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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 JURY 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)(A)(ii) 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, stating the issues with the same generality/specificity as any contested elements in the

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relevant jury instructions, all organized by counts, (v) a joint exhibit list in numerical order, including a brief description of the exhibit and Bates numbers, a column for when it is offered in evidence, a column for when it is received in evidence, and a column for any limitations on its use, and (vi) each party’s separate witness list for its case-in-chief witnesses (including those appearing by deposition) providing, for all such witnesses other than an individual plaintiff and an individual defendant, a statement of the substance of his/her testimony and, separately, what, if any, non-cumulative testimony the witness will give (to be used to set time limits). Items (v) and (vi) should be appendices to the proposed order. Please state which issues, if any, are for the Court to decide, rather than the jury.

(b) 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 \_\_\_\_\_,” with the blanks filled in as appropriate. If disputed, each version of the instruction shall be inserted together, back to back, 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 topic shall bear the same number. Citations with pin cites are required, even if the instruction is by stipulation. Any modifications to a form instruction must be plainly identified. If a party does not have a counter-version and simply contends no such instruction in any version should be given, then that party should so state (and explain why) on a separate page inserted in lieu of an alternate version. You need not provide any preliminary instructions, general instruction or concluding instructions, all of which the Court will do on its own in a draft for comment.

1 (c) A separate memorandum of law in support of each party’s disputed  
2 instruction, organized by instruction number. *Please quote exactly (without*  
3 *ellipses) controlling passages from the authorities and give pin cites.*

4 (d) A joint special verdict form with the questions (as few as possible)  
5 arranged in a logical sequence.

6 (e) A joint set of proposed voir dire questions supplemented as  
7 necessary by separate requests.

8 (f) Any motion *in limine*, with the opposition, filed as follows:

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

14 Each motion should be presented in a separate memo and numbered as in, for  
15 example, “Plaintiff’s Motion in Limine No. 1 to Exclude . . . .” Please limit  
16 motions *in limine* to circumstances that really need a ruling in advance.

17 Usually five or fewer motions per side is sufficient at the conference stage  
18 (without prejudice to raising matters *in limine* as the trial progresses).

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

21 (g) Copies of the Rule 26(a)(3) disclosures.

22 (h) Trial briefs are optional.

23 3. *The above shall be submitted in hard copies and should be three-hole punched on*  
24 *the left, so the judge’s copy can be put in binders. Please provide them at least seven calendar*  
25 *days prior to the pretrial conference for the judge’s study and review — THIS IS IMPORTANT.*

26 4. At the final pretrial conference, counsel must take notes on rulings and promptly  
27 submit a joint summary of all rulings in proposed-order format.

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1 days notice is given that no documents will be used, then all other counsel must give written  
2 notice of all other exhibits to be used on cross-examination (except for true impeachment) by  
3 2:00 p.m. on the calendar day immediately preceding the testimony; otherwise, other responding  
4 counsel need not give notice of exhibits they may use. Any exhibit timely noticed by anyone for  
5 the witness is usable as if timely noticed by everyone, subject to substantive objections.  
6 Similarly, if reference is made to an exhibit during an examination (even if not offered in  
7 evidence and even if not noticed for use with the witness), then in any follow-up examination by  
8 others, the exhibit may be used to the same extent as if it had been timely noticed, subject to  
9 substantive objections. All notices shall be sent by fax or electronically and be time-and-date  
10 verifiable. If counsel decides not to call a noticed witness, then prompt written notice of the  
11 cancellation must be given. Impeachment exhibits are ordinarily limited to statements signed by  
12 or adopted by the witness. Compliance with a two-day notice period, of course, will not satisfy  
13 compliance with FRCP 26 or any other disclosure rule.

14 12. The official tagged exhibit should be shown to witnesses — not supposed copies  
15 or notebooks of supposed copies. Before the examination begins, retrieve the official tagged  
16 exhibits to be used and have them at the ready. Using copies leads to discrepancies between the  
17 exhibit actually introduced into the record (*always* the official tagged exhibit) versus the stray  
18 before the witness. The required procedure also helps find any glitches in the official tagged  
19 exhibits.

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

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

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1 and have reached professional judgments based thereon. Carrying this one step further, even a  
2 retained expert may read a financial statement in evidence, watch a video in evidence, listen to a  
3 recording in evidence, and so on and offer opinions based on the contents. This is because the  
4 contents themselves are clearly defined.

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

10 **USE OF DEPOSITIONS TO IMPEACH AND SHORT READ-INS**

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

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

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

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

27 (d) The first time a deposition is read, state the deponent’s name, the  
28 date of the deposition, the name of the lawyer asking the question, and if it was



1 FRCP 30(b)(6) deposition, please say so. The first time a deposition is read,  
2 the Court will give an appropriate explanation to the jury about depositions.  
3 Please do not embellish on this with follow-on questions.

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

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

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

16 **DEPOSITION DESIGNATION**

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

23 (a) To designate deposition testimony, photocopy the cover page,  
24 the page where the witness is sworn, and then each page from which any  
25 testimony is proffered. Line through or x-out any portions of such pages not  
26 proffered. Also, line through objections or colloquy unless they are needed to  
27 understand the question. Please make sure any corrections are interlineated and  
28 that references to exhibit numbers are conformed to the trial numbers.

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Such interlineations should be done by hand. The finished packet should then be the actual script and should smoothly present the identification and swearing of the witness and testimony desired. The packet should be provided to all other parties at least **FIVE CALENDAR DAYS** before it will be used in court. For the rare case of voluminous designations, more lead time will be required. Please be reasonable.

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

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

5 (e) When a witness appears by deposition rather than live, counsel  
6 may present it by reading or by video. When reading, it is best — for jury  
7 comprehension — to use a “witness” (usually co-counsel, a legal assistant or  
8 opposing counsel) to read the answers from the witness stand while counsel  
9 reads the questions from the lectern. If the read-in is short, a single attorney can  
10 read it all, being careful to say “question” and “answer,” as appropriate, so that  
11 everyone including the court reporter, will follow exactly who said what. The  
12 exhibits, if admitted, may be projected onto the screen during the read-in as they  
13 are referenced. In the Court’s judgment, this is an effective procedure and  
14 avoids the problems of paper-shuffling, background noise, long pauses, difficult  
15 accents, and video-quality problems. When showing a videotaped deposition, it  
16 is best to scroll the question and answer in text near the bottom of the screen and  
17 to show any exhibits on a split screen. The entire length of all designations  
18 should never be longer than one hour without prior court clearance. Anything  
19 longer is usually counterproductive to jury comprehension. Remember that court  
20 reporters do *not* transcribe video excerpts, so counsel must file with the deputy  
21 clerk an exact record of what was shown and identify it for the record.

22 **REQUESTS FOR ADMISSIONS AND INTERROGATORIES**

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

25 **EXHIBITS**

26 22. As stated, FRCP 26(a)(3) disclosures regarding proposed exhibits must be made  
27 at least **THIRTY CALENDAR DAYS** before trial and any objections thereto must be made within  
28 **FOURTEEN CALENDAR DAYS** thereafter (or waived unless excused for good cause). The joint

1 list must be filed **SEVEN CALENDAR DAYS** in advance of the final pretrial conference (as per  
2 paragraph 2 above). By designating an exhibit, a party waives any objection to authenticity  
3 and any reciprocal objection, meaning any objection mutually available to both the designating  
4 party and the opposing party if and when offered by one against the other. Therefore, the  
5 non-designating party may offer the exhibit subject only to non-reciprocal objections. For  
6 example, if P designates a record from a non-party, such as a telephone company, then D can  
7 equally offer the same exhibit save for any objection that would be unique against D. To take a  
8 contra example, if P designates D’s internal email, it will usually *not* be admissible at the  
9 instance of D, there being a non-reciprocal hearsay hurdle when offered by D. If the  
10 designating party states that the exhibit is only for a limited purpose, then the waiver extends  
11 only to the same limited purpose. Notwithstanding the foregoing, FRE 403 objections are never  
12 waived. And, any party may always attempt to lay full foundation to admit any exhibit  
13 designated by itself or by any other party without regard to any waiver.

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

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

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA
<b>TRIAL EXHIBIT 100</b>
CASE NO. _____
DATE ENTERED _____
BY _____ DEPUTY CLERK

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, in the jury room, and on appeal. Each exhibit must be tagged and in a separate folder (not in notebooks). Deposit the exhibits with the deputy clerk (Dawn Logan) on the first day of trial.

25. Please move exhibits into evidence as soon as the foundation is laid and it is fresh in the judge’s mind. Do not postpone motions and expect the judge to remember the foundation. 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.

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

27. In addition to the official record exhibits, a *single joint* set of bench binders containing copies of the key exhibits only (usually the combined top twenty will do) should be provided to the Court on 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 say

1 the exhibit number on the binders. Please use binders thin enough to lift with one arm and with  
2 locking rings.

3 28. Before the closings, counsel must confer with the clerk to make sure the exhibits  
4 in evidence are in good order. Counsel should, but are not required to, jointly provide a revised  
5 list of all exhibits actually in evidence (and no others) stating the exhibit number and a brief,  
6 non-argumentative description (*e.g.*, letter from A. B. Case to D. E. Frank, dated August 17,  
7 1999). This joint list shall go into the jury room to help the jury sort through exhibits in  
8 evidence.

9 **OBJECTIONS DURING EXAMINATION**

10 29. Counsel shall stand when making objections and shall not make speaking  
11 objections. The one-lawyer-per-witness rule is usually followed but will be relaxed to allow  
12 young lawyers a chance to perform. Side bar conferences are discouraged.

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

16 **STIPULATIONS**

17 31. You must read all stipulations to the jury (slowly) in order for them to become a  
18 part of the jury record. They do not go into the jury room in written form.

19 32. To improve jury comprehension of the evidence, counsel should agree on a  
20 non-argumentative posterboard timeline to be ever-present in the courtroom for ready reference  
21 by the jury as the evidence comes in. It will provide an undisputed fixed frame of reference  
22 about which the jury can organize the disputed issues. It should be large enough to view from  
23 across the courtroom, about four by eight feet, and in timeline format. Counsel should also  
24 stipulate to the maximum feasible extent as to all facts that in good faith cannot be disputed, so  
25 that the jury can concentrate on assessing the issues in play. Some evidence can still be  
26 presented on any stipulated point as it is often necessary to do so to tell the story but  
27 stipulations allow the jury and counsel to concentrate their time on the points in controversy  
28 (and for the jury to appreciate *which* points are in controversy). In a further effort to improve

1 jury comprehension, the Court will sua sponte invite counsel at various points during the  
2 evidence to make short statements to alert the jury to the upcoming items of interest. The Court  
3 welcomes other ideas for improving jury comprehension.

4 **TIME LIMITS**

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

9 **PUNITIVE DAMAGES**

10 34. For punitive damages, the jury will ordinarily be asked in their main  
11 deliberations only to determine whether a defendant acted with fraud, malice or oppression.  
12 If the jury answers “yes,” then (after a fifteen-minute recess) a short supplemental jury  
13 proceeding shall be held. The parties may then present evidence of that defendant’s financial  
14 condition, followed by brief argument by each side. The Court will then give the jury a  
15 supplemental instruction on punitives and a special verdict form. For this proceeding, counsel  
16 typically stipulate to the financial condition of the defendant. Failing a stipulation, the parties  
17 must put on proof in the traditional way. It is the responsibility of counsel to make whatever  
18 motions are necessary, in a timely way, to obtain any relevant financial information.

19 **CHARGING CONFERENCE**

20 35. As the trial progresses and the evidence is heard, the Court will fashion a  
21 comprehensive set of jury instructions to cover all issues actually being tried. A few days  
22 before the close of the evidence the Court will provide a draft final charge to the parties.  
23 After a reasonable period for review, one or more charging conferences will be held at  
24 which each party may object to any passage, ask for modifications, or ask for additions.  
25 Any instruction request must be renewed specifically at the conference or it will be deemed  
26 waived, whether or not it was requested prior to trial. One reason for this ground rule is that,  
27 before trial, parties usually submit numerous instruction requests that fall away as the evidence  
28 is received. The draft charge will omit points of law that appear irrelevant to the Court.

1 If, however, a party still wishes to request an omitted instruction after reviewing the Court’s  
2 draft, then it must affirmatively re-request it at the charging conference in order to give the  
3 Court a fair opportunity to correct any error. Otherwise, as stated, the request will be deemed  
4 abandoned or waived.

5 **PREPARING ELECTRONIC EVIDENCE TO GO INTO JURY ROOM**

6 36. While the jury is deliberating, it may wish to view videos, audios or digitized  
7 exhibits using the Court’s Jury Electronic Evidence PC. Please read the Court’s website  
8 describing the simple steps counsel will need to take to enable this PC. (Of course, the hard  
9 copies of all non-electronic exhibits received in evidence will go into the jury room during  
10 deliberations.)

11 **SETTLEMENTS AND CONTINUANCES**

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

26 38. Local Rule 40-1 provides that jury costs may be assessed as sanctions for failure  
27 to provide the Court with timely written notice of a settlement. Please be aware that any  
28 settlement reached on the day of trial, during trial, or at any time after the jury or potential




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jurors have been summoned without sufficient time to cancel, will normally require the parties to pay juror costs.

39. The Court strongly encourages lead counsel 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: May 8, 2017.

  
\_\_\_\_\_  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE