

**PRACTICES AND PROCEDURES OF
JUDGE DAVID STEWART CERCONE**

I. GENERAL MATTERS

A. Communications with the Court

In an urgent situation, Judge Cercone permits either correspondence or contact by telephone with his chambers. This includes such items as obtaining a one or two day extension of time to file a pleading when an unexpected event interferes with the attorney's ability to make a timely filing. He has a strong preference, however, that written communications with the court be in a form of a motion for docketing.

B. Communications with Law Clerks

Judge Cercone permits communications with his law clerks concerning the status of matters.

C. Telephone Conferences

Judge Cercone will permit attorneys or parties to participate in case management and status conferences by telephone but only, for the most part, where out-of-town counsel are involved. Lead trial counsel must physically be present for conciliation and pretrial settlement conferences.

D. Pro Hac Vice Admissions

Judge Cercone routinely grants pro hac vice admission provided counsel is a registered user of ECF in the United States District Court for the Western District of Pennsylvania, has paid the admission fee and has certified that he or she has read and understands the Local Rules.

E. Comment to the Media

No special policy is in effect and the Rules of Professional Conduct govern.

II. MOTIONS PRACTICE

A. Oral Argument

Oral argument will be scheduled on matters selected by the court, which usually are factually and legally complex, but not otherwise.

B. Briefs

Judge Cercone requires that briefs be filed with all motions except motions for a continuance, an extension of time, to compel discovery or to present an uncontested matter. A response and brief in support thereof are to be filed within fourteen (14) days of service of a motion - except for a dispositive motion, which shall be filed within twenty-eight (28) days of service. Except for a reply to (1) a dispositive motion or (2) a motion for injunctive relief, which is to be filed within fourteen (14) days of service of the response (or as otherwise ordered), a reply brief shall be filed

only with leave of court. When such leave is granted a reply brief shall be filed within seven (7) days of service of the response (or as otherwise ordered). Briefs shall not exceed twenty-five (25) pages without leave of court.

C. Chambers Copies of Motion Papers

Judge Cercone does not accept courtesy copies of motions and papers unless such copies have been requested from counsel.

D. Scheduling

Responses to motions are governed by Judge Cercone's Case Management Order. Judge Cercone appreciates scheduling pressures and will entertain requests for extensions.

E. Magistrate Judge's Report and Recommendation

When a Magistrate Judge makes a recommendation on a dispositive motion, it is Judge Cercone's practice to review the report and recommendation along with the parties' submissions in conjunction therewith in de novo fashion.

F. Evidentiary Hearings

In both civil and criminal matters which require an evidentiary hearing on a pretrial motion, Judge Cercone schedules the hearing in advance of trial and as soon as practical after all motions and briefs have been filed.

G. In Limine Motions

Motions in limine in civil cases are to be filed in accordance with Judge Cercone's Trial Management Order and comply with the formatting provisions of his Case Management Order and the Local Rules. Judge Cercone generally rules on such motions shortly before or at the time of trial.

III. CIVIL CASES

A. Pretrial Procedures

1. Local Rule 16.1

Judge Cercone has a standard Case Management Order in both jury and non-jury matters; a copy of each is posted for counsel's review.

2. Pretrial Conferences

An initial case management conference is scheduled approximately 60 days after counsel for all parties have been identified on the record. After the initial conference, the Case Management Order and ADR Referral Order are issued based on discussions with counsel at the conference as to issues related to ADR, the length of time necessary for discovery, the need for expert witnesses, and other matters. Additional conferences may take place on request of counsel. A pretrial settlement conference will be held

in all cases prior to the trial to discuss settlement and/or final preparations for trial. Counsel are encouraged to request the assistance of the court on any matter.

3. Settlement

Judge Cercone requires the parties to appear at a settlement conference with a principal who has authority to settle the case without further authorization. Judge Cercone will participate in the settlement of non-jury cases only with the consent of the parties and counsel. If any party objects to his participation, he will explore other options with counsel at the appropriate time. If Judge Cercone feels that discussing a specific amount of damages would prejudice his ability to remain neutral, he would refrain from participating in a damages discussion. However, it is very rare that he does not discuss both the liability and damages aspects of a non-jury case in the course of settlement.

4. Extensions and Continuances

Judge Cercone has no special rules regarding extensions and continuances. He prefers requests to be in the form of a motion. He will continue arguments, hearings and conferences if circumstances require.

B. Discovery Matters

1. Length of Discovery Period and Extensions

Judge Cercone normally grants a 150 day deadline for discovery, unless circumstances warrant a longer period at the outset.

2. Expert Witnesses

Judge Cercone has no specific policy with respect to discovery depositions of expert witnesses other than compliance with the Case Management Order and the Federal Rules of Civil Procedure.

3. Stay of Discovery

Judge Cercone's general policy is not to grant requests for a stay of discovery during the pendency of a dispositive motion unless the grounds for a stay are "obvious." His preference is to have the parties to move forward with developing the substance of a case. He will, however, entertain motions to stay.

5. Limitations on Discovery

Judge Cercone does not impose any restrictions on the number of interrogatories or depositions or the use of any other discovery procedure beyond those established by the Federal Rules of Civil Procedure and the Local Rules.

6. Rule 11 Motions - Rule 37 Sanctions

Judge Cercone generally defers ruling on Rule 11 and Rule 37 motions until the end of a case. Such motions must be briefed; if a party wants sanctions, the request must be supported with argument and law. Judge Cercone is hesitant to award attorneys' fees as sanctions.

C. Injunctions and TROs

Judge Cercone's general practice regarding TROs is that he requires opposing counsel to be identified and contacted. If circumstances warrant, he will rule ex parte. However, this is an extremely rare occurrence. Judge Cercone prefers to set a status conference with counsel as soon as practical to consider how best to proceed in the particular case. After ruling or otherwise resolving any need for status quo relief, he will schedule a preliminary injunction hearing promptly or as otherwise requested by all counsel. If injunctive relief is sought, it will be given accelerated treatment only if the particular case appears to warrant it.

D. Trial Procedures

1. Scheduling of Cases

In criminal cases, Judge Cercone sets a specific date for trial. In civil cases, Judge Cercone also is inclined to assign a specific "firm" date for the beginning of each trial. This date will be assigned after a final pretrial settlement conference has been held. Depending on the Court's schedule, he may also assign a "back-up" date, which will be an earlier date. Counsel will be kept apprised of the likelihood of the back-up date becoming the actual firm date. If he has to postpone a civil case because of a criminal trial, or for other reasons, he will try to reschedule it at the earliest practical date.

Judge Cercone generally will not consider other obligations of counsel and witnesses with respect to the "firm" date because it will be scheduled sufficiently in advance; he is, however, more flexible with respect to the "back-up" date. He will consider rescheduling to accommodate an expert witness if there is good cause for the request.

2. Trial Hours/Days

Judge Cercone generally conducts jury trials on Monday through Friday from 9:00 a.m. to 4:30 p.m., with an hour lunch break and a 15 minute recess in the morning and afternoon. Bench trials are conducted pursuant to a very similar daily schedule.

3. Trial Briefs

Judge Cercone does not require trial briefs in jury cases. If a trial brief is submitted, the page limit should be in accordance with the Case Management Order limitation of 25 pages absent leave of court. In

non-jury cases trial briefs must be submitted in accordance with the Case Management Order.

4. Voir Dire

Judge Cercone conducts voir dire in both civil and criminal cases with the assistance of his law clerks and deputy clerk. General questions will be asked of the venire panel as a whole; specific individual inquiry with prospective jurors will then be undertaken as warranted. Counsel are permitted to augment the standard voir dire questions set forth in the Local Rules by submitting proposed questions which will be ruled upon or otherwise considered in formulating the general questions to be asked of the panel. The due date for proposed voir dire questions is set by the Trial Scheduling Order.

5. Note Taking by Jurors

Judge Cercone generally does not permit jurors to take notes.

6. Side Bars

Judge Cercone permits side bar conferences. He has no special rules for when a side bar conference is appropriate.

7. Examination of Witnesses Out of Sequence

Judge Cercone is flexible and attempts to work with counsel in the sequence of calling witnesses.

8. Opening Statements and Summations

Judge Cercone does not have a set rule that limits the amount of time for opening statements. Nevertheless, he usually asks for counsel's estimation of the length of the statement and will set a limit if he believes that counsel's estimate is excessive.

9. Examination of Witnesses or Argument by More Than One Attorney

Judge Cercone permits participation by more than one attorney in a trial. Under special circumstances, he would permit more than one attorney to question a witness if justified reasons for doing so are present.

10. Examination of Witnesses Beyond Direct and Cross

Judge Cercone permits redirect and recross. He will only permit examination beyond redirect and recross if it truly is warranted.

11. Videotaped Testimony

Judge Cercone has no special procedures or requirements with respect to the use/admission of videotape testimony.

- 12. Reading of Material into the Record**

Judge Cercone requires that counsel or a designated individual read into the record such things as deposition testimony, stipulations, pleadings or discovery materials.
- 13. Exhibits**

Judge Cercone's Trial Management Order addresses the pretrial marking and exchange of exhibits. He permits counsel to use visual aids during trial, including opening statements, if all counsel consent. If there is a question on admissibility of a chart, model or blow-up, he will not permit the use of the exhibit during opening statements. He generally requires that an exhibit be offered into evidence before any substantive testimony regarding the exhibit is developed. He permits the use of exhibits or demonstrative charts used in trial during closing argument.
- 14. Directed Verdict Motions**

Judge Cercone has no standard requirement regarding directed verdict motions.
- 15. Jury Instructions and Verdict Forms**

Judge Cercone utilizes a compilation of standard jury instructions. He requires that proposed jury instructions and verdict forms be submitted prior to trial in conformance with his Trial Management Order. Judge Cercone rules upon or otherwise considers proposed jury instructions and holds an informal charge conference with counsel before closing arguments. Counsel are directed to enter their formal objections to the charge after it has been read to the jury.
- 16. Proposed Findings of Fact and Conclusions of Law**

Judge Cercone requires proposed findings of fact and conclusions of law be submitted in non-jury matters/cases. Initial findings and conclusions are to be submitted in accordance with his non-jury Case Management Order. Revised findings and conclusions can be submitted after the transcript is available. Generally, plaintiff's are due 30 days after the filing of the transcript and defendant's 30 days after plaintiff's are filed.
- 17. Offers of Proof**

Judge Cercone does not impose any restrictions upon requests for offers of proof during trial so long as the practice is not abused.
- 18. General Courtroom Rules**

Judge Cercone has no special courtroom rules regarding the conduct of counsel during trial.

E. Jury Deliberations

1. Written Jury Instructions

Judge Cercone gives the jury a copy of his instructions.

2. Exhibits in the Jury Room

As a general policy, Judge Cercone provides the jury with exhibits except if the exhibits involve contraband such as drugs or firearms.

3. Jury Request to Read Back Testimony or Replay Tapes During Deliberations

Judge Cercone generally will permit read-backs or replays after consultation with counsel, subject to consideration of the volume of the testimony needed to respond to the jury's inquiry and the amount time that will be involved.

4. Jury Questions

All questions from the jury must be in writing.

5. Availability of Counsel During Jury Deliberations

Trial counsel need not remain in the courtroom during jury deliberation. Nevertheless, counsel must be available by telephone and must return to the courtroom within 15 minutes after being requested to do so.

6. Interviewing the Jury

Judge Cercone has no special rules regarding interviewing jurors post-verdict. He tells jurors at the end of the case that they are free to speak about the case if they choose to do so, but should not disclose individual ballots.

F. General

1. Special Types of Cases

Judge Cercone uses a standard social security case order. He requires the filing of a RICO statement in RICO cases after the initial status conference and motions to certify a class in class actions.

2. Patent Cases

Judge Cercone has a Case Management Order for Patent Cases which is modeled on and follows the scheduling deadlines recommended in the Local Patent Rules. A copy of that Case Management Order also is posted for counsel's review.

IV. CRIMINAL CASES

A. Motions

Judge Cercone considers requests for extensions on a case-by-case basis. He requires language in any proposed order that effectively excludes time for purposes of the Speedy Trial Act.

B. Pretrial Conferences

Judge Cercone does not generally conduct “formal” pretrial conferences in criminal cases, but often will conduct one or more informal conferences with counsel prior to trial to deal with schedules, coordination with essential witnesses, and the like.

C. Guilty Pleas

Judge Cercone has no special rules regarding guilty pleas. He has no deadlines for accepting/rejecting plea bargains. Judge Cercone has a written format which he generally follows for the guilty plea colloquy, a copy of which is posted for counsel's review.

D. Voir Dire

Judge Cercone conducts voir dire in criminal cases with the assistance of his law clerks and deputy clerk. General questions will be asked of the venire panel as a whole; specific individual inquiry with prospective jurors will then be undertaken as warranted. Counsel are permitted to augment the standard voir dire questions set forth in the Local Rules by submitting proposed questions which will be ruled upon or otherwise considered in formulating the general questions to be asked of the panel. The due date for proposed voir dire questions is set by the Trial Scheduling Order.

E. Trial

In multi-defendant cases, Judge Cercone permits all counsel to examine each witness. However, he will insist that defense counsel not duplicate areas previously covered by other defense counsel.

If the parties request sequestration of witnesses, Judge Cercone grants the request.

Judge Cercone permits the government to use transcripts of tape recorded conversations. However, he charges the jury that the evidence is the tape recorded conversations, not the transcript. He also charges that if what the jury reads on the transcript differs from what they heard on the tapes, the tape controls.

Defense counsel is permitted to determine when to make an opening statement.

Judge Cercone does not permit the use of special interrogatories in a criminal case. Appendi requirements will be charged as an element of the offense.

Judge Cercone has no set rule as to when and how he prefers any waiver of the defendant's rights be placed on the record.

F. Sentencing Memoranda

Judge Cercone permits the filing of a sentencing memorandum, but it is not required. He has no set time as to when the sentencing memorandum must be filed other than submitting it with sufficient time so that it can be considered before the time of sentencing.

G. Sentencing Conference

Judge Cercone does not hold a sentencing conference regarding issues under the Sentencing Guidelines prior to the actual imposition of sentence. When necessary, he issues an order setting forth tentative finds and ruling on objections to guideline computations.

H. Other General Practices and Procedures

Judge Cercone will include recommendations to the Bureau of Prisons in the judgment order if deemed appropriate.

Judge Cercone's general policy is to encourage the government to disclose Jencks Act material at least five (5) business days prior to the commencement of trial.

Judge Cercone requires the filing of a formal motion for leave to travel outside the Western District by a defendant, even where the Assistant U. S. Attorney and Probation Officer consent to the travel.

Judge Cercone approaches conflicts between defense counsel and the defendant on a case-by-case basis.

V. BANKRUPTCY CASES

N/A

VI. BANKRUPTCY APPEALS (TO THE DISTRICT COURT)

A. Filing and Scheduling

Unless otherwise ordered, briefing on an appeal is to be filed in accordance with Bankruptcy Rule 8009.

B. Oral Argument

Oral argument generally is not scheduled, but will be considered upon request.

C. Other General Practices/Procedures

Briefing schedules and other deadlines imposed by the Federal Rules of Bankruptcy Procedure will be modified upon request where appropriate.