IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GUIDELINES FOR MOTIONS, FINAL PRETRIAL CONFERENCE, AND TRIAL IN CRIMINAL CASES BEFORE THE HONORABLE JEFFREY S. WHITE

MOTIONS

1. All motions, except those pertaining to sentencing, shall be filed at least **thirty-five (35)** days in advance of the hearing date. Opposition briefs shall be filed and served not more than **fourteen (14)** days after the motion is filed and served. Reply briefs shall be filed and served not more than **seven (7)** days after the opposition is due.

Motions for or relating to sentencing shall be filed at least **seven (7)** calendar days before the date on which Judgment and Sentencing is scheduled. Responses or objections to motions relating to sentencing shall be filed at least **five (5)** calendar days before the date on which Judgment and Sentencing is scheduled.

Although the parties are not required to file a Sentencing Memorandum, except as set forth in Criminal Local Rule 32-5(b), the Court encourages the parties to do so. If a party chooses to submit a Sentencing Memorandum to the Court, it must be filed at least **seven (7)** calendar days before the date on which Judgment and Sentencing is scheduled. Responses to Sentencing Memoranda shall be filed at least **five (5)** calendar days before the date on which Judgment and Sentencing is scheduled.

Courtesy copies of all briefs shall be delivered to the Clerk's Office in an envelope clearly marked with the case number and "JSW Chamber's Copy." All chambers copies must be securely bound at the top or on the side, either with staples, "ACCO" fasteners, velo-binding, or shall be submitted in binders. Binder clips, paper clips, and rubber bands will not satisfy this requirement. If a particular motion, declaration or other submission is more than two inches thick, the parties should submit the chambers copies of the document in multiple volumes that do not exceed two inches. When a declaration or other document includes exhibits, parties shall submit chambers copies of the documents which include tabs that separate each exhibit.

2. Motions or Stipulations to Continue any proceeding on the Court's criminal calendar, except a trial, shall be submitted to the Court no later than 9:00 a.m. the day before the proceeding is to be heard. Motions to continue a trial date shall be filed no later than **seven (7)** calendar days prior to the trial date. Any opposition to a motion to continue trial shall be filed no later than **five (5)** days prior to the trial date. Such motions will only be granted in extraordinary cases involving unforeseen circumstances and extremely good cause.

3. All motions and oppositions to motions shall comply with Criminal Local Rule 47-2(b), which requires that motions "presenting issues of fact ... be supported by affidavits or declarations which comply with the requirements of Civil Local Rule 7-5." Civil Local Rule 7-5, in turn, requires that "[f]actual contentions made in support of or in opposition to any motion must be supported by an affidavit or declaration and by appropriate references to the record."

Moreover, other evidence in support of or in opposition to any motion "must be appropriately authenticated by an affidavit or declaration." That rule further requires that affidavits and declarations contain factual contentions only, avoiding conclusions and legal argument, and "conform as much as possible to the requirements of Federal Rule of Civil Procedure 56(e)."

In accordance with Civil Local Rule 7-5, made applicable by Criminal Local Rule 47-2(b), any declaration or affidavit that does not comply with these requirements may be stricken.

4. Ex Parte Rule 17(c) Subpoena Requests: If a defendant files an ex parte application for document subpoena(s), pursuant to Federal Rule of Criminal Procedure 17(c), the defendant is required to demonstrate that proceeding ex parte is "necessary to preserve the defendant's overriding constitutional rights" because to do otherwise would "reveal[] his trial strategy." *See United States v. Tomison*, 969 F. Supp. 587, 595 (E.D. Cal. 1997). In addition, defendant is required to show that the information sought is: (1) relevant; (2) admissible; and (3) specifically identified. *United States v. Nixon*, 418 U.S. 683, 700 (1974). If the defendant seeks production in advance of trial, he or she is required to demonstrate good cause for advance production. See id.

If the defendant is able to make the requisite showing above, Rule 17(c) requires production of the documents to the Court, not to the defendant. The Court will review the materials to determine whether they are responsive to the subpoena(s). Following the Court's determination, both parties will be entitled to inspect the responsive materials unless defendant is able to demonstrate an overriding need for confidentiality. *See Tomison*, 969 F. Supp. at 597.

The Court will deny any application that does not meet the required showing, and it will indicate if the ruling is with or without prejudice to renewing the request.

FINAL PRETRIAL CONFERENCE

Counsel shall not prepare a joint pretrial conference statement. Instead counsel shall follow the following procedures:

5. In lieu of preparing a joint pretrial conference statement, the parties shall meet and confer in person and prepare a jointly signed proposed final pretrial order **fourteen (14)** days in advance of the Final Pretrial Conference. In addition to the matters set forth in Northern District Criminal Local Rule 17.1-1(b), this joint pretrial conference order should contain: (i) a brief description of the substance of the case; (ii) if appropriate, all stipulated facts; (iii) a joint exhibit list in numerical order, including a brief description of the exhibit and Bates numbers, a blank column for when it will be offered into evidence, a blank column for when it may be received into evidence, and a blank column for any limitations on its use; and (iv) each party's separate witness list for its case-in-chief witnesses (*see* N.D. Crim. L.R. 17.1-1(b)(9)). Items (ii) and (iii) should be appendices to the proposed order. The proposed order should also state which issues, if any, are for the Court to decide, rather than the jury. The objective is to convert the proposed order to a final order with the benefit of any discussion at the final pretrial conference.

6. In addition to the joint pretrial conference order, which shall be filed **fourteen (14)** days in advance of the Final Pretrial Conference, the parties shall file the following:

a) A joint set of proposed instructions on substantive issues of law arranged in a logical sequence. If undisputed, an instruction shall be identified as "Stipulated Instruction No. ____ Re _____." The parties must include all modifications to form instructions in their proposals, *i.e.* if a model instruction includes bracketed language or blanks, the parties must provide the Court with the appropriate language from the brackets and the blanks shall be completed.

   Even if stipulated, the instruction shall be supported by citation. If disputed, each version of the instruction shall be submitted together in their logical place in the overall sequence. Each such disputed instruction shall be identified as, for example, "Disputed Instruction No. ____ Re _____ Offered by _____," with the blanks filled in as appropriate. All disputed versions of the same basic instruction shall bear the same number. Citations with pin cites are required. If the parties modify a form instruction, they must clearly those modifications in bold or italics. If a party does not have a counter version and simply contends that no such instruction in any version should be given, then that party should so state (and explain why in the separate memoranda required by Paragraph 6(b)) on a separate page inserted in lieu of an alternate version. With respect to form preliminary instructions, general instructions, or concluding instructions, please simply cite to the numbers of the requested instructions in the current edition of the Ninth Circuit Manual of Model Jury Instructions (Criminal).

   Other than citing the numbers, the parties shall not include preliminary, general or concluding instructions in the packet, but they shall include the full text of these instructions on the CD-ROM required by this Order. Again, if the form instructions contain bracketed language or blanks, the parties should provide the Court with the appropriate language from the brackets and all blanks should be completed.

b) The parties are encouraged to keep disputed instructions to a minimum. To the extent they are unable to resolve their disputes, the Court requires complete briefing on disputed instructions. Thus, a party supporting an instruction must submit a separate memorandum of law in support of its disputed instructions, organized by instruction number. Counsel shall quote exact, controlling passages from the authorities. The party opposing a given instruction or instructions must include a responsive brief to the supporting party's memorandum, organized by instruction number and also shall quote exact, controlling passages from the authorities.

c) A simplified statement of the case to be read to the jury during voir dire and as part of the proposed jury instructions. Unless the case is extremely complex, this statement should not exceed one page.

d) A joint set of proposed voir dire questions supplemented as necessary by separate requests for good cause only. (Keep separate requests to a minimum.)

e) A trial brief not to exceed ten pages on any controlling issues of law.

f) A list of objections to each exhibit, in tabular form. The first column should describe the exhibit, the second column should set briefly set forth the basis of the objection, and the third column should set forth a brief response thereto. The parties shall meet and confer, in person, in an attempt to resolve objections to the exhibits before this list is filed with the Court, to consider exhibit numbers, and to eliminate duplicate exhibits and confusion over the precise exhibit. If there are exhibits to which the parties' object, the parties shall submit to chambers, but not file, a joint binder that contains the disputed exhibits and the list of objections.

   Unless there is a genuine issue as to the authenticity of exhibits, a party that has produced documents should not object to the other party offering those documents as exhibits on the basis of authenticity or the best evidence rule. Finally, the Court normally will not entertain routine objections to exhibits on the basis of a lack of foundation.

g) Any motions *in limine*, as to which the parties should follow the following procedure:

   The motions *in limine* and all oppositions thereto must be filed no later than **fourteen (14)** calendar days prior to the Final Pretrial Conference, and shall be submitted to the Court collated and in a binder, as set forth below. In order to ensure that motions *in limine* and oppositions are timely filed, at least **thirty (30)** calendar days before the Final Pretrial Conference, the moving party shall serve, but not file, the opening brief and at least **twenty (20)** calendar days before the Final Pretrial Conference, the responding party shall serve, but not file, the opposition. The Court does not permit reply briefs. Each motion should be presented in a separate memo and properly identified, for example, "Plaintiff's Motion in Limine No. 1 to Exclude . . . ."

   Please limit motions *in limine* to circumstances that require an advance ruling. **No more than five motions per side will be allowed.** If a party seeks to file more than five motions *in limine*, they must file an administrative motion at least **fourteen (14) days before the motions *in limine* are due to served on opposing counsel demonstrating extraordinarily good cause for allowing the excess motions.** The administrative motion should summarize the subject matter of each proposed additional motion *in limine*.

   Each motion *in limine* should address a single, separate topic, and contain no more than seven pages of briefing per side. Leave of Court will be required to exceed the page limitations. A joint binder containing all motions *in limine* should be submitted to the Clerk's office in an envelope clearly marked with the case number and "JSW chambers copy."

h) If the parties intend to use special verdict forms, they should meet and confer in an effort to submit a joint proposed special verdict form. If the parties cannot agree on a proposed special verdict form, they may submit separate proposals.

7. The joint proposed final pretrial order, the jury instructions, proposed voir dire, the statement of the case, objections to exhibits, and any proposed special verdict forms, shall be submitted to chambers on a CD-ROM, in either WordPerfect or Microsoft Word, as well as in hard copies. All hard-copy submissions should be submitted in a binder to the Clerk's office in an envelope clearly marked with the case number and "JSW chambers copies."

8. At the final pretrial conference, the above submissions shall be considered and, if necessary, the Court shall hear oral argument.

PRETRIAL ARRANGEMENTS

9. Should a daily transcript and/or real-time reporting be desired, the parties shall make arrangements with Odile Hansen, at 510-637-3534 or Odile_Hansen@cand.uscourts.gov, at least **fourteen (14)** calendar days prior to the trial date.

10. During trial, counsel may wish to use the technology available in the Courtroom. If that is the case, the parties shall refer to the Court's Website regarding Courtroom Technology at: https://cand.uscourts.gov/courtroomtech. If the parties prefer to use the Court's equipment rather than their own, they shall contact the Court's Courtroom Deputy to coordinate.

If the parties intend to use their own equipment, or intend to use equipment in addition to the equipment available through the Court, it should be shared by all counsel to the maximum extent possible. In addition, the United States Marshal requires a court order to allow equipment into the courthouse. For electronic equipment, parties should be prepared to maintain the equipment or have a technician available at all times. The Court will not grant continuances due to equipment failure. The parties shall disassemble and store all equipment in the courtroom at the end of each court day.

SCHEDULING

11. Trial normally will be conducted from 8:00 a.m. to 1:30 p.m. Mondays, Wednesdays, and Thursdays, and from 8:00 a.m. to 12:30 p.m. Tuesdays with two fifteen minute breaks. The Court will not hold trial on federal holidays. Counsel must arrive by 7:30 a.m., or earlier as needed for any matters to be heard out of the presence of the jury. The jury will be called at 8:00 a.m. This schedule may be modified at the discretion of the Court.

Subject to the Court's availability, the jury shall be chosen the Wednesday preceding the first day of trial, at 8:00 a.m.

THE JURY

12. The Court will conduct the voir dire.

13. The Court generally will select two alternate jurors. The jury is selected as follows: The jurors will be given consecutive numbers and shall be seated by juror number. Jurors 1 through 18 are seated in the jury box. The remaining venire will be seated in the public

benches. Hardship excuses will usually be considered at this point. The Court will then ask questions to the entire venire. The lawyers, at a side bar conference, will then advise if there are follow-up questions. For good cause, counsel may also ask questions of jurors at side bar. Challenges for cause will then be addressed. After a short recess, each side may exercise its allotment of peremptory challenges. Challenges must be made simultaneously in writing by each side (without knowing how the other side is exercising its challenges). The parties will write down the names and numbers of the candidates to be stricken. The fourteen surviving the challenge process with the lowest numbers become the final jury. For example, if the Government strikes 1, 5 and 7 and the defendant strikes 2, 4 and 9, then 3, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 become the final jury, including the alternates. If both sides strike one or more of the same jurors, then the fourteen unstruck jurors with the lowest numbers will be seated. Once the jury selection is completed, the jurors' names will be read again and they will be seated in the jury box. The Court may alter the procedure in its discretion.

14. Jurors may take notes. Note pads will be distributed at the beginning of each trial. The note pads will be collected at the end of each day. Jurors will be instructed on the use of notes both in the preliminary and final jury instructions.

GENERAL DECORUM

15. A trial is a rational and civilized inquiry to seek a just result. Counsel are expected to conduct themselves with dignity and decorum at all times. Disruptive tactics or appeals to prejudice are not acceptable.

16. Colloquy between counsel on the record is not permitted. All remarks are to be addressed to the Court.

17. Vigorous advocacy does not preclude courtesy to opposing counsel and witnesses and respect for the Court. Addressing witnesses or parties by first names or the Court by "Judge" or "Sir" on the record is not appropriate.

18. Counsel shall not engage in activity at counsel table, move about the courtroom, or in other ways cause distraction while opposing counsel is arguing or questioning witnesses. Neither counsel nor client should indicate approval, disapproval or otherwise react to any testimony or argument.

OPENING STATEMENTS

19. Counsel must cooperate and meet and confer to exchange any visuals, graphics or exhibits to be used in the opening statements, allowing for time to work out objections and any reasonable revisions. Opening statements should be limited to an objective summary of what counsel expects the evidence to show; no argument or discussion of the law is permissible.

WITNESSES

20. At the close of each trial day, all counsel shall exchange a list of witnesses for the next two full court days and the exhibits that will be used during direct examination (other than for impeachment of an adverse witness). Within **twenty-four (24)** hours of such notice, all other counsel shall provide any objections to such exhibits and shall provide a list of all exhibits to be used with the same witness on cross-examination (other than for impeachment). The first notice shall be exchanged prior to the first day of trial. All such notice should be provided in writing.

21. The parties shall have all upcoming witnesses on the same day available in the courthouse and ready to testify. Failure to have the next witness ready or to be prepared to proceed with the evidence may be deemed to constitute resting.

22. A witness or exhibit not listed in the joint pretrial statement may not be used without good cause. This rule does not apply to true rebuttal witnesses (other than rebuttal experts who must be listed). Defense witnesses are considered case-in-chief witnesses, not "rebuttal" witnesses.

23. Counsel shall stand at or near the podium to ask questions, straying only to point out material on charts or overheads. If counsel wish to approach the witness or the bench, they must request permission from the Court and clearly identify the reason for the request.

24. Counsel shall treat witnesses, including parties, with courtesy and respect, and not become familiar with the witnesses, *e.g.*, they should avoid the use of first or nick-names.

25. Counsel shall pose brief, direct and simply stated questions, covering one point at a time. Leading questions may be used for background, routine, or foundational matters.

26. Cross-examination similarly should consist of brief, simple questions. Cross-examination should not be a restatement of the direct examination and should not be used for discovery.

27. If the Court has made *in limine* rulings limiting testimony in a particular subject area, counsel are encouraged to request a sidebar in the event they believe a particular line of inquiry may implicate the Court's prior ruling.

EXHIBITS

28. Prior to the Final Pretrial Conference, counsel must meet and confer in person to consider all exhibit numbers and objections and to eliminate duplicate exhibits and confusion over the precise exhibit.

29. Use numbers only, not letters, for exhibits. Blocks of numbers should be assigned to fit the need of the case (*e.g.*, Government has 1 to 100, Defendant A has 101 to 200, Defendant B has 201 to 300, etc.). A single exhibit should be marked only once. If one party has marked an exhibit, then another party should not re-mark the exact document with another

number. Different *versions* of the same document, *e.g.*, a copy with additional handwriting, must be treated as different exhibits with different numbers. To avoid any party claiming "ownership" of an exhibit, all exhibits shall be marked and referred to as "Trial Exhibit No. _____," not as "Government's Exhibit" or "Defendant's Exhibit." The jury should always hear any given exhibit referred to by its unique number. There should be no competing versions of the same exhibit number; any discrepancies must be brought to the Court's attention promptly.

30. The exhibit tag shall be in the following form:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRIAL EXHIBIT 100

CASE NO. _____

DATE ENTERED_____

BY_____
DEPUTY CLERK

Counsel preferably will make the tag up in a color that will stand out (yet still allow for photocopying) but that is not essential. Place the tag on or near the lower right-hand corner or, if a photograph, on the back. Counsel should fill in the tag but leave the last two spaces blank. The parties must jointly prepare a *single* set of all trial exhibits that will be the official record set to be used with the witnesses and on appeal. Each exhibit must be tagged and in a separate folder (not in notebooks). Deposit the exhibits with the deputy clerk on the first day of trial. The tags can be adhesive or stapled on.

31. Counsel must consult with each other and with the deputy clerk at the end of each trial day and compare notes as to which exhibits are in evidence and any limitations thereon. If there are any differences, counsel should bring them promptly to the Court's attention.

32. In general, in addition to the official record exhibits, the Court requires one copy of a bench binder that contain copies of the exhibits. Counsel shall provide these binders to the Court no later than the first day of trial. Each exhibit must be separated with a label divider (an exhibit tag is unnecessary for the bench set). In large letters, the labels should identify the range of exhibit numbers contained in a binder.

33. Before the closing arguments, counsel must confer with the deputy clerk to make sure the exhibits in evidence are in good order. Before the case goes to the jury, counsel shall prepare an easy-to-read index of admitted exhibits, which should include all exhibits actually in evidence (and no others) stating the exhibit number and a brief, non-argumentative description (*e.g.*, letter from A. B. Case to D. E. Frank, dated August 17, 1999).

34. Exhibit notebooks for the jury will not be permitted. Publication must be by poster blow-up, overhead projection, or such other method as is allowed in the circumstances. Poster blow-ups should be about 4' x 6' to be seen by all jurors. Any overhead projector should have a powerful light to help in jury viewing. Counsel must have a practical means for all important documents to be published to the jury. It is permissible to highlight, circle or underscore in the enlargements so long as it is clear that it was not on the original.

OBJECTIONS

35. Counsel shall stand when making objections and shall not make speaking objections.

36. There can only be one lawyer per witness per party for all purposes, including objections. Only one lawyer will be permitted to make the opening statement and closing argument unless the Court has given prior approval to more than one lawyer doing so.

37. Side bar conferences are discouraged. The procedure described above should eliminate the need for most side bar conferences.

38. To maximize jury time, counsel must alert the Court in advance of any problems that will require discussion outside the presence of the jury, so that the conference can be held before after the jury leaves for the day.

STIPULATIONS

39. You must read all stipulations to the jury (slowly) in order for them to become a part of the record.

CHARGING CONFERENCE

40. As the trial progresses and the evidence is heard, the Court will fashion a comprehensive set of jury instructions to cover all issues actually being tried. Prior to the close of the evidence, the Court will provide proposed final instructions to the parties. After a reasonable period for review, the Court may hold one, or more, charging conferences, at which each party may object to any passage, ask for modifications, or ask for additions. If the Court does not hold a formal charging conference, it will permit the parties to make any objections to the jury instructions in writing or on the record. If a party wishes to request an instruction that the Court has chosen to omit, it must affirmatively re-request it either on the record or in writing in order to give the Court a fair opportunity to correct any error.

IT IS SO ORDERED.

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

Rev. 6/2019