copies of documents rather than originals, because the Court will not return your exhibits to you.

7. Privacy Protection: Local Rule 8.1 requires litigants to redact (omit or obscure) certain

information from their pleadings and from any exhibits attached to pleadings. Information that must be redacted includes: social security numbers, names of minor children, dates of birth, financial account information and home addresses.

Transcripts of the administrative record in social security proceedings do not need to have the above personal identifiers redacted.

B. FILING FEES AND *IN FORMA PAUPERIS*

Most civil complaints must be submitted with the filing fee set forth in 28 U.S.C. §1914(a), which is currently three hundred and fifty dollars ($350.00) plus an additional Administrative fee of $50 (as approved by the Judicial Conference at its March, 2013 session) for a total fee to file a civil case of $400. You must either pay the fee in full at the time you present your complaint to the Court for filing or, if you are unable to pay the fee, you must submit an application to proceed *in forma pauperis* along with your complaint.

If you file an application to proceed *in forma pauperis* instead of a filing fee, the Court will then consider your application and determine whether you are entitled to proceed *in forma pauperis*. *See* Local Rule 5.4. If the Court denies your *in forma pauperis* application, you must pay the full civil case fee of $400.00 within a certain period of time or your action will be dismissed.

In addition to waiving the obligation to pay the filing fee, being granted permission to proceed *in forma pauperis* entitles a person to: (1) submit a motion for appointment of counsel; and (2) have his or her complaint served on the defendant(s) by the U.S. Marshals Service. If you are not proceeding with your action *in forma pauperis*, you will be responsible for serving the summons and complaint on each defendant, in accordance with Federal Rule of Civil Procedure 4.

You may submit an *in forma pauperis* application at any time during the litigation, even if you have already paid the filing fee in full. However, you should note that being permitted to

proceed *in forma pauperis* after you have paid the fee will not entitle you to the return of the money you have paid.

***Pro se* litigants proceeding *in forma pauperis* are not exempt from other fees and costs in their actions, including but not limited to copying and witness fees.** Thus, *pro se* litigants must still provide identical copies of documents that must be served on the parties that they name in their lawsuit. If you cannot afford to pay for copies, you must handwrite copies of these documents for service on the other parties to the action.

It is important to realize that, even though you believe you cannot afford to pay for copies of documents, neither the Court nor the Clerk's Office can make copies for you free of charge. Therefore, even if you are proceeding with an action *in forma pauperis*, copies of documents in the file of your action cannot be provided to you by the Clerk's Office without a charge of fifty cents ($0.50) per page, which must be paid in advance. **You should always keep a copy, for your own records, of all documents that you send to the Court or the Clerk's Office.**

C. WHERE TO FILE

You must either deliver your documents to the Clerk of the Court in person, or send the documents in the mail. Please refer to Chapter I, page 2 for the locations and mailing addresses for the Clerk's Offices in the Northern District of New York. The Northern District does not accept any filings via facsimile.

D. ELECTRONIC CASE FILING

On January 1, 2004, the Northern District of New York implemented a new electronic case filing system (called Case Management/Electronic Case Files, or CM/ECF) that allows attorneys to file and view court documents over the Internet. General Order 22 governs the administrative procedures for electronic case filing. However, *pro se* parties are still required to submit and serve paper originals of all their documents. The Clerk's Office then scans the *pro se* party's documents

into the CM/ECF system so that those documents can be viewed on-line by the attorneys who represent the opposing party or parties.

E. A BRIEF LOOK AT THE MOST COMMON DOCUMENTS IN A CIVIL ACTION IN FEDERAL COURT

The following table may be used as a quick reference regarding the most common items that must be completed and filed by a party, a brief description of each item, the Federal or Local Rules that relate to each item (if any) and when the item must be submitted to the Clerk.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Civil Cover Sheet	The document that must accompany the complaint and summons before filing can occur.	L.R. 3.1	Initial filing.
Complaint	Commences the action when filed by the Clerk of the Court. Names the parties, and succinctly sets forth the controversy, including allegations of fact and the relief sought. Does not include legal argument.	Fed. R. Civ. P. 3, 8 & 10 L.R. 8.1, 10.1	Initial filing.
In forma pauperis application	Application made under penalty of perjury which seeks waiver of filing fee. If granted, filing fee only (not other fees such as witness or copying fees) is waived.	L.R. 5.4	Initial filing.
USM-285 Form	Directs the U.S. Marshals Service to serve the defendant listed on the form with the Summons and Complaint. You must fill out one USM-285 form for each defendant.	Fed. R. Civ. P. 4	Initial filing.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Summons	Served on the defendant with a copy of the complaint. A "Waiver of Service of Summons" can also be served on the defendant along with a copy of the complaint. The summons informs the defendant that unless a response to the complaint is filed, a judgment may be entered in favor of the plaintiff.	Fed. R. Civ. P. 4 L.R. 5.1(f) *et seq.*	Initial filing.
Answer	Filed by the defendant(s), the answer is a short and plain statement of the defenses to the claims stated in the complaint. The defendant(s) must either admit or deny each specific allegation in the complaint.	Fed. R. Civ. P. 12	Within 21 days from the date of service of the complaint, unless service was waived in which case defendants have 60 days to answer. The United States and federal officials have 60 days to file the answer.
Rule 16 Case Management Orders (non-incarcerated plaintiffs only)	Issued by the Court, following a Case Management Conference, which is held shortly after the action is commenced. A Rule 16 Case Management Order sets deadlines for initial disclosures, discovery and pretrial motions. Parties must confer and file a proposed plan prior to the Case Management Conference.	Fed. R. Civ. P. 16 L.R. 16.1	Issued by the Court after the Case Management Conference.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Motions	Items which seek an order from the Court on some particular matter during the pendency of a case. A party who files a motion is called a "movant."	Various Fed. R. Civ. P., such as 12 and 56 L.R. 7.1	At least 31 days before the "return date" of the motion, which is the date on which the motion is to be heard by the Court. Must be filed before expiration of motion filing deadlines.
Response to motions	Response to motion filed by the other party or parties.	L.R. 7.1(b)	At least 17 days before the return date of the motion.
Service of Documents	When motions, stipulations, letters or any other documents are sent to the Clerk or the Court, copies of any such documents must also be served on (in other words, sent to) all other parties to the action. If any other party is represented by counsel, service is properly made by sending a copy of each submission to counsel.	L.R. 5.1	When papers are sent to Court or the Clerk.
Proof of Service	Whenever a document is sent to the Court, there must be a "proof of service" document included, which states that a copy of that document was sent to the other party/parties or their attorneys.	L.R. 5.1	Attached to the document sent to the Court or the Clerk.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Discovery	All discovery requests, and the responses thereto, must be served upon the other parties or their attorney. Discovery shall **NOT** be filed with the Court except: i) if the Court orders particular materials to be filed; ii) when a party is making a motion pursuant to Fed. R. Civ. P. 37 regarding particular discovery materials; or iii) materials that are to be used at trial are to be filed with the Court prior to trial.	Fed. R. Civ. P. 37 L.R. 26.2	Discovery must be completed within Court-imposed deadlines.

CHAPTER VII – PRETRIAL PROCEEDINGS AND CASE MANAGEMENT

Upon the filing of a *pro se* complaint, the Court will review the pleading to determine whether it complies with the pleading requirements of the Federal Rules of Civil Procedure and to assess the sufficiency of the plaintiff's claims. Following that review, the Court will issue an order advising the plaintiff of its determinations and directing further action.

In order to help litigants resolve their civil disputes in a just, timely and cost-effective manner, the Court will issue a Case Management Order.

A case management conference will be scheduled by the Court shortly after the action is commenced. This conference is sometimes referred to as a Rule 16 Conference.

Prior to this conference, the parties will have to confer about and file a Case Management Plan. The Case Management Plan used by the Northern District of New York is set forth in General Order 25, which you should read and become familiar with. The parties are required to jointly address the items contained in the Case Management Plan, and to file the completed Plan with the Clerk's Office not later than fourteen (14) days prior to the conference date. In order to complete the Case Management Plan, you must identify and confer with the opposing party or

parties about your anticipated discovery requests (see Chapter IX for more information about discovery). You and the opposing party or parties must also decide upon a proposed timetable for discovery and for trial.

Following the Rule 16 Conference, the Court will issue a Uniform Pretrial Scheduling Order.

CHAPTER VIII - MAGISTRATE JUDGES

There are two types of Judges in the federal district courts: United States District Judges and United States Magistrate Judges. District Judges are appointed for life terms by the President of the United States with the consent and approval of the United States Senate pursuant to Article III of the Constitution. United States Magistrate Judges are appointed by the Board of District Judges of the Northern District of New York for terms of eight (8) years, and may be reappointed at the expiration of their term. Magistrate Judges are judicial officers who are authorized, pursuant to 28 U.S.C. § 636, to conduct any and all proceedings in civil cases, including with the consent of the parties, a jury or non-jury trial, and to order the entry of a final judgment.

Pursuant to General Order 12 of the Northern District of New York, when a complaint is filed and a case is assigned a civil action number and a District Judge, a Magistrate Judge *may* also be assigned. If a Magistrate Judge is assigned to your case he or she will normally handle all non-dispositive matters (that is, matters other than trial or final decisions on dispositive motions) in your action.

The parties' consent is not needed for the District Judge to refer the case to the Magistrate Judge for non-dispositive purposes. It is common for the Magistrate Judge to handle pretrial matters (i.e., to supervise discovery, set schedules, and attempt to settle the case). When a case has been assigned to a Magistrate Judge for general pretrial purposes, that means that all pretrial issues regarding scheduling, requests for extension of time, discovery proceedings and disputes, the schedule for the filing of motions and settlement, should be addressed to the Magistrate

Judge; letters about such matters should not be sent to or copied to the District Judge.

The Magistrate Judge's role in civil lawsuits is described in 28 U.S.C. § 636, Rules 72 and 73 of the Federal Rules of Civil Procedure, and Local Rules 72.2, 72.3 and 73.1.

A. CONSENT TO PROCEED BEFORE A MAGISTRATE JUDGE FOR ALL PURPOSES INCLUDING TRIAL

If all parties to the lawsuit consent, the lawsuit may be heard for all purposes by the Magistrate Judge, pursuant to 28 U.S.C. § 636(c). That means that the Magistrate Judge not only will set the schedule and resolve all non-dispositive matters, but also that the Magistrate Judge will decide all dispositive motions and conduct the trial of the case, with a jury if either party is entitled to a jury and has requested a jury trial.

There are a number of benefits to consenting to proceed before a Magistrate Judge. Perhaps the greatest benefit is time. District Judges are required to give priority to felony criminal trials, which often are lengthy and complicated. By consenting to proceed before a Magistrate Judge, you will find that your lawsuit generally proceeds with greater speed than if the case were before the District Judge. Because Magistrate Judges are not affected by the scheduling requirements imposed by felony criminal cases, generally the pretrial and discovery conferences, as well as trial, will occur sooner. In other words, your legal rights are the same before the District Judge or the Magistrate Judge, but generally your case will proceed to trial faster if you have consented to have your case heard before the Magistrate Judge.

In cases where the parties have consented to proceed before the Magistrate Judge for all purposes, the Magistrate Judge issues orders and opinions, and any appeal from the Magistrate Judge's decision is directly to the United States Court of Appeals for the Second Circuit.

B. ORDERS ISSUED BY THE MAGISTRATE JUDGE

In cases where the parties have not consented to proceed before the Magistrate Judge for

all purposes, the Magistrate Judge may issue an order on any non-dispositive matter (a matter that does not dispose of a claim or defense of a party). If you disagree with the Magistrate Judge's order, you may serve and file objections within fourteen (14) days. Objections should be filed with the Clerk's Office. If you do not object to the Magistrate Judge's order within that fourteen (14) day period, you may not later object to the order. The District Judge will consider any objections filed and set aside or modify the Magistrate Judge's order only if it is clearly erroneous or contrary to law. However, you are required to obey any order of a Magistrate Judge even if you have filed objections, unless you obtain a stay of the order from the Magistrate Judge or District Judge.

For matters that do dispose of a claim or defense – such as a motion to dismiss or a motion for summary judgment – if the parties have not consented to the referral of the matter to the Magistrate Judge for all purposes, the Magistrate Judge will not issue an order on the matter, but will issue a Report-Recommendation to the District Judge.

C. OBJECTIONS TO A MAGISTRATE JUDGE'S REPORT-RECOMMENDATION

If you disagree with the Magistrate Judge's Report-Recommendation, you must object in writing to any or all of the contents of the Report-Recommendation, within fourteen (14) days of the filing of the Report-Recommendation, plus three (3) calendar days if the Report-Recommendation is served by mail. You must serve all parties with your objections, attach a completed Affirmation of Service, and you must file all objections with the Clerk's Office. All objections should be captioned "Objections to the Report-Recommendation." You must clearly connect your objections to specific recommendations and explain why you object to any particular recommendation.

The District Judge will make a final decision, relying on the Magistrate Judge's Report-Recommendation and the parties' objections. The District Judge may adopt the Magistrate

Judge's findings in full or in part, or may decline to adopt the Report-Recommendation and issue an entirely new decision. If the District Judge's decision results in a final disposition of your case, you may appeal to the United States Court of Appeals for the Second Circuit.

Further information regarding the Report-Recommendation process may be found at 28 U.S.C. § 636(b)(1)(C), in Federal Rule of Civil Procedure 72 and in Local Rule 72.3.

CHAPTER IX – GATHERING INFORMATION

A. DISCOVERY: GATHERING INFORMATION FROM PARTIES

After pleadings are served, each party will typically gather information to support his or her case. (A "party" is a plaintiff or a defendant). This phase of the lawsuit is called "discovery," and is conducted in accordance with Federal Rules of Civil Procedure 26 through 37. The information can be in the form of oral or written statements made by the parties themselves, or by witnesses, regarding a particular event or series of events. Parties often need to gather documents also, such as medical records, business records, transcripts from prior court proceedings, etc. Sometimes parties will need to collect or examine physical objects, as well.

It is important for you to remember that typically each party in an action will seek some discovery. This means that if you file an action, you will need to both seek information from the parties you are suing, as well as provide information to them. For example, by filing an action in which your medical condition or treatment is in issue, at least some of your own medical records will be relevant to the case and will likely be sought in discovery. You will then need to provide written consent, authorizing release of the relevant medical records to opposing counsel. You may also need to provide such a consent form if you are seeking discovery of your own medical records.

It is also important for you to know that the costs of discovery remain the responsibility of each party, regardless of whether either party has been granted

permission to proceed *in forma pauperis*. *See* L.R. 5.4.

1. Interrogatories: One of the most cost-effective ways to get a sworn statement from someone who is a party to the action is to serve interrogatories on that party. Interrogatories are written questions that must be answered, under oath, by the party on whom they are served. Federal Rule of Civil Procedure 33 governs interrogatories.

You should note that you are limited to twenty-five (25) interrogatories, counting each sub-part separately, for each party. A person may serve more interrogatories on a party **only** if the Court grants the party special permission to serve more than twenty-five (25). Also, interrogatories may only be served on people who are parties to the litigation.

2. Depositions: Another means of obtaining a sworn statement from a party is to conduct an oral deposition of that party. For details regarding oral depositions, please refer to Federal Rules of Civil Procedure 27, 28, and 30.

While oral depositions can be helpful, you should know that they are expensive. The person who is seeking to conduct a deposition will be responsible for the costs of the deposition, including having it recorded, even if he or she has been granted permission to proceed *in forma pauperis*. Since these costs can be considerable, you should first consider whether there are more cost-effective means of gathering the information you seek.

3. Document Production: A party to a lawsuit may obtain access to documents and objects that are in another party's possession or control, in order to be able to inspect or copy them. The party wishing to make the inspection or copies must serve a request to do so on the party who has possession or control of the items, in accordance with Federal Rule of Civil Procedure 34. As with other discovery, the person who wishes to make copies of documents he or she inspects is responsible for the costs of doing so.

B. GATHERING INFORMATION FROM NON-PARTIES

Sometimes it will be necessary for a party to a lawsuit to gather information from people who are not parties to the lawsuit. There are various methods of seeking such information, some of the most common of which are discussed briefly below. As with obtaining discovery from parties to the lawsuit, **the person seeking the information from the non-party will be responsible for all associated costs, even if he or she is proceeding *in forma pauperis*.**

1. Ask First: The best way to gather information or get a statement from someone who is not a party to the lawsuit is to ask him or her! Often, by simply asking the person you can avoid the effort and expense of obtaining a subpoena from the Court.

2. Subpoenas: Subpoenas are notices, issued by a court, commanding someone to appear at a specified time and place and do some act such as give testimony or produce documents. A *pro se* party must request the issuance of a subpoena from the Court. It is the policy of the Court that no civil subpoena(s) may be provided by the Clerk's Office to a *pro se* party unless the judge to whom the case has been assigned has approved a written application by the *pro se* party requesting the subpoena(s). A form application may be obtained from the Clerk's Office. **Subpoenas are not used for parties**; you should use the methods of discovery outlined in Federal Rules of Civil Procedure 26 through 37 to gather information from parties. Federal Rule of Civil Procedure 45 discusses subpoenas.

CHAPTER X – LEGAL RESEARCH: AN OVERVIEW

It is not the purpose of this chapter to teach the *pro se* litigant all of the intricacies of legal research and writing, nor is it our goal to sort out the complexities of applying the law to the facts of a particular case. In fact, the law prohibits personnel employed by the Court, including its attorneys, from providing information regarding the application of the law to the

facts of any case. Instead, we are providing certain basic information as a guideline for conducting your own research.

While you should not be making legal arguments or using legal citations in your complaint, you may need to file documents that make legal arguments at some point during your case. One example of a time when a plaintiff will need to make legal arguments and use legal citations is when the defendant(s) have filed a motion to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failing to state a cause of action, and the plaintiff wishes to oppose that motion so the case will go forward. As part of the plaintiff's opposition, he or she would submit a memorandum of law which sets forth the legal reasons the plaintiff believes his or her complaint should not be dismissed.

Just as there are certain standards of procedure for filing documents with the Clerk's Office, there are certain standards for citing authority when applying the law to the facts of a case. The most common source people turn to in determining how to write correct citations is *The Bluebook: A Uniform System of Citation*, (Nineteenth Edition), published and distributed by The Harvard Law Review Association. It is more commonly referred to as "*The Bluebook.*" All of the information required for proper citation format can be found in this one text. *The Bluebook* is available in most law libraries and also at http://www.law.cornell.edu/citation/.

"Authority" is the information used by a party to persuade a Court to find in favor of that party's side. Legal authority is divided into two classes – primary and secondary.

A. PRIMARY AUTHORITY

Primary authority is the most accepted form of authority cited and should be used

before any other authority. There are two sources of primary authority: "statutory authority" and "case authority."

Statutory authority consists of constitutions, codes, statutes and ordinances of either the United States, individual states, counties or municipalities.

Case authority is comprised of court decisions, preferably from the same jurisdiction where the case is filed (in the Northern District, that includes the Second Circuit Court of Appeals and District Court cases from the Northern District of New York). When a particular case is decided by a Judge, it becomes "precedent," which means that it becomes an example or authority to be used at a later time for an identical or similar case, or where a similar question of law exists.

Cases are published in what is called the National Reporter System which covers cases decided by the United States Supreme Court, the Courts of Appeals and the District Courts. Digest systems gather case decisions by subject matter on various points of law. There are many different digests, and they can be found in most law libraries. For example, a person who wishes to bring a civil rights action in federal court can consult digests that contain many cases dealing with the subject of civil rights.

In conducting research, you should try to find cases that have already been decided (precedent) which support the position you are taking in your case.

B. SECONDARY AUTHORITY

Secondary authority is found in legal encyclopedias, legal texts, treatises and law review articles. It should not be cited except where no primary authority is located by the party conducting the research. Secondary authority can also be used to obtain a broad

overview of the area of law and also as a tool for finding primary authority.

There are various types of secondary authority, including the following:

Legal encyclopedias contain detailed information about various topics.

Treatises are texts written about a certain topic of law by an expert in the field.

Law review articles are published by most accredited law schools and sometimes provide a broad overview of a particular subject matter.

The *Index to Legal Periodicals* provides reviews of books in the law, as well as comments regarding cases listed in the Table of Cases.

American Law Reports Annotated is a collection of cases on more narrow issues of law.

Restatements are publications compiled from statutes and decisions which discuss the law of a particular field.

Shepard's Citations is a large set of law books that provides a means by which any reported case may be checked to see when and how another court has referred to or interpreted the first decision. Looking to see if another court has cited a reported case is commonly referred to as "Shepardizing." **All cases must be checked to make sure another court has not reversed or overruled the case you wish to use to support your position.**

C. WHERE TO FIND PRIMARY AND SECONDARY AUTHORITY

1. Law Libraries

You can find primary and secondary legal authority that may be relevant to your case at specialized law libraries. Law libraries are staffed by professionals who are experienced in helping attorneys and laypeople conduct legal research. Under New York state law, each county is required to provide the general public with access to a law library. To find the location of a publicly accessible law library in your county, call your county's New York State Supreme Court, or visit www.nycourts.gov/lawlibraries/publicaccess.shtml. Some universities may also permit you to conduct research in their law libraries.

When doing research at a law library, keep in mind that all legal citations are written with the volume number first, an abbreviation of the Reporter's name, and the page number. For example, "924 F.2d 345" refers to volume 924 of the Federal Reporter, second series, page 345. Furthermore, you should use the pocket part if your book contains one. A pocket part is a set of pages inserted in a pocket at the back of the book that includes updates to the information contained in the book. Lastly, be sure to Shepardize the primary authority you find so as to avoid relying on overruled cases or other outdated material.

2. Internet Resources

There are a large number of free resources available on the Internet that may provide primary and secondary materials relevant to your action. There are also several fee-based Internet databases that lawyers and other legal professionals use to conduct their legal research. You are not required to conduct your research using fee-based databases like Westlaw and Lexis Nexis, and if any party cites to a source that is only available on one of these databases, that party is required to provide *pro se* litigants with a full copy of the cited source. *See* L.R. 7.1(a)(1). Below is a table of some Internet resources along with brief description of what each offers as of the publication date of this handbook.

Name	URL	Description	Cost
American Law Sources Online	www.lawsource.com/also	Database of primary authority searchable by citation and links to secondary authority	Free

Name	URL	Description	Cost
Bloomberg Law	www.bloomberglaw.com	Large database of primary and secondary authority	Paid subscription (free trial available)
Fastcase	www.fastcase.com	Large database of primary authority	Paid subscription (free trial available)
Findlaw	www.findlaw.com	Provides links to online legal resources; includes state and federal primary authority	Free (with some forms available for purchase)
Free Law Reporter	www.freelawreporter.org	Searchable database of many published state and federal opinions	Free
Google Scholar	scholar.google.com	Searchable versions of published state and federal court opinions and some secondary authority	Free (some secondary sources are hosted on fee-based websites)
Hein Online	www.heinonline.org	Extensive database of secondary authority	Paid subscription
Legal Information Institute	www.law.cornell.edu/lii/get_the_law (Note the use of underscore characters in place of spaces in "get_the_law")	Searchable text versions of the U.S. Constitution, the Federal Rules, U.S. Code, select Supreme Court decisions, and links to many other sources of primary authority	Free
Lexis Nexis	www.lexis.com	Extensive searchable databases of primary and secondary authority	Paid subscription or pay-per-use

Name	URL	Description	Cost
Loislaw	estore.loislaw.com	Large databases of primary and secondary authority	Paid subscription (free trial available)
Public Library of Law	www.plol.org	Searchable database of select Supreme Court Cases, Circuit Courts of Appeals cases, state cases (from 1997-present), along with some state and federal statutory authority	Free (with links to PLoL's fee-based sponsor, Fastcase)
The Supreme Court	www.supremecourt.gov	Provides .pdf versions of opinions published in the U.S. Reports back to 1991, as well as all recent opinions that have not been published yet	Free
THOMAS	thomas.loc.gov	Searchable database of modern federal legislative history and bill text	Free
Versus Law	www.versuslaw.com	Large database of federal and state case law and other primary authority	Paid subscription (depending on your needs, possibly more affordable than Westlaw or Lexis)
Westlaw	www.westlaw.com	Extensive searchable databases of primary and secondary authority	Paid subscription or pay-per-use

As with book research, remember to search for recent cases on a topic and to Shepardize the material you find so as to ensure you are relying on valid authority.

CHAPTER XI – MOTIONS

A motion is an application by a party (the "movant") made to the Court, requesting a ruling or order in favor of the movant. Motions may be used to seek various types of relief while an action is pending, such as a motion to amend or a motion to compel discovery. However, motions should only be filed when necessary; multiple or frivolous motions can result in sanctions from the Court. *See* Chapter V.

Local Rule 7.1 sets forth the procedure for filing a motion in the Northern District; **motions must be filed in conformity with Local Rule 7.1 or else they will be denied**. Please read and become familiar with all of Local Rule 7.1 before you begin writing a motion. Please also note that, as with every document you submit to the Court for filing, each of these documents **must be signed and served on opposing counsel**.

A. DOCUMENTS REQUIRED TO FILE A MOTION

1. Notice of Motion: The notice of motion is a concise document identifying (a) the type of motion; (b) the return date (which is the date on which the motion is to be heard by the Court); (c) the time the motion is to be heard; and (d) the street address of the courthouse at which the motion is to be heard. When you make a motion, you choose the return date yourself. In choosing a return date, remember that you must file your papers with the Court and serve them on all parties **at least thirty-one (31) days before the return date that you select**. *See* L.R. 7.1(b).

2. Affidavit or Affirmation: An affidavit is a sworn declaration of the facts and procedural background pertinent to the motion, set forth in concise, paragraph form, sworn to be true before a notary public. Statements in affidavits must be based on personal knowledge. Affidavits

submitted with a motion should contain **only** the procedural history of the case and the factual basis of the claim—in other words, affidavits should not contain legal arguments. While an affidavit is required for most motions, an affidavit is not required, unless the Court otherwise directs, for motions filed pursuant to Federal Rules of Civil Procedure 12(b)(6), 12(c) or 12(f). *See* L.R. 7.1(a)(2).

If you do not have access to a notary public, you may submit an affirmation. An affirmation is essentially the same as an affidavit except that, instead of being notarized, the party who signs the affirmation includes a short statement affirming that the statements made in the affirmation are true.

3. Memorandum of Law: A memorandum of law is a document prepared by a party arguing his or her position on a legal matter in a case. It should contain a brief summary of the significant facts of the case; pertinent laws, including case law; and an argument as to how the law applies to the facts of the case. A memorandum should also refer to specific sections of any affidavits or exhibits that have been filed along with the motion. A memorandum of law may not exceed twenty-five (25) pages in length.

As with affidavits, there are certain motions for which a memorandum of law is not required, unless the Court directs otherwise. The motions for which no memorandum of law is required are those made pursuant to Federal Rules of Civil Procedure 12(e), 15, 17, 25, 37 and 55. *See* L.R. 7.1(a)(1).

4. Other Documents that May be Required: Often some other document or documents may be required for a particular type of motion. Two of the most common types of motions that require other documents or information are motions to amend and motions to compel.

A motion to amend is filed when a party wishes to amend his or her pleading. For example, a person may want to amend his or her complaint to add a new party, identify a party previously

named only as "John Doe," or add a new cause of action. A motion to amend must be accompanied by the proposed amended pleading, which must be a complete pleading.

A motion to compel is typically used when a party has refused to comply with a discovery request, or when the movant believes the response that was provided to a discovery request is incomplete or insufficient. Before a party may file a motion to compel, the parties must make a good faith effort to resolve the dispute themselves. If they cannot resolve the dispute and a party wishes to file a motion to compel, he or she must provide the Court with both the discovery request itself and the response that is being challenged.

B. TIME CONSIDERATIONS

Local Rule 7.1 addresses the time frame in which motion papers must be filed.

1. Moving Papers: As noted above, the moving party must file the required papers with the Clerk's Office and serve them on the other parties at least thirty-one (31) days before the return date. (If the return date on the notice of motion is incorrect, the Clerk's Office will set an appropriate date and notify the parties of the new date). Of course, parties must be sure to file all motions within the time limits previously established by the Court.

2. Response Papers: Parties responding to the motion must file their papers with the Clerk's Office, and serve them on the other party, at least seventeen (17) days before the return date. (For response to cross-motions, see (4) below).

3. Reply Papers: A movant may wish to file papers in response to the papers filed in opposition to his or her motion. In the case of non-dispositive motions, the party must obtain permission from the Court to file "reply" papers. Such permission will only be granted upon a showing of necessity. If Court permission is granted, reply papers must be filed with the Clerk and served on the opposing parties not less than eleven (11) days before the return date of the motion.

4. Cross-Motions: A cross-motion is a motion made by the responding party against the

original movant. A cross-motion requests that the Court rule in favor of the party filing the cross-motion (the "cross-movant") on a basis similar to that requested by the original movant. A cross-motion must be filed with the Clerk and served on all parties at least seventeen (17) days before the return date of the original motion. Any papers responding to the cross-motion must be filed with the Clerk and served on all parties at least eleven (11) days prior to the original motion date.

CHAPTER XII – ENDING A CASE BEFORE TRIAL

Today, most cases never actually go to trial. There are various ways that a case can end before trial, some of the most common of which are discussed below.

A. *SUA SPONTE* DISMISSAL BY THE COURT

If a plaintiff has filed an application to proceed *in forma pauperis*, Title 28, section 1915 of the United States Code governs his or her case. 28 U.S.C. § 1915(e) states that a Judge shall dismiss a case if at any time the Court determines that: (1) the plaintiff's allegations of poverty are untrue, (2) the action is frivolous or malicious, (3) the plaintiff has failed to state a claim upon which relief can be granted, or (4) the plaintiff is seeking monetary relief against a defendant who is immune from such relief.

The Court also has the inherent power to determine that a claim is not frivolous before permitting a plaintiff to proceed, and may *sua sponte* dismiss a *pro se* complaint which is frivolous or fails to state a claim even if the filing fee has been paid. *See Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 363 (2d Cir. 2000); *Wachtler v. Herkimer County*, 35 F.3d 77, 82 (2d Cir. 1994).

B. 12(b)(6) MOTION TO DISMISS AND 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim upon

which relief can be granted is very similar to a Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings. Both motions argue that, even if all the facts the plaintiff has alleged are true, the plaintiff has not stated a valid claim under the law. The essential difference is the time at which each is made: a 12(b)(6) motion to dismiss is made by the defendant after the complaint has been served but before the defendant has submitted an answer; a 12(c) motion is made after the defendant has already filed an answer.

C. MOTION FOR SUMMARY JUDGMENT

Either the plaintiff or the defendant may move for summary judgment pursuant to Federal Rule of Civil Procedure 56. In a motion for summary judgment, the moving party argues that there is no question of material fact, or in other words, that the parties agree on the important points of what happened. Since a trial is only needed if there are material facts in dispute, if the parties agree on the facts the Court may apply the law to the facts of the case and render judgment without a trial. The plaintiff may wish to make a motion for summary judgment him- or herself, or may be called upon to respond to a motion for summary judgment made by the defendant(s).

Local Rule 7.1 requires that a special statement of material facts be filed along with a motion for summary judgment. The Local Rule 7.1 statement of material facts is a separate document, containing a short and concise statement, in numbered paragraphs, of the significant facts as to which the moving party contends there is no dispute. In preparing a statement of material facts, the movant must support the facts listed in his or her statement of material facts with an accurate citation to the record where that fact is established (for example, the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other documents).

The party opposing a motion for summary judgment must also include a Local Rule 7.1 statement, responding to the movant's 7.1 statement. The opposing statement must mirror the moving party's 7.1 statement by admitting and/or denying each of the moving party's assertions

in matching numbered paragraphs. The opposing statement should be a short and concise statement of the facts over which a dispute exists. The opposing party must support any denial with a specific citation to the record where the asserted factual issue arises (for example, the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other documents). **If the opposing party fails to contest any of the facts contained in the movant's statement of material facts, those facts are deemed admitted**. *See* Local Rule 7.1(a)(3).

If the opposing party moves for summary judgment and you do not respond in opposition, summary judgment, if appropriate, will be entered against you. If partial summary judgment is granted against you, the portions of your case as to which summary judgment was granted will be dismissed; there will be no trial as to these portions of your complaint. If summary judgment is granted as to your entire complaint, your case will be dismissed and there will not be a trial concerning any of the claims asserted in your complaint.

D. ALTERNATIVE DISPUTE RESOLUTION

If the plaintiff is not a prisoner, the Court may direct the parties to participate in Alternative Dispute Resolution, or ADR. The types of ADR that are used in the Northern District of New York are Arbitration, Mediation, and Early Neutral Evaluation. While these forms of ADR do not render binding judgments on the parties, they often help to clarify the issues and may assist the parties in reaching a settlement before trial. Please refer to Local Rules 83.7 through 86.1 for more information on ADR in this Court.

E. SETTLEMENT

Parties will sometimes reach an agreement on their own as to how to end their case. Typically a defendant will agree to give something to the plaintiff in exchange for the plaintiff

ending the suit against the defendant. A settlement can happen any time after initiation of a lawsuit. The responsibility for negotiating a settlement rests with the parties. The Court may, in its discretion, opt to conduct a settlement conference.

F. FAILURE TO PROSECUTE AND DEFAULT JUDGMENT

A case will only continue to go forward if the plaintiff is actively pursuing his or her lawsuit. Federal Rule of Civil Procedure 41(b) permits courts to dismiss actions when the plaintiff fails to "prosecute," or pursue the case. Local Rule 41.2(a) provides that the failure of a plaintiff to take any action in his case for four (4) months shall be presumptive evidence of lack of prosecution. Therefore, if a plaintiff fails to take any action in his or her case for a period of four (4) months or more, the case is subject to dismissal by the Court.

A plaintiff can fail to prosecute his or her case in different ways. For example, if a plaintiff fails to provide the Court with an updated address after he or she has moved, or if a plaintiff fails to serve the summons and complaint on the defendant, the case may be dismissed for failure to prosecute. A case may also be dismissed if the plaintiff fails to comply with a Court order.

On the other hand, a defendant may fail to defend him- or herself in a case, which can occasionally lead to a default judgment against the defendant, in favor of the plaintiff. Federal Rule of Civil Procedure 55 and the corresponding Local Rules govern default judgments. You should note, however, that it is well-settled in the Second Circuit that default judgments are not favored, and there is a strong preference for resolving disputes on their merits. *See Brien v. Kullman Indus.,* 71 F.3d 1073, 1077 (2d Cir. 1995).

CHAPTER XIII – TRIAL

The Federal Rules and the Local Rules of the Northern District of New York cover all phases of trial preparation from the pretrial conference to the conclusion of a case. The following

information is not meant to be all inclusive and you should always consult the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Northern District of New York to ascertain what the Court requires of all parties when preparing for trial and trying a lawsuit. In addition, you should become familiar with the Federal Rules of Evidence, which govern the admission of evidence at trial.

A. FINAL PRETRIAL CONFERENCE AND ORDER

Prior to the actual trial, a pretrial conference is usually held between a judicial officer and the parties (or their counsel) to determine (1) what exhibits and witnesses each side might use during the trial; (2) the approximate length of time that will be necessary for the trial and (3) the "ground rules" the Court will utilize before, during and after the trial. After this conference, an order is usually prepared which sets out the above. Note that it is the policy of the Court that no civil subpoena(s) may be provided by the Clerk's Office to a *pro se* party unless the judge to whom the case has been assigned has approved a written application by the *pro se* party requesting the subpoena(s). A form application may be obtained from the Clerk's Office.

B. THE TRIAL: THE ROLE OF THE JUDGE AND JURY

A trial is defined as "a judicial examination of issues between parties to an action." If your case proceeds to trial, the parties will each get the opportunity to present their side of the case, and the Judge and jury (if the trial is a jury trial) are responsible for entering a verdict and judgment based on the evidence and arguments presented. It is the Judge's duty to see that only proper evidence and arguments are presented. In a jury trial, he or she also instructs the jury, which will be called upon at the conclusion of the jury trial to make decisions regarding factual matters in dispute. A judgment will then be entered based on the verdict reached by the jury. L.R. 58.1.

If the parties have not requested a trial by jury pursuant to Local Rule 38.1, the judge becomes the trier of both law and fact. At the end of the trial, the Judge enters "Findings of Fact" and "Conclusions of Law," sometimes in writing, based on the evidence and arguments presented. A judgment is then entered based on those findings of fact and conclusions of law.

C. SELECTION OF THE JURY

A jury trial begins with the Judge choosing prospective jurors to be called for voir dire (examination). *See* L.R. 47.2 and General Order No. 24. The Court will determine the number of jurors, which is currently at least six (6) and no more than twelve (12). L.R. 48.1.

1. Peremptory Challenges: Each party will be given a number of peremptory challenges which enable the party to reject (in most cases) prospective jurors without cause. This decision is based on subjective considerations of the party when he or she feels a prospective juror would be detrimental to his or her case.

2. Challenges for Cause: The plaintiff or defendant may also challenge a prospective juror "for cause" when the prospective juror lacks a qualification required by law, is not impartial, is related to either of the parties, or will not accept the law as given to him or her by the Court.

D. OPENING STATEMENTS

After the jury is sworn in or "empaneled," each side may present an opening statement. The plaintiff has the burden of proving that he or she was wronged and suffered damages from that wrong and that the defendant caused those damages. The plaintiff is allowed to present the opening statement first. This may be followed by a statement by the defendant. The Court will determine the time to be allotted for opening and closing arguments. *See* L.R. 39.1.

E. TESTIMONY OF WITNESSES

After opening statements are given, testimony of witnesses and documents are presented to the jury or the Court. The plaintiff presents his or her case first. After the initial examination of a witness (also known as "direct examination"), cross-examination is conducted by the other side. After a party has cross-examined a witness, the opposing side has the opportunity to conduct "redirect" examination in order to re-question the witness on the points covered by the cross-examination.

If a witness testifies as to a fact, and a statement or document in the case file contradicts that testimony, the document can then be used to question the witness on the accuracy of the witness' statements. If the evidence shows that the testimony of the witness is false, the witness is considered "impeached" by the cross-examination.

F. MOTIONS DURING THE COURSE OF THE TRIAL

Before the closing arguments and up until the time the case is sent to the jury for deliberation, the following motions may be made:

1. Motion in Limine: This motion is typically made prior to the jury selection. It requests that the Judge not allow certain facts to be admitted into evidence, such as insurance policies, criminal records or other matters which are either not relevant to the particular case or which might unfairly influence the jury. Either party may file a motion in limine.

2. Motion for Judgment as a Matter of Law: This motion is usually made by the defendant at the close of evidence presented by the plaintiff. It is based on the premise that the plaintiff has failed to prove his or her case. If this motion is granted, the trial is concluded in the movant's favor. If the Court denies the motion, the trial continues with presentation of the defendant's side.

3. Motion for Mistrial: Either party can move for a mistrial if, for example, during the course of the trial certain matters which are not admissible (such as those determined to be inadmissible in a prior motion in limine) are presented by any witness, either purposely or unintentionally, in the

presence of the jury. If the Judge grants the motion for mistrial, the trial is immediately ended and the jury is dismissed.

4. Objections: During the examination of a witness, one side may "object" to the questioning or testimony of a witness, or presentation of evidence, if the litigant believes that the testimony or evidence about to be given should be excluded. If the objection is *sustained* by the Judge, that particular testimony or evidence is excluded. If the objection is *overruled* by the Judge, the testimony or evidence may be given despite the objection.

G. REBUTTAL TESTIMONY

After each side has presented its evidence, the plaintiff may be allowed by the Judge to present some rebuttal testimony.

H. CLOSING ARGUMENTS

Closing arguments to the jury set out the facts that each side has presented and the reasons why each party believes the jury should find in favor of him or her. Time limits are sometimes set by the Court for closing arguments, and each side must adhere to the specified time. *See* L.R. 39.1.

I. CHARGE TO THE JURY

After each side presents testimony and evidence, the Judge delivers the "charge" to the jury, usually in the form of written instructions. Each side may present proposed written instructions to the Judge for consideration. After the Judge has considered all proposed instructions, the jury is given appropriate instructions which set forth the jury's responsibility to decide the facts in light of the applicable rules of law. The jury then returns a verdict in favor of either the plaintiff or the defendant and assesses damages to be awarded, if any.

J. MISTRIAL

If a jury is unable to reach a verdict and the Judge declares a mistrial, the case must be tried again before a new jury. A jury which cannot reach a verdict is usually referred to as a "hung jury."

K. JUDGMENT AND COSTS

Following the entry of the jury's verdict, judgment in favor of the prevailing party is entered by the Clerk.

If costs are awarded to the prevailing party, it is necessary to prepare a "bill of costs" for the approval of the Court. A bill of costs sets forth those costs that were incurred in the suit. *See* L.R. 54.1. A prevailing party may serve a bill of costs within thirty (30) days after entry of a judgment. If attorney's fees are awarded, an application for attorney's fees must be made by motion filed no later than fourteen (14) days after entry of judgment. *See* Fed. R. Civ. P. 54(d)(2).

L. SATISFACTION OF JUDGMENT

Satisfaction of a money judgment will be entered by the Clerk's Office upon the specific conditions set forth in Local Rule 58.2.

CHAPTER XIV – APPEALS

If you are unhappy with the ultimate disposition of your action, you may appeal that determination to the United States Court of Appeals for the Second Circuit. Grounds for an appeal usually consist of allegations that the Judge made an error either in interpreting or applying the law or in a procedural ruling during the course of the case. Any error must have been sufficiently significant that the Judge or jury reached an incorrect result as a result of the error.

In general, only final orders or judgments of the district court may be appealed to the Second Circuit. 28 U.S.C. § 1291. This kind of appeal is called an appeal as of right. There are

limited exceptions to the "final order or judgment" rule which are set forth in 28 U.S.C. § 1292. A final order or judgment is the document which announces the final decision with respect to your case (that is, whether you won or lost) and closes the case with the district court. In order to appeal, a final order or judgment should be entered on the docket of your case.

A. INITIATING AN APPEAL

You generally have thirty (30) days from the date that the final order or judgment was entered on the docket to file a notice of appeal with the Clerk of the Northern District. A notice of appeal is a one-page document containing the name and civil action number of your case, your name, a description of the order or judgment being appealed, and the name of the court to which the appeal is taken (the Second Circuit). If the United States government or an officer or agency of the United States is a party to your action, you have sixty (60) days from the entry of the final order or judgment to file your notice of appeal. The District Court may extend the time for filing a notice of appeal only upon a showing of "excusable neglect" or "good cause." *See* Fed. R. App. P. 4(a).

B. FILING FEES ON APPEAL

The fee for filing an appeal is five hundred and five dollars ($505). The filing fee must be paid to the Clerk of the District Court when the notice of appeal is filed unless you are unable to pay the fee and request *in forma pauperis* status. Generally, if you were granted *in forma pauperis* status by the District Court and that status has not been revoked, then you do not need to pay the fee or submit another application to waive the fee. If you are uncertain about your *in forma pauperis* status and are not able to pay the filing fee you should submit a current signed *in forma pauperis* application when you file your notice of appeal.

C. PROCEEDINGS ON APPEAL

The Second Circuit is an appellate court and will only consider issues addressed by the District Court. Generally, a panel of three Judges is assigned to consider an appeal. In addition to the record from the District Court, which is sent to the Second Circuit from the District Court, the Second Circuit will consider a party's legal position or argument as set forth in their brief on appeal and during oral argument. Once the Second Circuit reaches a decision on the appeal, both parties will be notified.

Once you file a notice of appeal from a final order or judgment the District Court no longer has jurisdiction over your case and all questions regarding the case or the Second Circuit's procedures should be addressed to the Clerk of the Second Circuit. The Clerk's Office for the Second Circuit is located at:

United States Court of Appeals
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 370
New York, New York 10007

The mailing address for the Second Circuit is:

United States Court of Appeals
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

If you plan to appeal a final order or judgment to the Second Circuit you should very carefully read the Federal Rules of Appellate Procedure, which are available on the Second Circuit's website: http://www.ca2.uscourts.gov.