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Federal Trial Judge's Reflections on the Preparation for and Trial of Civil Cases

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United States District Court for the District of Columbia

A Federal Trial Judge's Reflections on the Preparation for and Trial of Civil Cases

JUDGE CHARLES R. RICHEY*

I. INTRODUCTION

The opportunity to participate in this Colloquium comes at a timely moment, for I have just completed the process of revising the pre-trial order that I have employed in civil cases. In the past, when asked by law students and practitioners for "tips" on the preparation and trial of civil cases, I have usually recommended that they first examine my pre-trial order. Thus, I welcome this opportunity to direct the attention of the readers of this Colloquium to the revised version of this pre-trial order.[1] It is, hopefully, self-explanatory, and I sincerely believe that a practitioner, particularly one just beginning his or her career, will find the Order to contain useful and practical advice on how to prepare for trial. In addition, I have taken this opportunity to articulate some additional thoughts on the preparation and trial of a civil case which I have formulated on the basis of my years in practice and on the bench. The readers of this Colloquium will hopefully find these reflections helpful. This is not the proper forum for a complete exposition of my experience and ideas. Thus, the following are merely highlights of some of the more important areas counsel should consider.

It has often been said that one cannot overprepare for the trial of a case, be it civil or criminal, although a case can surely be over-tried. Solid preparation before trial, beginning from the moment a client walks into a lawyer's office, is a must. A full, thorough, and uninterrupted interview of the client should be the first step, followed by an independent investigation of all possible leads which might lead to the discovery of relevant facts. The next step should be the comprehensive research of the applicable law. Upon completion of these steps, further conferences with the client and prospective witnesses will enable counsel to develop fresh ideas and new approaches, both as to the facts and the law. The issues should then be narrowed as the careful lawyer begins to envision the ultimate approach and answer to the case.

During this entire process, which may take some weeks or even longer in a complex case, the client must and should be kept fully informed, preferably in writing, as to the status of the case. Failure to keep clients fully advised is one of the principal causes of dissatisfaction with lawyers. Malpractice claims against lawyers are often the result of this client dissatisfaction.

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*United States District Court for the District of Columbia.

[1]See APPENDIX I, *infra*.

With these general thoughts in mind, I turn now to a discussion of some specific suggestions on how to approach a case from the time of filing suit through pre-trial and the trial itself.

II. From the Plaintiff's Point of View: The Complaint

There are a variety of considerations for which plaintiff's counsel must be prepared. First, the jurisdiction of the Court to grant the relief requested must be properly researched and correctly invoked. Second, all essential facts pertaining to each of the elements of the alleged claims should be concisely stated in separately numbered paragraphs. Third, if there is more than one claim to be asserted, each should be separately stated in consecutively numbered counts with each court re-alleging and incorporating by reference at the outset all the allegations in previous counts. Fourth, the desired relief merits particular attention. Indeed, careful counsel will always include the "catch-all" phrase — "and for such other and further relief as to the Court seems just and proper in the premises." The concept of relief is generally given less consideration than other aspects of a case, despite the fact that relief often becomes the most important issue in a case. Since the initial prayer for relief is often determinative of the remedy ultimately obtained, intial legal research should focus on the subject of relief even though the extent of legal literature on remedies is often relatively sparse. Depending on the particular issue, counsel may have to be imaginative and innovative in order to make a proper prayer for relief. On the other hand, in addition to being prepared on the subject of relief, *never* ask for that which the client is not entitled to receive.

III. Service of Your Complaint and Summons

When the Complaint and Summons are filed at the Clerk's Office, the exact filing fee needed for the Clerk and also the fee for the service of process should be ascertained in advance. The Clerk may then be paid by check, thereby enabling the attorney to maintain an accurate record of disbursements.[2]

If the defendant is going to be difficult to find, or if speed is important or essential, the advisability of appointment of a special process server should be considered.

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[2]It is advisable to send copies of all pleadings to your client along with a running log of disbursements on his, her, or its behalf. The client will appreciate this, and it will demonstrate that you are doing the work you are being paid for.

IV. The Defendant's Answer on Responsive Pleading

Similarly, the defendant's counsel has many important considerations. First, the correctness of service of process should be verified. Second, the questions of the Court's jurisdiction and the venue which would best serve the defendant's interest should be reviewed. Third, examine the alleged facts with the client and immediately interview all available witnesses who have knowledge of the relevant facts. It is always prudent for counsel to conduct such interviews in the presence of an independent third person, not only to protect the attorney from possible later attack as to improper conduct, but also to prevent a subsequent attack with respect to his or her ability to continue as counsel, rather than as a witness, in the case. If possible, witnesses' statements should, with advance permission and knowledge of the witness, be recorded, reduced to writing and signed by the witness. Fourth, most state and local court rules, as well as the Federal Rules of Civil Procedure, provide for dispositive motions, *e.g.*, a motion to dismiss or for summary judgment. These generally will toll the time for filing an Answer or responsive pleading.[3] Fifth, consider the advisability of undertaking discovery before filing an Answer. Pre-Answer discovery may produce more accurate and precise knowledge of the facts upon which motions or responsive pleadings may be predicated.[4] Sixth, begin preparation of the trial brief and legal memoranda in support of your position.[5]

V. Conference Between Counsel for Plaintiff and Defense

Assuming that no dispositive motions are sustained, it is my view that, after their respective investigations as to the facts and law have been completed, counsel should arrange for a face-to-face conference to explore the possibility of settlement. The popular notion that it is a confession of weakness to initiate such a conference should be dispelled. If counsel is well prepared, no appearance of "weakness" will result. Moreover, the more quickly one can dispose of a case and proceed to the next, the better for both client and lawyer. One important caveat should be noted: Advance written permission from the client as to the parameters of authority should be secured before entering into any stipulations or agreements with opposing counsel regarding any aspect of the case, including, but not limited to, a final settlement or disposition.[6]

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[3]*See, e.g.*, Fed. R. Civ. P. 12(a). *See generally* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1346 (1969).

[4]*See, e.g.*, Fed. R. Civ. P. 30(a), 8 C. Wright & A. Miller, Federal Practice and Procedure § 2104 (1969).

[5]See Appendix I, *infra*.

[6]See ABA Code of Professional Responsibility, Ethical Consideration 7-7 for additional guidance.

VI. The Pre-Trial Conference

If properly used, the pre-trial conference presents an opportunity to simplify the issues, identify the contentions of the parties and enter into stipulations as to the facts and the admissibility of documentary exhibits. Proposed stipulations, carefully drafted and not overstated, can be of great help both to the Judge or Magistrate conducting the pre-trial and to the client. If requests for admissions and pre-trial discovery have been properly employed in advance, however, stipulations may not be necessary, except perhaps with respect to evidentiary problems and the framing of hypothetical questions. The pre-trial proceeding, therefore, should not be taken lightly. Prepare for it thoroughly just as for trial. Unless there are extenuating circumstances, an overlooked fact, exhibit, or contention at pre-trial may well preclude an offering of the same at the trial itself.

Appendix II to this Article is a sample of the notice of pre-trial used by the magistrates in the District of Columbia. The reader's particular attention is directed to the fact that liability and damages are separate issues,[7] both of which must be proved independently. Thus, be prepared to itemize with particularity how you expect to prove or disprove each of these matters, and do it in writing *in advance.*

VII. The Trial Itself

Any special rules or requirements of the Judge assigned to conduct the trial should be reviewed in advance. The "Helpful Hints" contained in *Appendix III,* written by United States District Judge Pregerton of the Central District of California, will enable the trial lawyer to avoid many problems at trial by smoothly moving things along at a proper pace.

Assuming that counsel have properly prepared for trial, a few items deserve particular mention lest they be overlooked. First, reinterview all witnesses and research memoranda of law again to see if the cases or authorities relied upon have been changed. Access to computer research aids allows one to update research quickly, easily, and relatively inexpensively. If the law has been changed or modified, it is counsel's duty to advise the court and opposing counsel promptly. Second, formally summon all witnesses, but advise them in advance that they will be so summoned, so that they will not be surprised, upset, or angered.[8] Third,

[7]Trial judges, in the exercise of their discretion, will sometimes bifurcate these issues and try one or the other first. For example, in one case involving multiple defendants with several cross-claims and counterclaims, I had occasion, with the consent of counsel, to try the question of the amount of damage to a valuable painting before trying the question of liability. After the jury determined the value of the painting both before and after the explosion which damaged it, the defendants opted to settle the case rather than risk an adverse decision on the issue of liability.

[8]Do not excuse a witness who has been summoned unless prior approval of the court has been obtained and notice given to the opposing counsel.

follow all pre-trial instructions and orders to the letter![9] Fourth, be on time, accept the rulings of the court with courtesy, and make only a brief opening statement. On this latter point, one should emphasize that an opening statement to the jury should reveal *only* what the attorney expects the evidence to establish and no more. Finally, at the close of the plaintiff's case verify with the courtroom clerk that all of plaintiff's written testimony and exhibits are in evidence.

At this stage in a jury trial, defendant's counsel will often move for a directed verdict.[10] If the argument is to be extensive, defense counsel should suggest at the bench that the jury be excused. If the jury is not excused, the parties will have to engage in bench conferences, necessarily conducted in hushed tones, which are generally not as effective or helpful to the court. In a non-jury case in the federal system, bear in mind that defense counsel's analogous motion will be a motion to dismiss[11] and not a motion for a directed verdict. Remember that in this situation the court does not draw any inferences in favor of the party bearing the burden of proof (generally plaintiff), nor concern itself with whether the plaintiff has made out a *prima facie* case. Instead, the court weighs the evidence, resolves any evidentiary conflicts, and decides where the preponderance lies, just as it does at the end of a non-jury case.[12]

VIII. Closing Arguments

Closing arguments should be as brief as possible, but refer back to the opening statement to indicate to the jury that the theories set forth have been proved by evidence presented at trial. As an aid in this regard, I have made a habit, both as a practitioner and now as a judge, of keeping a checklist of the elements of both plaintiff's and defendant's claim(s), and of how and by whom each was established. List the claims and elements in one column, the proof in a parallel column and compare them as the trial progresses. This will serve to jog your memory and will assist greatly in final argument.

IX. Verdict Sheet

I have found from my experience as a trial judge that in jury trials the use of a verdict sheet articulating clearly and concisely the questions to be decided is very helpful and eliminates confusion. One judge on my court even has the foreperson and all other jurors sign the verdict sheet before they advise the Marshal that they have reached a verdict.

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[9]See Appendix I, *infra*.
[10]*See, e.g.*, Fed. R. Civ. P. 50(a).
[11]*See* Fed. R. Civ. P. 41(b).
[12]*See* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2371 (1969).

X. Conclusion

Whether the case is civil or criminal,[13] and regardless of the forum, *preparation* is the key word. The effective courtroom advocate will make little progress if he or she is not adequately organized and prepared. By the same token, the lawyer who has command of the pertinent facts, who presents the case to the fact-finder in a logical and well organized fashion, and who has the applicable law at his or her finger-tips will maximize his or her chance for success.

[13]I have not discussed preparation for criminal trials in this article. Obviously, criminal trials involve many of the same aspects as civil trials; on the other hand, the differences that do exist are certainly significant enough to deserve separate treatment. I would simply refer the reader to some of the important sources in this area. The United States Court of Appeals for the District of Columbia Circuit delivered a definitive opinion on effective assistance of counsel in United States v. DeCoster, 487 F.2d 1197 (1973). Chief Judge Bazelon's opinion in United States v. Lucas, 513 F.2d 509 (D.C. Cir. 1975), highlights the importance of effective assistance of counsel at sentencing. An article entitled *"Sentencing — Making the Best of a Bad Situation,"* by Herald P. Fahringer, Esq. of Buffalo, New York, found in the *New York State Bar Journal* (June 1974), is an invaluable aid to defense counsel on the question of sentencing. The American Bar Association's *Standards Relating to the Prosecution and Defense Functions* is, of course, invaluable as well.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Plaintiff(s)

v. Civil Action No. _____

Defendant(s)

ORDER

In accordance with Fed. R. Civ. P. 16 and Local Rule 1-15, and in order to administer the trial of cases in a manner consistent with the ends of justice, in the shortest possible time, and at the least possible cost to the court and to litigants, it is, by the court, this ____ day of _____, 1977,

ORDERED, that all discovery in the above-entitled cause shall be completed on or before 5:00 p.m. on _____, and any extensions of time for further discovery must be previously approved by the court in writing; and it is

FURTHER ORDERED, that any and all dispositive motions shall be filed with the court, as hereinafter provided, on or before _____ a.m./p.m., on _____ and replies thereto shall be filed on or before _____ a.m./p.m., on _____; and it is

FURTHER ORDERED, that, in the event said dispositive motions are denied, this case be, and the same is, set for trial to begin at _____ a.m./p.m., on _____, in courtroom No. 11 of this courthouse; and it is

FURTHER ORDERED, that counsel for each of the respective parties be, and the same hereby are, directed to comply with each of the following requirements:

I. *PRELIMINARY STATEMENT IDENTIFYING THE CASE*

In cases which are to be tried to a jury, plaintiff's counsel shall prepare, and serve on opposing counsel not later than 20 days prior to trial, a concise statement describing the case in an impartial, easily understood manner, which shall be read to the jury panel prior to the voir dire. Counsel for the parties shall then confer *in person* in a good-faith effort to agree upon said statement.

In the case of agreement as to the contents of the preliminary statement, the parties and their counsel shall sign the prepared statement and file same with the court, in triplicate, as hereinafter provided, not later than 15 days before trial.

In the event of inability to agree, counsel for the parties shall file their proposed preliminary statements with the court, in triplicate, as hereinafter provided, not later than 15 days before trial, with copies served on opposing counsel at the same time.

In any case, counsel for each side shall include either in the agreed-upon preliminary statement or in their respective proposed preliminary statements the names, addresses, and occupations of all witnesses each side intends to call.

II. *TRIAL BRIEFS*

In all cases plaintiff's counsel shall file a trial brief with the court, in triplicate, as hereinafter provided, not later than 15 days before the trial, serving a copy on counsel for all parties at the same time.

The plaintiff's trial brief shall:

(A) Identify each issue to be tried and each element of the claim(s) involved in the action.

(B) Identify all facts which plaintiff intends to prove at trial to sustain each element of the claim(s) for relief, and list the names and addresses of all witnesses who will testify in support of each such fact and element. If any facts or elements of any claim(s) for relief are to be proved by documentary or physical exhibits, as contrasted with the testimony of witnesses, such documentary or physical evidence shall be itemized and listed under each element of the claim(s) for relief.

(C) Contain appropriate memoranda, with citations to legal authority, in support of evidentiary questions and any other legal issues which may reasonably be anticipated to arise at trial.

Trial briefs from opposing counsel shall be filed with the court, in triplicate, as hereinafter provided, not later than 10 days before trial, with a copy to be served on counsel for all parties at the same time.

Opposing counsel's trial brief shall:

(A) State precisely the extent to which it agrees and/or disagrees with the plaintiff's statement of the issues.

(B) Identify any additional issues to be tried.

(C) Identify all facts which defendant intends to prove at trial to defend against each element of the plaintiff's claim(s) for relief, and list the names and addresses of all witnesses who will testify contrary to each fact and element of the plaintiff's claim(s). If any facts are to be proved by documentary or physical exhibits, as contrasted with the testimony of witnesses, such documentary or physical evidence shall be itemized and listed under each element of plaintiff's claim(s) for relief. With respect to affirmative defenses, witnesses and documentary and physical exhibits to be offered in support of facts and elements thereof shall be identified.

(D) Contain appropriate memoranda, with citations to legal authority, in support of evidentiary questions and any other legal issues which may reasonably be anticipated to arise at trial.

Counsel for any party who deems it necessary may file a supplementary brief with the court, in triplicate, as hereinafter provided, not later than 5 days before trial, with a copy to be served on counsel for all parties at the same time.

In order to eliminate surprise or prejudice, counsel who have not identified their witnesses and physical or documentary exhibits in their respective trial briefs shall, except upon a showing of good cause, be precluded from offering such proof at trial.

III. *PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW*

In all non-jury cases counsel for each of the parties shall prepare proposed findings of fact and conclusions of law, three copies of which are to be served on opposing counsel not later than 15 days before trial.

> [Note: The plaintiff's conclusions of law shall include a statement of the applicable statute(s) conferring jurisdiction upon the court, with appropriate citations.]

Upon receiving these proposed findings of fact and conclusions of law from the opposing side, each counsel shall then:

(A) Underline with red pencil those portions which he/she disputes.

(B) Underline with blue pencil those portions which he/she admits.

(C) Underline with yellow pencil those portions which he/she does not dispute, but deems irrelevant.

In this connection, counsel are to note that they need not come to a uniform conclusion as to an entire proposed finding, or, indeed, an entire sentence within a proposed findings. They may agree with part of it, disagree with part of it, and/or consider a portion of it irrevelant.

Upon completion of the foregoing, each counsel shall then file two marked copies of opposing counsel's proposed findings of fact and conclusions of law with the court in chambers, room 4317, and return one marked copy to opposing counsel, not later than 5 days before trial.

The parties shall be prepared to submit to the court, and to exchange among themselves, supplemental findings of fact and conclusions of law during the course of the trial, with respect to which the same underlining procedure may be ordered.

IV. *VOIR DIRE QUESTIONS AND JURY INSTRUCTIONS*

In cases which are to be tried to a jury, a complete set of proposed voir dire questions and jury instructions shall be prepared in writing by plaintiff's counsel, who shall then serve opposing counsel with a copy of same not later than 15 days before trial. Counsel for the parties shall then confer *in person* and, to the extent possible, agree upon a complete set of voir dire questions and jury instructions.

Thereafter, counsel for plaintiff shall file with the court, in triplicate, as hereinafter provided, not later than 5 days before trial, those voir dire questions and jury instructions as to which agreement has been reached.

With respect to any areas of disagreement, each counsel shall file his or her additional, proposed voir dire questions and jury instructions upon which agreement could not be secured, with points and authorities in support thereof. This submission is to be filed with the court, in triplicate, as hereinafter provided, not later than 5 days before trial, with a copy to be served upon opposing counsel at the same time.

V. *STIPULATIONS*

In all cases the parties shall confer *in person* with respect to, and reduce to writing, all stipulations. Said stipulations shall be signed by counsel for all of the parties and filed with the court, in triplicate, in chambers, room 4317, not later than 5 days before trial.

VI. *HYPOTHETICAL QUESTIONS*

Any hypothetical questions which are to be put to an expert witness on direct examination shall be submitted to opposing counsel not later than 10 days before trial. Counsel for all parties shall then confer *in person* in an effort to reach agreement on the wording of such questions.

A copy of all agreed-upon hypothetical questions is to be filed with the court, in triplicate, as hereinafter provided, not later than 5 days before trial and signed by all counsel.

With respect to any contested hypothetical questions, each side shall file with the court, in triplicate, as hereinafter described, a memorandum of law clearly and succinctly stating its position, citing appropriate points and authorities, not later than 5 days before trial.

VII. *EXHIBITS*

In all cases counsel for the parties shall mark their documentary or physical evidence numerically in advance of trial. Furthermore, counsel are to provide a list containing a brief description of each item of documentary or physical proof which is to be offered in evidence as an exhibit at trial. Counsel for plaintiff shall file said list with the court, in triplicate, as hereinafter provided, not later than 15 days before the trial, with a copy to be served on defendant's counsel. Counsel for defendant shall file said list with the court, as hereinafter provided, not later than 10 days before trial, with a copy to be served on plaintiff's counsel.

All counsel shall confer *in person* and initial all items of documentary or physical proof to be offered in evidence by other parties to which there is no objections and which may be admitted without formal proof. A list of such items shall be filed with the court, in triplicate, as hereinafter provided, not later than 5 days before trial.

With respect to those exhibits to which there is an objection, counsel shall file with the court, in triplicate, as hereinafter provided, appropriate memoranda, citing points and authorities, as to why the same should be admitted or not admitted, whichever the case may be, not later than 5 days before trial, and serve a copy on opposing counsel for the other parties at the same time.

Counsel for the parties are hereby authorized to issue subpoenas *duces tecum* returnable to counsel's office as to all necessary exhibits not otherwise voluntarily obtainable, provided, however, that a copy of such subpoena *duces tecum* is delivered not less than 10 days in advance to all opposing counsel so that appropriate objections may be made to the court.

VIII. *PROCEDURE FOR FILING SUBMISSIONS*

Whenever this Order requires filing "with the court, as hereinafter provided," the procedure shall be as follows:

(1) The original shall be filed with the Clerk of the Court, who will also file-stamp all copies.

(2) Counsel shall then deliver one copy to Deputy Clerk Sharon Moore, room 1800, telephone number: 426-7077.

(3) Counsel shall then deliver one copy to the court in chambers, room 4317.

In those instances where deadlines have been imposed and counsel wait until the last day of that deadline, the filing of papers in the court house and/or upon counsel for the other parties must be completed by 4:30 p.m.

IX. *WAIVER OF JURY*

In the event the above-entitled cause contains a jury demand, counsel are directed to confer with their clients and opposing counsel to determine

whether a waiver of a trial by jury is acceptable; and, if so, all counsel, and their respective clients, are directed to sign a praecipe to that effect and promptly return same to Miss Sharon Moore, Deputy Courtroom Clerk, room 1800, telephone number: 426-7077, with a copy to the court in chambers, room 4317.

Should the parties agree to a change from a jury to a nonjury trial, the court's Deputy Clerk, Miss Sharon Moore, shall be notified at least 10 days before trial. Part III of this Order shall then become applicable and binding as to Proposed Findings of Fact and Conclusions of Law.

X. *SETTLEMENT*

If the case can be settled without a trial, counsel for the respective parties shall immediately advise Miss Sharon Moore, Deputy Courtroom Clerk, and chambers.

XI. *PRIOR ORDERS - ISSUES*

Any order by one of the court's Magistrates or by the court heretofore entered, including cutoff dates for discovery as specified herein, shall continue to be binding on the parties *except as herein modified.* Moreover, this Order shall not be construed to allow the parties to enlarge the issues as limited by any pre-trial order or the pleadings.

XII. *SANCTIONS FOR NON-COMPLIANCE*

Counsel are expected to comply literally with this pre-trial order. The court will consider the imposition of appropriate sanctions in the event of non-compliance.

XIII. *SUMMARY OF COUNSEL'S DUTIES FOR COMPLIANCE WITH THE FOREGOING PROVISIONS*

DEADLINE — days before trial	RESPONSIBILITY OF COUNSEL
1. 20	Plaintiff's counsel serves proposed preliminary statement on opposing counsel; conference ensues (jury trial only) (see part I)
2. 15	Plaintiff's counsel files trial brief (see part II)
3. 15	Each counsel serves upon the other(s) proposed findings of fact and conclu-

		sions of law (nonjury trial only) (see part III)
4.	15	Plaintiff's counsel serves upon opposing counsel proposed voir dire questions and jury instructions; conference ensues (jury trial only) (see part IV)
5.	15	Counsel jointly file agreed-upon preliminary statement; *or,* if no agreement has been reached, each counsel files his/her proposed preliminary statement (see Part I)
6.	15	Plaintiff's counsel files list describing items of documentary and physical proof to be offered in evidence as exhibits at trial (see part VII)
7.	10	Defendant's counsel files trial brief (see Part II)
8.	10	Each counsel serves upon the other(s) any proposed hypothetical questions to be put to expert witnesses; conference ensues (see part VI)
9.	10	Defendant's counsel files list describing items of documentary and physical proof to be offered in evidence as exhibits at trial (see Part VII)
10.	5	Each counsel files memoranda on admission of non-admission of contested proposed documentary or physical exhibits (see Part VII)
11.	5	Each counsel files a marked copy of opposing counsel's proposed findings of fact and conclusions of law (see Part III)
12.	5	Plaintiff's counsel files agreed-upon voir dire questions and jury instructions, and each counsel files his/her additional pro-

		posed voir dire questions and jury instructions (see Part IV)
13.	5	Counsel jointly file all stipulations (see Part V)
14.	5	Counsel jointly file agreed-upon hypothetical questions, and each counsel files memoranda on contested hypothetical questions (see Part VI)

The foregoing summary (XIII) has been prepared merely as a checklist and guide for the convenience of counsel.

CHARLES R. RICHEY
United States District Judge

APPENDIX II

UNITED STATES MAGISTRATE
FOR THE DISTRICT OF COLUMBIA
UNITED STATES DISTRICT COURT
WASHINGTON, D. C. 20001

RE:

Civil Action No.

Dear

The above case is set for:
_____ Pretrial Status or Settlement Hearing
_____ Hearing on Pretrial Motions
_____ Pretrial Conference with Pretrial Statements
on _____ , 19___ , at _____ before United States Magistrate _____ in Room No. _____ , United States Courthouse, Washington, D. C.

The purpose of a pretrial status hearing is to determine the extent of pretrial discovery which remains to be accomplished, what pretrial motions, if any, may need to be resolved, and to explore the potential for settlement. If the case cannot be settled, a firm date for completion of all pretrial discovery and/or a formal pretrial conference will be set.

In connection with formal pretrial conferences, counsel for all parties shall submit pretrial statements at least two (2) work days prior to pretrial. The Pretrial Statements should be filed with the United States Magistrate who is conducting the pretrail. Trial counsel must attend the pretrial, unless he calls the United States Magistrate and obtains permission for an associate fully knowledgeable about the case and with the same authority to stipulate and settle the case as he has, to attend in his place.

1. Pretrial Statements must set forth with *particularity* a party's contentions as to liability and damages. Special damages must be itemized.

2. Pretrial Statements should include all requests for stipulations on which the parties are reasonably certain they can agree both as to the *facts* and the *authenticity* and *admissibility* of exhibits. Exhibits need not be brought to pretrial conference.

3. Pretrial Statements shall contain the names of all known witnesses, their addresses, and whether they are witnesses to events or expert, and if expert, the area of expertise. An estimate of trial time should be included.

If any matters should arise not covered by these instructions, counsel shall call the chambers of the undersigned United States Magistrate. All discovery must be completed prior to formal pretrial, except for exceptional circumstances and when specifically authorized by the United States Magistrate or the Judge to whom the case is assigned.

Failure to comply with any of these requirements may result in a dismissal or a default, as may be appropriate.

UNITED STATES MAGISTRATE

APPENDIX III

HELPFUL HINTS

I. EXAMINATION OF WITNESSES AND ARGUMENT

1. Counsel should conduct examination of witnesses from the lectern.
2. Do not approach a witness without asking permission of the Court. When permission is granted for the purpose of working with an exhibit, resume the examination from the lectern when finished with the exhibit.
3. Rise when addressing the Court and when making objections. This calls the Court's attention to you.
4. During opening statement and argument, counsel should stand at the lectern.

II. OBJECTIONS TO QUESTIONS

1. When objecting, state only that you are objecting and specify the ground or grounds of objection. Do not use objections for the purpose of making a speech, recapitulating testimony or attempting to guide the witness.
2. Argument upon the objection will not be heard until permission is given or argument is requested by the Court.

III. DECORUM

1. Colloquy or argument between attorneys is not permitted. Address all remarks to the Court.
2. In a jury case, if there is an offer of stipulation, first confer with opposing counsel about it.
3. Do not ask the reporter to mark testimony. All requests for re-reading of questions or answers shall be addressed to the Court.
4. Counsel during trial shall not exhibit familiarity with witnesses, jurors or opposing counsel. The use of first names ought to be avoided. During jury argument, no juror shall be addressed individually or by name.
5. During the argument of opposing counsel, remain seated at the counsel table and be respectful. Never divert the attention of the Court or the jury.

IV. THE WITNESS

1. Witnesses shall be treated with fairness and consideration; they shall not be shouted at, ridiculed or otherwise abused.
2. No person shall ever by facial expression or other conduct exhibit any opinion concerning any testimony which is being given by a witness. Counsel ought to admonish their clients and witnesses about this common occurrence.

V. COURT HOURS AND PROMPTNESS

1. The Court makes every effort to commence proceedings at the time set. Promptness is expected from counsel and witnesses.

2. If a witness was on the stand at a recess or adjournment, have the witness on the stand ready to proceed when Court is resumed.

3. Don't run out of witnesses. If you are out of witnesses and there is a substantial delay, the Court may deem that you have rested.

VI. DOCTORS AND OTHER PROFESSIONAL WITNESSES - OUT OF SEQUENCE

The Court attempts to cooperate with doctors and other professional witnesses and will, except in extraordinary circumstances, accommodate them by permitting them to be put on out of sequence. Anticipate any such possibility and discuss it with opposing counsel. If there is objection, confer with the Court in advance.

VII. EXHIBITS.

1. Each counsel shall keep a list of all exhibits.

2. Whenever possible have photocopies of an exhibit for the Court, opposing counsel and the witness.

3. Each counsel is responsible for any exhibits which he secures from the Clerk. At each noon-time or end-of-the-day adjournment, return all exhibits to the Clerk.

4. Do not approach the witness to hand him an exhibit. All exhibits will be placed before the witness by the Bailiff.

5. Documents and other exhibits, where practical, should be tagged as exhibits and shown to opposing counsel *before* their use in court.

6. Exhibits should be marked for identification in open court by a request that the Clerk so mark them. At the time of making such a request, counsel should briefly describe the nature of the exhibit. [Note that this differs from *Appendix I* (pre-trial order)]

7. Ordinarily, exhibits should be offered in evidence when they become admissible rather than at the end of counsel's case.

8. When counsel or witnesses refer to an exhibit, mention should also be made of the exhibit number so that the record will be clear.

9. Where maps, diagrams, pictures, etc. are being used as exhibits, and locations or features on such documents are being pointed out by witnesses or counsel, such locations should be indicated by appropriate markings on the documents if not readily apparent from the documents themselves. Unnecessary markings should be avoided. Markings on exhibits should only be made after receiving the Court's permission to do so.

10. Where several exhibits are contained within an envelope, package or box, mark the container as exhibit 1, for example, and the others as exhibit 1-A, 1-B, etc.

VIII. DIFFICULT QUESTIONS - ADVANCE NOTICE.

If you have reason to anticipate that any question of law or evidence is difficult or will provoke an argument, give the Court advance notice. [See *Appendix I*, part II, pp. 118-19]

IX. DEPOSITIONS - FILING AND USE DURING TRIAL.

1. All depositions which are used in the trial, either as evidence or for impeachment, must be signed and filed before the trial commences.
2. All depositions used at the trial shall be marked for identification as exhibits.
3. Portions of depositions used for impeachment may be read to the jury during the cross-examination, with pages and lines indicated for the record before reading. However, prior to reading, the witness should be shown the pages and lines and permitted to read them to himself.

X. USE OF ANSWERS TO INTERROGATORIES AND REQUESTS FOR ADMISSIONS.

Where there has been extensive discovery and counsel expects to offer answers to interrogatories or requests for admissions extracted from several separate documents, a document showing such question and answer or admission shall be prepared with copies for the Court and opposing counsel. This obviates the time-consuming process of thumbing through extensive files to locate the particular items.

XI. OPENING STATEMENTS.

Confine your opening statements to what you expect the evidence to show. It is not proper to use the opening statement to argue the case or instruct as to the law.

HARRY PREGERSON
United States District Judge