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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GUIDELINES FOR TRIAL AND FINAL PRETRIAL CONFERENCE

IN CIVIL BENCH CASES

BEFORE THE HONORABLE WILLIAM ALSUP

FRCP 26(A)(3) DISCLOSURES

1. All parties are reminded of their disclosure duties under FRCP 26(a)(3), which begin **THIRTY CALENDAR DAYS** before trial. The FRCP 26(a)(3)(B) requirement for designating deposition transcripts, however, need not be done until later, as set forth below, although the name of each trial witness to appear by deposition must be so designated at least **THIRTY CALENDAR DAYS** before trial.

FINAL PRETRIAL CONFERENCE

2. At least **SEVEN CALENDAR DAYS** in advance of the final pretrial conference, please file the following:

- (a) A joint proposed final pretrial order, signed and vetted by all counsel, that contains: (i) a brief description of the substance of claims and defenses which remain to be decided, (ii) a statement of all relief sought, (iii) all stipulated facts, (iv) a list of all factual issues which remain to be tried, (v) a joint exhibit list in numerical order, including a brief description of the exhibit and

1 Bates numbers, a column for when it is offered in evidence, a column for when it
2 is received in evidence, and a column for any limitations on its use, and (vi) each
3 party's separate witness list for its case-in-chief witnesses (including those
4 appearing by deposition) providing, for all such witnesses other than an individual
5 plaintiff and an individual defendant, a statement of the substance of his/her
6 testimony and, separately, what, if any, non-cumulative testimony the witness will
7 give (to be used to set time limits). Items (v) and (vi) should be appendices to the
8 proposed order.

9 (b) Any motion *in limine*, with the opposition, filed as follows:

10 At least **TWENTY CALENDAR DAYS** before the conference, serve, but do not yet
11 file, the moving papers. At least **TEN CALENDAR DAYS** before the conference,
12 serve the oppositions. When the oppositions are received, the moving party
13 should collate the motion and the opposition together, back to back, and then file
14 the paired sets at least **SEVEN CALENDAR DAYS** before the conference.

15 Each motion should be presented in a separate memo and numbered as in,
16 for example, "Plaintiff's Motion in Limine No. 1 to Exclude" Please limit
17 motions *in limine* to circumstances that really need a ruling in advance. In bench
18 trials, usually three or fewer motions per side is sufficient at the conference stage
19 (without prejudice to raising matters *in limine* as the trial progresses).

20 Each motion should address a single topic, be separate, and contain no more than
21 seven pages of briefing per side.

22 (c) Copies of the Rule 26(a)(3) disclosures.

23 (d) Each side's proposed findings of fact and conclusions of law.

24 (e) Trial briefs are optional.

25 3. The above shall be submitted on a 3-1/2-inch disk in WordPerfect 10.0 format,
26 as well as in hard copies. *All hard-copy submissions should be three-hole punched on the left, so*
27 *the judge's copy can be put in binders. Please provide them at least seven calendar days prior*
28 *to the pretrial conference for the judge's study and review — this is important.*

1 exhibits to be used on cross-examination (except for true impeachment) by 2:00 p.m. on the
2 calendar day immediately preceding the testimony; otherwise, other responding counsel need not
3 give notice of exhibits they may use. Any exhibit timely noticed by anyone for the witness is
4 usable as if timely noticed by everyone, subject to substantive objections. Similarly, if reference
5 is made to an exhibit during an examination (even if not offered in evidence and even if not
6 noticed for use with the witness), then in any follow-up examination by others, the exhibit may
7 be used to the same extent as if it had been timely noticed, subject to substantive objections.
8 All notices shall be sent by fax or electronically and be time-and-date verifiable. If counsel
9 decides not to call a noticed witness, then prompt written notice of the cancellation must be
10 given. Impeachment exhibits are ordinarily limited to statements signed by or adopted by the
11 witness.

12 10. Always have your next witness ready and in the courthouse. Failure to have the
13 next witness ready or to be prepared to proceed with the evidence will usually constitute resting.
14 If counsel plans to read in a transcript of a deposition anyway, it is advisable to have a deposition
15 prepared and vetted early on to read “just in case.”

16 11. When there are multiple parties, counsel are responsible for coordination of the
17 cross-examination to avoid duplication. Stand at or near the microphone to ask questions,
18 straying only to point out material on charts or overheads. Please request permission to approach
19 the witness or the bench.

20 **EXPERTS**

21 12. A recurring problem in trials is the problem of expert witnesses trying to go
22 beyond the scope of their expert reports on direct examination. FRCP 26(a)(2) and FRCP 37(c)
23 limit experts to the opinions and bases contained in their timely reports (absent substantial
24 justification or harmlessness). The Court regularly enforces these rules. FRCP 26(a) also
25 requires that any “exhibits to be used as a summary of or support for the opinions” be included in
26 the report. Accordingly, at trial, the direct testimony of experts will be limited to the matters
27 disclosed in their reports. New matters may not ordinarily be added on direct examination.
28 This means the reports must be complete and sufficiently detailed. Illustrative animations,

1 diagrams, charts and models may be used on direct examination only if they were part of the
2 expert's report, with the exception of simple drawings and tabulations that plainly illustrate what
3 is already in the report, which can be drawn by the witness at trial or otherwise shown to the
4 jury. If cross-examination fairly opens the door, however, an expert may go beyond the written
5 report on cross-examination and/or re-direct examination. By written stipulation, of course, all
6 sides may relax these requirements. Material in a "reply" report must ordinarily be presented in
7 a party's rebuttal (or sur-rebuttal) case *after* the other side's expert has appeared and testified.

8 13. Another recurring problem is the retained expert who seeks to vouch for the
9 credibility of fact witnesses and/or to vouch for one side's fact scenario. Qualified experts,
10 of course, are always welcome to testify concerning relevant scientific principles, professional
11 standards, specialized facts known within a trade or discipline and the like. They are also
12 welcome to apply those principles and standards to various assumed fact scenarios. This is so
13 even if an opinion is given on the "ultimate issue." But they should not try to vouch for one
14 side's fact scenario, *i.e.*, witness believability.

15 14. There is an important exception. Experts and doctors who perform scientific
16 tests, site visits, or treat victims, among other possibilities, may testify to their findings within
17 the scope of their firsthand knowledge. This is because they have made personal observations
18 and have reached professional judgments based thereon. Carrying this one step further, even a
19 retained expert may read a financial statement in evidence, watch a video in evidence, listen to a
20 recording in evidence, and so on and offer opinions based on the contents. This is because the
21 contents themselves are clearly defined.

22 15. As to damages studies, the cut-off date for *past damages* will be as of the expert
23 report (or such earlier date as the expert may select). In addition, the experts may try to project
24 *future damages* (*i.e.*, after the cut-off date) if the substantive standards for future damages can be
25 met. With timely leave of Court or by written stipulation, the experts may update their reports
26 (with supplemental reports) to a date closer to the time of trial.

USE OF DEPOSITIONS TO IMPEACH AND SHORT READ-INS

16. Depositions can be used at trial to impeach a witness testifying at trial or, in the case of a party deponent, “for any purpose.” Please follow the following procedure:

(a) On the first day of trial, be sure to bring the original and clean copies of any deposition(s) for which you are responsible. Any corrections must be readily available. If you are likely to need to use the deposition during a witness examination, then give the Court a copy with any witness corrections at the outset of your examination. This will minimize delay between the original question and the read-ins of the impeaching material. Opposing counsel should have their copy immediately available.

(b) When you wish to read in a passage, simply say, for example: “I wish to read in page 210, lines 1 to 10 from the witness’ deposition.” A brief pause will be allowed for any objection.

(c) When reading in the passage, state “question” and then read the question exactly. Then state “answer” and then read the answer exactly. Stating “question” and “answer” is necessary so the jury and the court reporter can follow who was talking at the deposition.

(d) The first time a deposition is read, state the deponent’s name, the date of the deposition, the name of the lawyer asking the question, and if it was FRCP 30(b)(6) deposition, please say so.

(e) Please do NOT ask, “Didn’t you say XYZ in your deposition?” The problem with such a question is that the “XYZ” rarely turns out to be exactly what the deponent said and is part spin. Instead, ask for permission to read in a passage, as above, and read it in exactly, without spin.

(f) Subject to Rule 403, party depositions may be read in whether or not they contradict (and regardless of who the witness is on the stand). For example, a short party deposition excerpt may be used as foundation for questions for a different witness on the stand.

1 (g) Rather than reading the passage, counsel are free to play an
2 audiovisual digitized version of the passage but counsel must have a system for
3 immediate display of the precise passage.

4 **DEPOSITION DESIGNATION**

5 17. The following procedure applies only to witnesses who appear by deposition.
6 It does not apply to live witnesses whose depositions are read in while they are on the stand.
7 To save time and avoid unnecessary work, it is not necessary to make all deposition
8 designations before trial (as normally required by FRCP 26(3)(B)). In the Court's experience,
9 by the time the read-in occurs, the proponent has usually reduced substantially the proposed
10 read-ins. Instead, the following steps should be followed:

11 (a) To designate deposition testimony, photocopy the cover page,
12 the page where the witness is sworn, and then each page from which any
13 testimony is proffered. Line through or x-out any portions of such pages not
14 proffered. Also, line through objections or colloquy unless they are needed to
15 understand the question. Please make sure any corrections are interlineated and
16 that references to exhibit numbers are conformed to the trial numbers.
17 Such interlineations should be done by hand. The finished packet should then be
18 the actual script and should smoothly present the identification and swearing of
19 the witness and testimony desired. The packet should be provided to all other
20 parties at least **FIVE CALENDAR DAYS** before it will be used in court. For the rare
21 case of voluminous designations, more lead time will be required. Please be
22 reasonable.

23 (b) All other parties must then promptly review the packet and
24 highlight in yellow any passages objected to and write in the margin the legal
25 basis for the objections. If any completeness objection is made, the objecting
26 party must insert into the packet the additional passages as needed to cure the
27 completeness objection. A completeness objection should normally be made
28 only if a few extra lines will cure the problem. Such additions shall be

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highlighted in blue and an explanation for the inclusion shall be legibly handwritten in the margin. Please line out or x-out any irrelevant portions of the additional pages.

(c) The packets, as adjusted, must then be returned to the proffering party, who must then decide the extent to which to accept the adjustments. The parties must meet and confer as reasonable. Counsel for the proffering party must collate and assemble a final packet that covers the proffer and all remaining issues. At least **TWO CALENDAR DAYS** before the proffer will be used, the proponent must provide the Court with the final packet, with any objected-to portions highlighted and annotated as described above. If exhibits are needed to resolve the objections, include copies and highlight and tag the relevant passages. Alert the Court on the record that the packet is being provided and whether any rulings are needed. *Tag all passages that require a ruling.* The Court will then read the packet and indicate its rulings. Ordinarily, argument will not be needed.

(d) Counter designations must be made by providing a packet with the counter-designated passages to the proponent at the same time any objections to the original proffer are returned to the first proffering party, who must then supply its objections in the same manner.

(e) When the packet is read to the jury, the examiner reads the questions (and any relevant colloquy) from the lectern and a colleague sits in the witness stand and reads the answers. When a video-taped deposition is to be played instead, the packets must still be prepared, as above, in order to facilitate rulings on objections. The video should omit any dead time, long pauses, and objections/colloquy not necessary to understand the answers.

REQUESTS FOR ADMISSIONS AND INTERROGATORIES

18. Please designate responses to requests for admissions and interrogatory answers in the same manner and under the same timetable as depositions.

EXHIBITS

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2 19. As stated, FRCP 26(a)(3)(C) disclosures regarding proposed exhibits must be
3 made at least **THIRTY CALENDAR DAYS** before trial and any objections thereto must be made
4 within **FOURTEEN CALENDAR DAYS** thereafter (or waived unless excused for good cause).
5 The joint list must be filed **SEVEN CALENDAR DAYS** in advance of the final pretrial conference
6 (as per paragraph 2 above). By designating an exhibit, a party waives any objection to it if
7 offered by the other side (even if not designated by the other side) except for objections based
8 on Rule 402 or Rule 403. Nor will there be any waiver with respect to admissions by party
9 opponents, *i.e.*, such admissions may be designated without waiving the objection that the same
10 items would be self-serving hearsay if offered by the other side. Nor will there be a waiver if
11 the designation is qualified to be operative only in a specified contingency, such as only if
12 issue X is eventually deemed relevant by the Court. If, however, that contingency materializes,
13 then such designated materials may be used by the other side, subject to the Rule 702, 703 and
14 804(d)(2) qualifications stated above.

15 20. Prior to the final pretrial conference, counsel will please meet and confer in
16 person over all exhibit numbers and objections and to weed out duplicate exhibits and confusion
17 over the precise exhibit. Use numbers only, not letters, for exhibits, preferably the same
18 numbers as were used in depositions. Blocks of numbers should be assigned to fit the need of
19 the case (*e.g.*, Plaintiff has 1 to 100, Defendant A has 101 to 200, Defendant B has 201 to 300,
20 etc.). A single exhibit should be marked only once, just as it should have been marked only
21 once in discovery (if this Court’s guidelines were followed). If the plaintiff has marked an
22 exhibit, then the defendant should not re-mark the exact document with another number.
23 Different *versions* of the same document, *e.g.*, a copy with additional handwriting, must be
24 treated as different exhibits with different numbers. To avoid any party claiming “ownership”
25 of an exhibit, all exhibits shall be marked and referred to as “Trial Exhibit No. _____,” not as
26 “Plaintiff’s Exhibit” or “Defendant’s Exhibit.” If an exhibit number differs from that used in a
27 deposition transcript, then the latter transcript must be conformed to the new trial number if and
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1 when the deposition testimony is read to the jury (so as to avoid confusion over exhibit
2 numbers).

3 21. The exhibit tag shall be in the following form:

4
5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
7 **TRIAL EXHIBIT 100**
8 CASE NO. _____
9 DATE ENTERED _____
10 BY _____
11 DEPUTY CLERK
12

13 Place the tag on or near the lower right-hand corner or, if a photograph, on the back. Counsel
14 should fill in the tag but leave the last two spaces blank. The parties must jointly prepare a
15 *single* set of all trial exhibits that will be the official record set to be used with the witnesses, in
16 the jury room, and on appeal. Each exhibit must be tagged and in a separate folder (not in
17 notebooks). Deposit the exhibits with the deputy clerk (Dawn Logan) on the first day of trial.

18 22. Please move exhibits into evidence as soon as the foundation is laid and it is
19 fresh in the judge’s mind. Do not postpone motions and expect the judge to remember the
20 foundation. Counsel must consult with each other and with the deputy clerk at the end of each
21 trial day and compare notes as to which exhibits are in evidence and any limitations thereon.
22 If there are any differences, counsel should bring them promptly to the Court’s attention.

23 23. Any objections ordinarily must have been preserved under FRCP 26(a)(3).
24 However, evidence that is cumulative or excludable under Rules 402–403 may possibly be
25 excluded even if no objection has been preserved under FRCP 26(a)(3).

26 24. In addition to the official record exhibits, a *single, joint* set of bench binders
27 containing copies of the key exhibits only (usually the combined top twenty will do) should be
28 provided to the Court on the first day of trial. Each exhibit must be separated with a label

1 divider (an exhibit tag is unnecessary for the bench set). In large letters, the labels should say
2 the exhibit number on the binders. Please use binders thin enough to lift with one arm and with
3 locking rings.

4 **OBJECTIONS DURING EXAMINATION**

5 25. Counsel shall stand when making objections and shall not make speaking
6 objections. The one-lawyer-per-witness rule is usually followed but will be relaxed to allow
7 young lawyers a chance to perform.

8 **TIME LIMITS**

9 26. Ordinarily, the Court shall set fixed time limits at the final pretrial conference.
10 All of your examination time (whether direct, cross, re-direct or re-cross) for all witnesses must
11 fit within your time limit and you may allocate it as you wish. Opening and closing time limits
12 shall be *in addition to* your examination allocation.

13 **SETTLEMENTS AND CONTINUANCES**

14 27. Shortly before trial or a final pretrial conference, counsel occasionally wish
15 jointly to advise the clerk that a settlement has been reached and seek to take the setting off
16 calendar but it turns out later that there was only a settlement “in principle” and disputes
17 remain. Cases, however, cannot be taken off calendar in this manner. Unless and until a
18 stipulated dismissal or judgment is filed or placed on the record, all parties must be prepared to
19 proceed with the final pretrial conference as scheduled and to proceed to trial on the trial date,
20 on pain of dismissal of the case for lack of prosecution or entry of default judgment. Only an
21 advance continuance expressly approved by the Court will release counsel and the parties from
22 their obligation to proceed. If counsel expect that a settlement will be final by the time of trial
23 or the final pretrial conference, they should notify the Court immediately in writing or, if it
24 occurs over the weekend before the trial or conference, by voice mail to the deputy courtroom
25 clerk. The Court will attempt to confer with counsel as promptly as circumstances permit to
26 determine if a continuance will be in order. Pending such a conference, however, counsel must
27 prepare and make all filings and be prepared to proceed with the trial.

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28. The Court strongly encourages law firms to permit young lawyers to examine witnesses at trial and to have an important role. It is the way one generation will teach the next to try cases and to maintain our district's reputation for excellence in trial practice.

IT IS SO ORDERED.

Dated: January 11, 2016.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE