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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)(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, (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

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

8 (b) 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,
15 for 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. In bench
17 trials, usually three 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 (c) Copies of the Rule 26(a)(3) disclosures.

22 (d) Each side’s proposed findings of fact and conclusions of law.

23 (e) Trial briefs are optional.

24 3. The above shall be submitted in *Word Perfect X3 or 10 format* to
25 whapo@cand.uscourts.gov and in hard copies. *All hard-copy submissions should be three-hole*
26 *punched on the left, so the judge’s copy can be put in binders. Please provide them at least*
27 *seven calendar days prior to the pretrial conference for the judge’s study and review — THIS IS*
28 *IMPORTANT.*

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

3 **PRETRIAL ARRANGEMENTS**

4 5. Should a daily transcript and/or real-time reporting be desired, the parties shall
5 make arrangements with Rick Duval, Court Services Coordinator, at
6 richard_duval@cand.uscourts.gov.

7 6. Counsel are encouraged to use overhead projectors, laser-disk/computer graphics,
8 poster blow-ups, models or specimens. The United States Marshal requires a court order to
9 allow equipment into the courthouse. For electronic equipment, either know how to fix it or
10 have a technician handy. For overhead projectors, have a spare bulb. Tape extension cords to
11 the carpet for safety. Please take down and store the equipment (in the courtroom) at the end of
12 each court day. Please work with Angie Meuleman (415-522-2020) on courtroom-layout issues
13 and contact her to learn how to use the electronic presentation system.

14 **SCHEDULING**

15 7. The normal trial schedule will be 8:00 a.m. to 1:00 p.m. (or slightly longer to
16 finish a witness) with two fifteen-minute breaks and ending before lunch. Counsel must arrive
17 by 7:30 a.m. The trial week is usually Monday through Friday.

18 **OPENING STATEMENTS**

19 8. Each side will have a time limit for its opening statement (to be determined at the
20 final pretrial conference). Counsel must cooperate and meet and confer to exchange any visuals,
21 graphics or exhibits to be used in the opening statements.

22 **WITNESSES**

23 9. Except for good cause, all counsel are entitled to written firm notice of the order
24 of witnesses for the next court day and the exhibits (including merely illustrative exhibits) to be
25 used on direct examination (other than for true impeachment of a witness). The Court
26 encourages two days notice, *i.e.*, written notice by 2:00 p.m. on the *second* calendar day before
27 the witnesses testify or the exhibit is used. At a minimum, notice must be given no later than
28 2:00 p.m. on the calendar day *immediately* preceding. If two days written notice is given or two

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 10. 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 11. 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 12. 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.
28

EXPERTS

1
2 13. A recurring problem in trials is the problem of expert witnesses trying to go
3 beyond the scope of their expert reports on direct examination. FRCP 26(a)(2) and FRCP 37(c)
4 limit experts to the opinions and bases contained in their timely reports (absent substantial
5 justification or harmlessness). The Court regularly enforces these rules. FRCP 26(a) also
6 requires that any “exhibits to be used as a summary of or support for the opinions” be included in
7 the report. Accordingly, at trial, the direct testimony of experts will be limited to the matters
8 disclosed in their reports. New matter may not ordinarily be added on direct examination.
9 This means the reports must be complete and sufficiently detailed. Illustrative animations,
10 diagrams, charts and models may be used on direct examination only if they were part of the
11 expert’s report, with the exception of simple drawings and tabulations that plainly illustrate what
12 is already in the report, which can be drawn by the witness at trial or otherwise shown to the
13 jury. If cross-examination fairly opens the door, however, an expert may go beyond the written
14 report on cross-examination and/or re-direct examination. By written stipulation, of course, all
15 sides may relax these requirements. Material in a “reply” report must ordinarily be presented in
16 a party’s rebuttal (or sur-rebuttal) case *after* the other side’s expert has appeared and testified.

17 14. Another recurring problem is the retained expert who seeks to vouch for the
18 credibility of fact witnesses and/or to vouch for one side’s fact scenario. Qualified experts,
19 of course, are always welcome to testify concerning relevant scientific principles, professional
20 standards, specialized facts known within a trade or discipline and the like (so long as it is in the
21 report). They are also welcome to apply those principles and standards to various assumed fact
22 scenarios. This is so even if an opinion is given on the “ultimate issue.” But they should not try
23 to vouch for one side’s *fact* scenario. *i.e.*, witness believability.

24 15. There is an important exception. Experts and doctors who perform scientific
25 tests, site visits or treat victims, among other possibilities, may testify to their findings within the
26 scope of their firsthand knowledge. This is because they have made personal observations and
27 have reached professional judgments based thereon. Carrying this one step further, even a
28 retained expert may read a financial statement in evidence, watch a video in evidence, listen to a

1 recording in evidence and so on, and offer opinions based on the contents. This is because the
2 contents themselves are clearly defined.

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

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

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

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

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

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

25 (d) The first time a deposition is read, state the deponent’s name, the
26 date of the deposition, the name of the lawyer asking the question, and if it was
27 FRCP 30(b)(6) deposition, please say so.
28

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

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

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

12 **DEPOSITION DESIGNATION**

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

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

3 (b) All other parties must then promptly review the packet and
4 highlight in yellow any passages objected to and write in the margin the legal
5 basis for the objections. If any completeness objection is made, the objecting
6 party must insert into the packet the additional passages as needed to cure the
7 completeness objection. A completeness objection should normally be made only
8 if a few extra lines will cure the problem. Such additions shall be highlighted in
9 blue and an explanation for the inclusion shall be legibly handwritten in the
10 margin. Please line out or x-out any irrelevant portions of the additional pages.

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

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

26 (e) When the packet is read in court, the examiner reads the questions
27 (and any relevant colloquy) from the lectern and a colleague sits in the witness
28 stand and reads the answers. When a video-taped deposition is to be played

1 instead, the packets must still be prepared, as above, in order to facilitate rulings
2 on objections. The video should omit any dead time, long pauses, and
3 objections/colloquy not necessary to understand the answers.

4 **REQUESTS FOR ADMISSIONS AND INTERROGATORIES**

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

7 **EXHIBITS**

8 20. As stated, FRCP 26(a)(3) disclosures regarding proposed exhibits must be made
9 at least **THIRTY CALENDAR DAYS** before trial and any objections thereto must be made within
10 **FOURTEEN CALENDAR DAYS** thereafter (or waived unless excused for good cause). The joint
11 list must be filed **SEVEN CALENDAR DAYS** in advance of the final pretrial conference (as per
12 paragraph 2 above). By designating an exhibit, a party waives any objection to authenticity
13 and any reciprocal objection, meaning any objection mutually available to both the designating
14 party and the opposing party if and when offered by one against the other. Therefore, the
15 non-designating party may offer the exhibit subject only to non-reciprocal objections.
16 For example, if P designates a record from a non-party, such as a telephone company, then D
17 can equally offer the same exhibit save for any objection that would be unique against D.
18 To take a contra example, if P designates D's internal email, it will usually *not* be admissible
19 at the instance of D, there being a non-reciprocal hearsay hurdle when offered by D. If the
20 designating party states that the exhibit is only for a limited purpose, then the waiver extends
21 only to the same limited purpose. Notwithstanding the foregoing, FRE 403 objections are never
22 waived. And, any party may always attempt to lay full foundation to admit any exhibit
23 designated by itself or by any other party without regard to any waiver.

24 21. Prior to the final pretrial conference, counsel will please meet and confer in
25 person over all exhibit numbers and objections and to weed out duplicate exhibits and confusion
26 over the precise exhibit. Use numbers only, not letters, for exhibits, preferably the same
27 numbers as were used in depositions. Blocks of numbers should be assigned to fit the need of
28 the case (*e.g.*, Plaintiff has 1 to 100, Defendant A has 101 to 200, Defendant B has 201 to 300,

1 etc.). A single exhibit should be marked only once, just as it should have been marked only
2 once in discovery (if this Court’s guidelines were followed). If the plaintiff has marked an
3 exhibit, then the defendant should not re-mark the exact document with another number.
4 Different *versions* of the same document, *e.g.*, a copy with additional handwriting, must be
5 treated as different exhibits with different numbers. To avoid any party claiming “ownership”
6 of an exhibit, all exhibits shall be marked and referred to as “Trial Exhibit No. _____,” not as
7 “Plaintiff’s Exhibit” or “Defendant’s Exhibit.” If an exhibit number differs from that used in a
8 deposition transcript, then the latter transcript must be conformed to the new trial number if and
9 when the deposition testimony is read to the jury (so as to avoid confusion over exhibit
10 numbers).

11 22. The exhibit tag shall be in the following form:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRIAL EXHIBIT 100

CASE No. _____

DATE ENTERED _____

BY _____
DEPUTY CLERK

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

26 23. Please move exhibits into evidence as soon as the foundation is laid and it is
27 fresh in the judge’s mind. Do not postpone motions and expect the judge to remember the
28 foundation. Counsel must consult with each other and with the deputy clerk at the end of each

1 trial day and compare notes as to which exhibits are in evidence and any limitations thereon.
2 If there are any differences, counsel should bring them promptly to the Court’s attention.

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

6 25. In addition to the official record exhibits, a *single joint* set of bench binders
7 containing a copy of the exhibits only (usually the combined top twenty will do) should be
8 provided to the Court on the first day of trial. Each exhibit must be separated with a label
9 divider (an exhibit tag is unnecessary for the bench set). In large letters, the labels should say
10 the exhibit number on the binders. Please use binders thin enough to lift with one arm and with
11 locking rings.

12 **OBJECTIONS DURING EXAMINATION**

13 26. Counsel shall stand when making objections and shall not make speaking
14 objections. The one-lawyer-per-side rule is usually followed but will be relaxed to allow young
15 lawyers a chance to perform.

16 **TIME LIMITS**

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

21 **SETTLEMENTS AND CONTINUANCES**

22 28. Shortly before trial or a final pretrial conference, counsel occasionally wish
23 jointly to advise the clerk that a settlement has been reached and seek to take the setting off
24 calendar (but it turns out later that there was only a settlement “in principle” and disputes
25 remain). Cases, however, cannot be taken off calendar in this manner. Unless and until a
26 stipulated dismissal or judgment is filed or placed on the record, all parties must be prepared to
27 proceed with the final pretrial conference as scheduled and to proceed to trial on the trial date,
28 on pain of dismissal of the case for lack of prosecution or entry of default judgment. Only an

1 advance continuance expressly approved by the Court will release counsel and the parties from
2 their obligation to proceed. If counsel expect that a settlement will be final by the time of trial
3 or the final pretrial conference, they should notify the Court immediately in writing or, if it
4 occurs over the weekend before the trial or conference, by voice mail to the deputy courtroom
5 clerk. The Court will attempt to confer with counsel as promptly as circumstances permit to
6 determine if a continuance will be in order. Pending such a conference, however, counsel must
7 prepare and make all filings and be prepared to proceed with the trial.


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

11 **PANDEMIC**

12 40. During the pandemic, all counsel, witnesses and parties or personnel in the
13 courtroom — including potential jurors — must be fully vaccinated, meaning with booster
14 shots. Written proof of vaccination and booster will be required.

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16 **IT IS SO ORDERED.**

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18 Dated: March 3, 2022.

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE