PRE-TRIAL PROCEDURE

I. INITIAL PLEADINGS

A. Complaint

The complaint is the first step to getting to trial in a civil proceeding. This document, once filed in the appropriate court system, formally establishes a cause of action against another party, and details the basis for the cause of action.

The form of the complaint generally is controlled by federal, state and local rules of civil procedure. For example, Fed. R. Civ. P. 8(a) and 8(e) provide:

> A complaint shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.
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> …
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> Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.
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> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.
>
> A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.

Most courts follow the above guideline that the complaint should be "short, plain, simple, concise and direct," with the exceptions of causes of actions that require more detailed allegations, such as fraud. Fed. R. Civ. P. 9(b). Additionally, virtually all courts require a specific demand for jury trial, otherwise this right is waived. Fed. R. Civ. P. 38.

As a general rule, even when not required by court procedure, it's best to keep complaints as short, plain, simple, concise and direct as possible, so as not to limit future arguments or positions that might be inconsistent with the complaint. While most jurisdictions permit the pleading of inconsistent positions within a complaint, I try to avoid this because some jurisdictions permit the complaint to be introduced as evidence. Inconsistent positions can hinder the plaintiff's credibility and position.

On the other hand, you definitely want to make sure that you preserve all causes of actions and positions you might wish to argue at trial. For this reason, I generally prepare the initial complaint utilizing very general phrases and terms, minimum factual statements, and include as many potential causes of actions as I can assert. As discovery proceeds, and the evidence becomes more clear, I periodically review my complaint to determine whether any additional causes of actions can be asserted and/or whether I need to include additional factual information in my complaint to support the causes of actions previously pled. I then immediately amend the complaint, if necessary, to support every cause of action and issue I intend to argue at trial.

It's not uncommon for me to amend my complaints three or four times during the discovery process. I do this to make sure that I have sued the properly named defendants, and that I can overcome motions for judgment on the pleadings and motions for summary judgment. I also do this to make sure that the evidence I intend on introducing at trial is not excluded on the grounds of being irrelevant to the causes of actions pled in the complaint. I rather have multiple amendments to my complaint than to wait too long and be prevented from amending the complaint due to it being untimely. See for example Fed. R. Civ. P. 15.

Importantly, while the rules of civil procedure dictate the form of the complaint, much of the substance of the complaint will be controlled by statutory, administrative and common law. It's crucial before filing the initial complaint to thoroughly research the United States Code, the Code of Federal Regulations, federal common law, state statutes, state administrative codes, state common law, local codes and ordinances, and applicable jury instructions. These sources will provide you crucial information regarding the various causes of actions available, and the elements of each cause of action.

B. Answer:

The answer to a complaint is the defendant's official admission/denial of the facts and issues asserted in the plaintiff's complaint, including any affirmative defenses that the defendant asserts (such as, accord and satisfaction, assumptions of the risk, estoppel, fraud, laches, res judicata).

Similar to the form of a complaint, defense counsel should write the answer in short, plain and concise terms. Fed. R. Civ. P. 8(b) & (e). Most often, the defendant has the luxury of simply writing the words "denied" or "unknown." Rarely does the defense, nor should the defense, admit many allegations in the complaint. Plaintiff's counsel, however, should immediately and carefully compare the complaint to the answer to make sure that the defendant admitted the allegations that plaintiff's counsel thought should be admitted; such as, the defendant's full legal name, the wrongdoer was an employee of defendant, the wrongdoer was acting within the scope of his employment, etc.

It's important for the defendant to timely answer the complaint, as the defendant's failure to deny an assertion in the complaint is an admission to its truth. Fed. R. Civ. P. 8(e) Also, the

defendant needs to be careful to include all possible affirmative defenses in its answer, and to timely file motions that must be asserted before or simultaneously with the answer; e.g., lack of personal jurisdiction, lack of subject matter jurisdiction, improper venue, failure to state a cause of action. Fed. R. Civ. P. 12(b)

Defense counsel should periodically review the answer to make sure that all possible affirmative defenses, and potential counterclaims, have been asserted. If necessary, the defendant should file a motion to amend the answer. A judge will prevent the presentation of affirmative defenses that have not been timely raised before trial.

C. Reply:

A reply is the plaintiff's formal response to the defendant's answer. Many courts, such as federal court, do not permit the filing of a reply other than to respond to an asserted counterclaim. Fed. R. Civ. P. 7(a). Some courts, however, do require a formal reply to affirmative defenses.

You want to carefully review the procedures of each court you appear to determine the requirements for filing a reply. If a reply is required, you generally will follow the same procedure the defense follows in responding to a complaint.

II. CASE MANAGEMENT CONFERENCE

Most courts, especially in federal court, issue a case management order soon after the complaint and answer are filed. The case management order generally specifies the discovery procedures and limitations, and provides anticipated schedules for the completion of discovery, exchange of witness and exhibit lists, pre-trial conferences, and trial settings. While the exact dates for the pre-trial conference and trial setting most often will not be listed, time periods will be provided.

Often, the federal, state and local rules of procedure provide guidance to the attorneys regarding case management orders to be issued. For example, Local Rule 16.1, Massachusetts Federal Rules of Civil Procedure, provides:

> In every civil action … the judge . . . shall convene a scheduling conference as soon as practicable, but in any event within ninety (90) days after the appearance of a defendant and within one hundred twenty (120) days after the complaint has been served on a defendant.
>
> …
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> Unless otherwise ordered by the judge, counsel for the parties must, pursuant to Fed. R. Civ. P. 26(f), confer at least 21 days before the date for the scheduling conference for the purpose of:

(1) preparing an agenda of matters to be discussed at the scheduling conference,

(2) preparing a proposed pretrial schedule for the case that includes a plan for discovery, and

(3) considering whether they will consent to trial by magistrate judge.

Unless otherwise ordered by the judge, the parties are required to file … a joint statement containing a proposed pretrial schedule, which shall include:

(1) a joint discovery plan scheduling the time and length for all discovery events …

If the court does not issue a case management order, you always have the right to seek a hearing to discuss these same issues with the court and get guidance early in the case. This can be helpful when you are concerned with the discovery process taking too long or a trial date being delayed. You can ask the court to issue a time schedule for the completion of discovery, exchange of witness and exhibit lists, and the setting of a pretrial conference.

III. DISCOVERY

A. Generally:

Discovery is the legal term referencing the formal investigation process in litigation. The main forms of discovery include depositions, interrogatories, requests to produce, requests to admit, non-party production subpoenas, independent medical examinations, site visits and product testing.

The process of discovery generally is controlled by federal, state and local rules of procedures. For example, Fed. R. Civ. P. 26 provides that the attorneys must meet as soon as practicable in order to propose a discovery plan, and to exchange potential witness, exhibit and evidence lists. Of course, the court can, and usually does, issue directives as to the specific time periods in which this meeting must take place, and in which the exchange of information must occur, including the detailed reports of expert witnesses. In addition to this required process, Fed. R. Civ. P. 26 permits depositions, interrogatories, requests to produce, independent medical examinations, and requests to admit. Generally, however, these forms of discovery are not permitted until after the initial attorneys' meeting and exchange of required information.

All forms of discovery are subject to objections on grounds of privilege, such as attorney-client and work product.

B. Interrogatories:

The submission of interrogatories for discovery purposes is the process of serving formal written questions to opposing counsel, which opposing counsel is required to answer in a specified time period. Interrogatories may relate to any matter relevant to the claims and defenses asserted, including the existence, description, nature, custody, condition, and location of any books, documents or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. Answers to interrogatories generally are admissible as evidence at trial, subject to the applicable rules of evidence.

The form and number of interrogatories generally are dictated by federal, state and local rules of procedure. For example, Fed. R. Civ. P. 33 provides a party is permitted to serve upon an opposing party interrogatories, not exceeding twenty-five in number, including all discrete subparts. To submit more than twenty-five interrogatories, a party must seek leave of court. Generally, the court will authorize additional interrogatories, as long as the interrogatories are specifically worded and not vague or over burdensome.

It's not unusual for me to submit five to ten sets of interrogatories throughout the course of the pre-trial process. Every time I think of an issue that I need the opposing side to formally acknowledge or provide additional information, I send an interrogatory. Write your interrogatory questions as specific as possible so that the opposing side has difficulty in providing an evasive answer. Moreover, you want your interrogatories clear enough so that during trial you can read the question and response to the jury and there will be no ambiguity as to what was asked and how it was answered.

It should be noted that lawyers disagree on the use of interrogatories. Some like to limit interrogatories to determine the names of potential witnesses and the location of potential evidence. These lawyers do not like submitting interrogatories for factual statements or evidentiary issues, because they believe it permits the opposing side too much time to thoroughly prepare the answers and analyze all possible repercussions. These lawyers like to surprise the opposing side with the questions during depositions. Other lawyers, including myself, believe that getting the opposing side committed early to a version of the facts, before the opposing side has a chance to analyze all relevant evidence and research the law, will result in a more truthful version of what occurred. Moreover, it provides great impeachment when the opposing side tries to take a different position in depositions or at trial.

C. Requests to Produce:

A request to produce is a written demand on an opposing party for tangible forms of evidence, such as, correspondence, e-mails, notes, investigative material, reports, studies, photographs, video media and audio media. The form and restrictions on these types of requests are controlled by federal, state and local rules of procedure. See for example Fed. R. Civ. P 34.

Unlike interrogatories, rules of procedure generally do not limit the number of requests to produce. However, a party always can object to the requests being vague, ambiguous, overly burdensome, harassing and/or privileged. Thus, it's important to make your requests very clear, concise and specific, leaving little room for objections. This advice also will prove valuable when publishing the request and response to the jury. When introducing this type of evidence at trial, it's crucial for the jury to easily comprehend the information requested and what the opposing side produced in response to the request.

It is not unusual for me to submit five to ten sets of requests to produce during the pre-trial phase, with each set averaging ten different requests. Any time I think of tangible information the opposing side might possess that could be beneficial to me or to them, I request it. It's just as important to possess information valuable to opposing side's position as it is to have information valuable to your side. This is the only way to properly evaluate the strengths and weaknesses of your case, and prepare a winning theme.

D. Requests to Admit

Requests to Admit are an extremely useful trial tool that attorneys utilize too seldom. *See* Fed. R. Civ. P. 36. I submit requests to admit in every single case. Most of the time I am trying to get the opposing side to agree to factual issues that I do not desire to call a witness at trial, and which I believe the opposing side must admit. For example, I might submit the following: "Admit that Mr. Jones was an employee of XYZ Corporation at the time of the subject incident." "Admit that Mr. Jones was acting within the scope of his employment with XYZ Corporation at the time of the subject incident." "Admit that the document attached as Exhibit 1 is an authentic copy of a document produced by XYZ Corporation in the normal course of its business operation."

I also like requests to admit because they have a definite evidentiary impact on the jury. This is especially true because it is one of the few times during the trial that you stand in front of the jury and read a document directly to them. As an example, in one case I sent the following requests to admit to Wal-Mart: "Admit that on January 26, 2001, Wal-Mart was the largest seller of ammunition in the world." "Admit that on January 26, 2001, Wal-Mart was the second largest seller of ammunition in the world." "Admit that on January 26, 2001, Wal-Mart was the third largest seller of ammunition in the world." I did this all the way through "tenth largest seller." Wal-Mart answered each request with the simple response "unknown." I published the requests to admit and responses in my case-in-chief. I knew the jury would not believe that Wal-Mart did not know where it ranked worldwide in regard to the sell of ammunition. Thus, the jury would find that Wal-Mart was purposely being evasive. Moreover, in closing argument it allowed me to point out to the jury that Wal-Mart lacked so much concern regarding its gun and ammunition operation that it didn't even know whether it was the largest seller of ammunition in the world.

Another reason I like requests to admit is that generally there is not a limit on the number an attorney can submit to the opposing side. Also, the opposing side must answer requests to admit

within thirty days or else they are admitted. It's much more difficult to delay answering a request to admit, than it is to delay answering an interrogatory or request to produce. Thus, requests to admit become an extremely effective discovery tool the closer you get to trial, especially when you are trying to limit the remaining depositions needed and the number of witnesses to be called in the case-in-chief.

E. Non-Party Production

A request for non-party production is the process of issuing a subpoena on a non-party requesting the non-party produce tangible information relevant to a case. See Fed. R. Civ. P. 45. Many times opposing parties will object to the use of this form of discovery if a deposition is not simultaneously set with the subpoena. Opposing counsel will do this when concerned he will not receive adequate or complete copies of the information produced from subpoena. If opposing counsel does object to the use of non-party production subpoenas, then you will need to set the deposition duces tecum of the non-party. See Fed. R. Civ. P. 45(c)(2)(B)

Non-party subpoenas are often utilized to acquire medical records, government documents, law enforcement investigative reports and photographs, and non-party commercial records relevant to the case. For example, in an automobile collision, each side could subpoena the cell phone records of each driver from the applicable cell phone providers. This would help prove whether the driver was utilizing the cell phone at the time of the collision.

F. Deposition Testimony

The key form of discovery utilized in every case is the taking of depositions, both of lay persons and experts. See Fed. R. Civ. P. 30. In regard to my technique for taking a deposition, it depends upon whether I am taking the deposition for discovery purposes or trial purposes.

If the deposition is of the opposing side's witness or expert, then I take a discovery type deposition. A discovery deposition is one in which I am trying to determine all possible knowledge and information the witness has regarding the topics the witness might testify at trial. The purpose of the deposition is to discover the complete opinions and anticipated testimony of the witness. This type of deposition generally is lengthy and the questioning very broad in scope. I try not to ask the deposition questions in a sequence and logic that will make it easy for the opposing side to utilize the deposition at trial. If the witness is a key witness for the opposing side, I generally will set the deposition by videotape. The reason for this is that during the deposition stage, the witness generally is not as well prepared as he will be during trial, will make more mistakes, will appear more uncomfortable, and will be more likely to act unprofessionally. This video often proves beneficial during cross-examination of the witness at trial.

When taking the deposition of my anticipated witnesses for trial purposes, I take the deposition as if I am presenting a direct examination of the witness during the actual trial. I narrow my

questioning to the essential information I wish to present in proving my case. I ask my questions in a non-leading, succinct and clear manner. I properly prepare the witness for my questions, along with the anticipated cross-examination. Depending upon how the witness comes across, I determine whether I wish to videotape the deposition. Specifically, I make the choice whether I want the jury to see and hear the witness's testimony, or simply hear it.

If the witness truly is independent, then I do my best to speak with the witness before taking the deposition, and preferably get from them a recorded or signed statement regarding their complete knowledge of the incident. If the information is beneficial to my client, I generally set the deposition in order to preserve the witness's testimony, just in case the witness is no longer available or becomes adverse to my client. If the witness's testimony is adverse to me, I generally will not set the deposition, but will wait to see if the opposing side lists the person as a witness for trial. If so, I then will set the deposition, and examine them as noted above for opposing side witnesses.

An interesting aspect of taking the deposition of a corporation is that the rules of procedure permit you to specify the topics you are seeking information, and the corporation is required to produce one or more employees who have the most knowledge regarding the topcis. This commonly is referenced as a 30(b)(6) deposition, referring to Fed. R. Civ. P. 30(b)(6).

A process known as depositions duces tecum is utilized when an attorney wishes the deponent to bring tangible evidence to the deposition. See Fed. R. Civ. P. 45. For example, if an attorney is unable to acquire appropriate tangible evidence through requests to produce or non-party production, depositions duces tecum work very well. This type of deposition often is utilized when taking the deposition of experts, medical providers and investigating officers. This way the attorney is assured that she has a complete copy of the deponent's file when questioning the deponent.

In regard to depositions, you have the right to request the deponent read his/her deposition after it's transcribed and to note any corrections or changes to the transcript. See Fed. R. Civ. P. 30(e). I do recommend doing this for all depositions. This way the deponent will have much less an opportunity during trial to alter or refute his deposition testimony.

Some courts limit the number of depositions that can be taken. For example, federal procedure limits the number of depositions to ten. Fed. R. Civ. P. 30(2)(A). Courts, however, almost always allow more than ten depositions upon motion of counsel.

Some courts limit the length of depositions. For example, Fed. R. Civ. P. 30(d)(2) limits the length of depositions to seven hours. This rule of limitation is more likely to be enforced than the total number of depositions limitation. The reason for this is that attorneys have a reputation for abusing the deposition process by harassing party deponents with multiple day depositions.

Pursuant to Fed. R. Civ. P. 32, you are permitted to utilize the deposition of the opposing party at

any time during trial, meaning you can read all or part of it during your case. You do not have to put the opposing party on the witness stand. Additionally, if the opposing party is on the witness stand, you can utilize his deposition to impeach him.

If a non-party is on the witness stand testifying, you also have the right to utilize her deposition to impeach her. However, if she fails to take the witness stand, her deposition cannot be published to the jury unless she is unavailable as a witness; for example, dead, greater than a certain distance from the courthouse (e.g., 100 miles), unable to testify because of health reasons, or cannot be located.

During trial if you introduce only part of a deposition, the opposing side has the option of requiring you to introduce any other part that in fairness should be considered with the part you introduced. Fed. R. Civ. P. 32(a)(4).

Generally, if a witness would not be permitted to testify to something on the witness stand during trial, then the testimony is not admissible at trial simply because the it's in deposition form. The rules of evidence apply the same whether the person is testifying at trial or the person's deposition is being read at trial. Fed. R. Civ. P. 32(b) & (d). There are minor exceptions to this rule, such as dealing with an opposing side's failure to object to the form of a question asked during the deposition.

G. Electronic Discovery

The internet has opened up a new world of instantaneous discovery. The information that can be acquired over the internet is amazing and revolutionary to the trial process. I have had cases whereby a witness was on the stand during direct-examination and testified to something I had never heard. When this occurred, I accessed the internet through a wireless connection, while still in the courtroom, and conducted various forms of public record searches. In one case, I was able to bring back an internal company document submitted to a state government that directly refuted what the witness stated. Because I keep a small, portable printer with me in the courtroom, I was able to print the document and show it to the witness. In this particular case, the signature of the witness was on the document, and the government had maintained the record in .pdf format. Thus, it was a perfect copy. Obviously, this was shocking to the witness, and was very effective before the jury.

The various types of electronic discovery sources are infinite. The only way to become familiar with these sources is to get on the internet and begin experimenting. Some of the electronic discovery that I most often conduct includes general search engines, private and government web sites, BLOGs, Chat Rooms, public record providers, and legal service providers.

IV. PRE-TRIAL CONFERENCE

You have conducted most of your pre-trial discovery, and have enough information that you

believe you are ready to proceed to trial. The question is how do you get a trial setting? In many cases (state and federal), judges issue case management orders early in the process, as previously discussed. This order generally specifies the discovery procedures and limitations, the pre-trial conference date, and a trial date.

When the court does not issue such an order, you generally can file a motion seeking a case management conference, at which time you seek guidance from the court on the proposed discovery schedule, pre-trial conference dates, and trial setting. Also, upon the completion of discovery, it's useful to file a Notice for Trial Setting with the court, if a trial date has not been set. In this notice, you inform the court that all discovery has been completed, and that you are requesting the setting of a pre-trial conference and trial setting. You might wish to try to set a hearing with the court to discuss the setting of the trial, especially if you anticipate a lengthy trial or a lot of experts or out-of-town witnesses, and would like the court to set a special date and time for your trial.

Approximately two to three weeks before the trial setting, most courts will hold a pre-trial conference with the attorneys, and require the filing of a joint or separate pre-trial memorandum. This memorandum generally contains a short statement of the case to be read to the venire, a list of outstanding motions, lay witness and expert witness lists for each party, an exhibit list for each party, proposed jury instructions, and a proposed verdict form.

The preparation of the pre-trial memorandum is to be taken very seriously. I spend at least one full week (7 days, 10 hours per day) for a three day trial, organizing and reviewing the entire case file before preparing the pre-trial memorandum. I want to make sure that I reveal all possible witnesses and exhibits I intend on using, and that the jury instructions and verdict form are exactly in the form I most desire. In many, if not most, cases, both sides will agree to the jury instructions and verdict form as part of the joint pre-trial memorandum process. This is very valuable in preparing the case for trial.

Additionally, as part of the pre-trial memorandum process, it's very convenient to get the opposing party to stipulate to the admission of as many exhibits as possible. This avoids having to go through the foundation process during trial, and provides the opportunity to have the exhibits marked into evidence before the opening statement. Also, the pre-trial memorandum process provides the proper time for preparing motions in limine. If opposing counsel will not agree to the motions in limine, then file them simultaneously with the pre-trial memorandum. If enough time exists during the pre-trial conference, the judge likely will rule on most of the motions, especially if you have well briefed the issues.

During the pre-trial conference, you will want to determine the following issues:

General Information:

- ☐ The date, time and location jury selection will begin.
- ☐ The date, time and location opening statement will begin.
- ☐ The days of the week the trial will take place, the time trial will begin each morning, the times of each daily break, and the time trial will end each day.
- ☐ Does the judge have a preferred table that the plaintiff and defense sit at (e.g., does the judge want the plaintiff or the defense closest to the jury)?
- ☐ Does the judge place time limitations on voir dire, opening statement, closing argument and/or the case-in-chief?
- ☐ Does the judge have a writing that provides proper and expected trial procedure?
- ☐ Will the court, plaintiff's counsel or defense counsel provide the court reporter?
- ☐ What technology does the courtroom have available and what technology must the attorneys provide; e.g., televisions, VCR players, DVD players, computer monitors, video projectors, visual presenters, screens, Sympodiums, wireless internet connectivity, easels, etc.?
- ☐ Can the attorneys attain a copy of the letters, forms and questionnaires that the clerk of the court mails and distributes to the members of venire, including any videos the members of the venire view?
- ☐ Does the judge allow the jury to take notes?
- ☐ Does the judge allow the jury to ask questions of the witnesses? If so, what procedure does he utilize? For example, are the questions in writing and must the jurors wait until the close of direct and cross-examination before submitting the questions?
- ☐ Does the judge generally ask questions of the witnesses? If so, what procedure does he utilize when doing this?
- ☐ What instructions does the judge provide the jury upon impaneling them, before opening statements, after opening statements, and at the end of each day.

Jury Selection:

- ☐ How many persons will the judge sit on the venire?
- ☐ Will the judge asks questions of the venire? If so, what questions will the judge ask?
- ☐ Will the lawyers be permitted to ask questions of the venire? If so, how long will each attorney have for questioning? Will the lawyers be able to test an individual member of the venire's response to case specific facts and legal issues?
- ☐ Will individual members of the venire be questioned in front of the entire panel or at sidebar?
- ☐ Will the venire be provided a form questionnaire? If so, when can the lawyers acquire a copy?
- ☐ Will the judge permit the submission of a case specific questionnaire?
- ☐ What system does the judge utilizing for questioning the venire? Does he limit

the questioning to a specified number of the venire or does he permit questioning of the entire venire?
- ☐ What system does the judge utilize in down-selecting the jury? Does he take the first six/twelve in the box, or will the lawyers strike venire members until the appropriate number of jurors remain?
- ☐ How many peremptory challenges will each side have?
- ☐ Will the attorneys know who the replacement juror will be if an attorney uses a peremptory challenge?
- ☐ Will the judge permit back striking of members of the venire?
- ☐ How many alternate jurors will be chosen?
- ☐ Will the judge select the foreperson or will the jury? If the judge selects the foreperson, will the judge do this before opening statement or after closing argument?

Opening Statement:

- ☐ Will the judge permit the use of demonstrative aids and exhibits during the opening?
- ☐ Will the judge permit the lawyers to explain the law on burden of proof?

Direct Examination:

- ☐ What procedure does the judge prefer for establishing the foundation of an expert witness?
- ☐ What procedure does the judge prefer for establishing the foundation of exhibits and demonstrative aids?

Cross Examination:

- ☐ What procedure does the judge prefer for impeaching and refreshing the memory of a witness with prior written statements and depositions?

Jury Instructions:

- ☐ Does the judge send the jury instructions back with the jury?
- ☐ Does the judge read the instructions to the jury before or after closing argument?

Closing Argument:

- ☐ Will the judge permit the reading or showing of portions of witness testimony that occurred during trial?

Jury Deliberations:

- ☐ Will alternate jurors deliberate or will they be dismissed before jury deliberation?

Verdict:

- ☐ Is a unanimous verdict required? If not, what percentage of the jurors must agree on the verdict?

V. INITIAL TRIAL PREPARATION

My standard rule of thumb is that I devote three weeks (7 days per week, 10 hours per day) in preparing for a 3-5 day trial. The process begins with the creation of the pre-trial memorandum, which usually takes one week, and is written as part of my first week process in organizing my trial file. This is the file I utilize during trial. Every lawyer has his own system of creating a trial file, and my system is provided in detail below:

I first create individual manila folders labeled: Order of Proof, Pleadings, Motions in Limine, Voir Dire, Opening Statement, Examinations, Directed Verdict, Jury Instructions, Verdict Form, Closing Argument, Exhibits, and Research. Additionally, I create witness folders for every conceivable witness (direct and cross). While some lawyers prefer to create trial notebooks, I do not prefer this method because it requires me to punch holes in the documents. I prefer having complete, non-tampered documents that are readily accessible.

In the *Order of Proof* folder, I keep the most current version of the order in which I intend to present my case-in-chief. This document, which I generally create in Microsoft Excel, is extremely detailed. It list the order in which I intend to perform each action (e.g., voir dire, motions in limine, opening statement, direction examination of witnesses, publication of interrogatories, etc.). By each description I list the date and time it will take place and how long the act should take. Additionally, I include the contact information for each person I might call to the stand, including home number, business number, cell number, and e-mail address. The reason I create this document in Excel format is that I can create a formula within the document so that if I change the projected time of a task, or the actual time of the task, the document automatically reformulates all remaining tasks. This becomes extremely important when you are trying to determine which evidence you wish to present. For example, you always want to begin and end the day on a strong point. Additionally, you try to never end the day at the close of your direct examination. You do not want to give opposing counsel all night to prepare a cross. Thus, many times you will choose to deviate from your set order of proof in order to make your presentation end appropriately at specified breaks.

In the *Pleading* folder, I include the most current version of the complaint, answer, reply and

pre-trial memorandum. Additionally, if the court has issued any orders that might arise during the course of the trial, I also include these orders as part of the file.

In the *Motions in Limine* folder, I include all motions in limine with the applicable research attached thereto, and any order issued by court thereon. I make sure I have enough copies of each outstanding motion and applicable research to provide to opposing counsel and the judge.

In the *Voir Dire* folder, I include the venire list, public record information, questionnaires, seating charts, venire questions, and applicable law regarding challenges for cause, peremptory challenges, back striking, and other issues that might arise. Again, I have adequate copies of the research for opposing counsel and the judge.

In the *Opening Statement* folder, I include a complete script of my opening statement, along with an outline. The outline is what I take to the podium when presenting my opening statement. If there are any legal issues I foresee arising (such as objections or the use of demonstrative aids), I keep the applicable case law in the folder, with enough copies for opposing counsel and the judge.

In the *Examination* folder, I include my typed questioning for all potential witnesses (direct and cross, lay and expert). This Examination folder is limited to the actual questions. Generally, I place depositions, prior written statements, and other witness specific documents (such as impeachment exhibits) in individual witness folders. These individual witness folders are filed in alphabetical order and kept together in large banker boxes clearly marked "Depositions."

In the *Directed Verdict* folder, I include an original and copies of the directed verdict motion I anticipate filing at the end of the opposing side's case-in-chief. I attach the relevant research, including copies for the opposing side and judge. Additionally, I include copies of all research that I believe will be necessary to refute the anticipated directed verdict to be filed or argued by opposing counsel.

In the *Jury Instruction* folder, I include the final version of the jury instructions (if stipulated), with enough copies for opposing counsel and the judge. If the jury instructions have not been stipulated, and remain at issue, I create possible versions, and have the applicable case law attached thereto.

In the *Verdict Form* folder, I include the final version of the verdict form (if stipulated), with enough copies for opposing counsel and the judge. If the verdict form has not been stipulated, and remains at issue, I create various possible versions, and have the applicable case law attached thereto.

In the *Closing Argument* folder, I include a complete script of my closing and rebuttal argument, along with an outline of each. The outline is what I take to the podium when presenting my argument. If there are any legal issues I foresee arising (such as objections), I keep the

applicable case law in the folder, with enough copies for opposing counsel and the judge.

In the *Exhibit* folder, I include the final exhibit lists for all parties. I also file a tabular format of the exhibits that I intend to introduce at trial, with a column noting the description of the exhibit, a column noting the number of the exhibit, and two columns noting whether the exhibit was admitted or denied. Finally, I include the clearest original or copy of every exhibit. I attach an original exhibit sticker on the exhibits I intend on introducing into evidence. I then make enough copies of each exhibit to provide to opposing counsel and the judge.

In the *Research* folder, I include all research that I anticipate could become an issue, but does not specifically have a location in any of the other folders.

At the close of the first week of trial preparation, I should have my trial file completely organized. I should have a list of all witnesses and exhibits I intend on utilizing, and I should have my suggested jury instructions and verdict form completed. Additionally, I should have a prepared motion in limine containing the evidence and testimony I wish to have excluded. Finally, I should have the pre-trial memorandum completed, and hopefully stipulated by opposing counsel.

At this time, it is crucial to make sure that all your trial witness subpoenas have been issued and served, including those witnesses you believe will show voluntarily. In virtually all cases, I have the trial witness subpoenas served approximately four weeks before trial. I do this in order to make sure the subpoenas all get served in a timely manner. The reason I also serve voluntary witnesses is for my protection in case they do not show for trial. If you have served a trial subpoena and the witness fails to show, then the court will allow you to read the witness's deposition testimony. If you have not served the witness, and the witness lives or works within a certain radius (e.g., 100 miles) of the courthouse, the judge likely will not permit you to publish the deposition testimony.

During the remaining two weeks before the beginning of the trial, I finalize my voir dire, motions in limine, opening statement, examinations (direct and cross), directed verdict motion, jury instructions, verdict form, closing argument, exhibits and demonstrative aids. I also prepare all my witnesses, and attempt to get opposing counsel to stipulate to admission of my exhibits, demonstrative aids, and the portions of the deposition testimony I desire to publish or show the jury.