

GUIDELINES FOR CIVIL TRIAL PREPARATION  
Judge Virginia Emerson Hopkins

Many lawyers told me before I became a judge that delay in obtaining decisions on motions and obtaining firm trial dates were their major concerns with litigation in many courts where they practiced. However, none said they wanted to practice in a court where the judge focused on the speed of moving the docket at the expense of fairness. The tension is inherent: try to move cases and some will say speed has overcome fairness; let the litigants or their counsel set the pace and cases go on for years at great expense to themselves and the judicial system.

The court understands the concerns: fairness has to prevail. The court also believes that a judge-managed docket with firm trial dates, combined with easy access to a judge for prompt resolution of motions disputes and a “no surprises” approach to trial where each side knows the other side’s evidence and witnesses weeks before trial, is an effective means of disposing of cases in a fair and prompt manner.

[1] The court’s Initial Scheduling Order structures a civil case for trial from the outset and a **firm immovable trial date** ensures the parties that the case will be heard and decided within a reasonable amount of time.

[2] Discovery is compressed. Only five non-party depositions are permitted without leave of court. Discovery without limits takes on a life of its own. Leave to take more can be obtained, but only for good cause shown.

[3] Motions can be made and decided in most cases in two weeks (10 business days), three weeks (15 business days) for dispositive motions. When motions remain pending for months, the case stops moving towards resolution.

[4] The case can be resolved fairly and efficiently to all sides if the attorneys understand and follow these Guidelines and the Standing Order Establishing Pretrial Procedures. Both require the same thing that success in anything requires: preparation .

**1. Live and die by the Scheduling Order.** The Scheduling Order is the law governing case preparation and trial. READ IT and follow it literally. Woe be to the lawyer who does not abide by the conditions set therein. The discovery cut off is just that: the date by which all discovery must be complete. This means you must calculate backwards to the date which is the last day where you can send out discovery and receive a response within the discovery period. It does not mean the last day that you may send out discovery.

**2. The Scheduling Order contemplates immediate commencement of discovery.**

a. Contact opposing counsel to schedule the immediate exchange receipt of the mandatory disclosure information required by F.R.Civ.P. 26 (a)(1) unless a case specific Order has modified that requirement. Review the documents and names you receive and decide which witnesses to depose right away. It goes without saying that a disclosure that says “Witness A may have knowledge of some matter related to the issues in the case” is not an adequate response. Resolve questions about disclosure by over-disclosure.

b. Insist on adherence to discovery deadlines. Lawyers often extend the deadline for the production of discovery to each other as a matter of courtesy. The difficulty this courtesy may create is that the time for discovery is by design very limited: approximately 150 days. Lawyers often don’t use the first 30 days at all. Any extensions of time to furnish discovery can impact the scheduling of depositions, and the production of documents. If there are disputes about the production of documents, then delay may push you back against the discovery cut off, causing problems for you in the preparation of your case. Do not place yourself in a position of peril by agreeing to an extension of time and then expecting the court to rescue you. Give this case the priority it deserves, and expect no less from opposing counsel.

**3. Promptly file written objections to and pursue unresolved discovery disputes by motions to compel.**

a. Prior to filing a motion to compel discovery, attorneys are required to confer with each other to discuss the discovery dispute and attempt to resolve it. Experience has shown

that an exchange of letters is often insufficient; meet face to face with the disputed Interrogatory or Request for Production in front of you. I recommend that you promptly pursue discovery issues using the proper channels. Once everyone understands there is no discourtesy intended, resolution of discovery issues will quicken.

b. Objections must be filed within 15 days of receipt of discovery despite the fact that there is a 30 day response time to discovery. Many lawyers ignore this rule. Objections are deemed waived if not filed in writing within 15 days. Lengthy “boilerplate” discovery requests with pages of definitions which are met by form objections reciting every possible ground of objection, are both disfavored. Similarly disfavored are blanket privilege objections with little or no knowledge of the facts supporting the claim(s), and no information supplied to support the claim(s). Ask case-specific questions and make case-specific objections.

c. Remember to document by letter any attempt you have made to resolve the discovery dispute prior to filing the motion. The Magistrate Judge or I will require some evidence that you complied with the rules.

**4. Secure experts prior to filing or contemporaneous with filing and lock them in right away.**

a. Retain experts who are going to assist you at trial immediately.

b. Secure the expert’s commitment to promptly respond to the requirements of FRCiv. P 26 concerning expert witness disclosure well in advance of the due date so that you will have time to review their disclosures.

c. Inform the expert witness of the trial date and confirm their appearance with a subpoena. Explain to him/her that the trial will not be continued because the expert is traveling or is unavailable. You must require a firm commitment of his/her appearance at trial or make prior arrangements for video/deposition trial testimony.

d. Disclose the expert witness report as required by the federal and local rules and the Standing and Scheduling orders. There is nothing wrong with disclosing expert

witness information as soon as you have it in final form, and no later than a couple of days in advance of the due date. However, since many of us procrastinate, if you intend to disclose on the last day, make sure that your disclosure fully complies with the requirements of the rules. See 5.

**5. As to expert witnesses, aim to over- disclose the factual basis and opinions upon which the experts intend to testify.** Cagey, insufficient disclosure of expert witnesses can come back to haunt you during the trial. Do not be surprised if I hold you and your expert to the literal statements contained in the expert witness disclosure. If you fail to disclose some material point of the expert’s opinion or the factual basis underlying it, you risk exclusion of the expert’s testimony or video/deposition transcript at trial. The court believes in full disclosure of expert testimony prior to trial in order to avoid trial by ambush and surprise.

There are different rules for treating physicians. An expert witness may not be required to prepare a Rule 26(a) report if he or she wasn't hired just for the litigation and hasn't been provided with information from another source. Sometimes treating physicians and other experts may qualify for “non-retained” status, but choose this option carefully because a late development in treatment or diagnosis that affects your client’s prognosis or damages could leave you wanting to use such an expert when you haven’t fully disclosed the required information. The flip side of this coin is that there’s no excuse for failing to identify your known non-retained experts early as part of the standard initial disclosure or interrogatory about expert evidence. If an attorney holds back a name in response to an interrogatory, and then asserts “non-retained” status at report time, he or she is creating the “trap for the unwary” discussed in Sullivan v. Glock, Inc., 175 F.R.D. 497 (D. Md. 1997), and the court or the magistrate judge will probably share opposing counsel’s displeasure. Hiding the ball will cost you the ball.

**6. Understand that in federal court, unlike most state circuit courts, summary judgment motions are filed and granted often. Prepare for summary judgment now.**

In most cases, with the exception of the routine automobile a case involving negligence, parties can expect that the defense will move for summary judgement. The federal practice is so different than state practice that many lawyers are surprised, some shocked, that summary judgment is granted. It's not a discretionary decision used for docket control: a properly supported summary judgment motion must be granted, and it will be for both plaintiff and defendant. And either side may move for partial summary judgment.

Under Rule 56 of the Federal Rules of Civil Procedure, it is incumbent upon the non-moving party to demonstrate the existence of a genuine dispute of material fact. Typically the non-moving party is the plaintiff, because the plaintiff has the burden of proof on liability and damages in the case. Under Rule 56(e) the non-moving party may not rest upon the mere allegations or denials of the adverse party's pleading. The non-moving party's response by affidavit or as otherwise provided in the rule must provide specific facts that are admissible in evidence showing that there is a genuine issue for trial. It is not sufficient for the non-moving party to simply attack the credibility of the moving parties' affidavit(s) without a contrary factual showing; the Rule accepts the moving party's affidavits as accurate until the non-moving party produces a counter affidavit or other admissible evidence demonstrating that the moving party's affidavit is disputed, and therefore a question for the trier of fact. The non-moving party must demonstrate to the court that there is sufficient evidence to establish a genuine issue of material fact for trial. Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986).

Understanding that a motion for summary judgment will inevitably be filed in your case, it is necessary to prepare during the discovery period for the summary judgment motion. You must elicit the required information during depositions, then make deposition excerpts. You must interview witnesses who are not deposed to ensure their availability if you need to secure affidavits from them to respond to summary judgment. Don't wait until you are served with a summary judgment motion to begin the research or information gathering to meet the issues. You can reasonably anticipate early on what will be presented in that

motion. If in doubt, read the 11<sup>th</sup> Circuit case law of your statute if your claim is statutory, or review the Federal Pattern Jury Instructions. The federal court's Law Library is an excellent resource with competent and helpful staff; a review of the sign in sheet shows the library is rarely used by most members of the Bar. You may ask the court for a copy of any jury instructions it may have on the substantive elements of your claims and any defenses applicable to your case. Many plaintiffs do not appreciate the quality of evidence necessary to overcome statutory or case law created defenses such as qualified immunity, in a 1983 action, or a non-discrimination policy in a Title VII action.

Many summary judgment motions are granted because the non-movant does not fully appreciate what is required for a prima facie case or what is required to overcome a specific defense raised by the opponent, resulting in an inadequate responsive filing. When the court follows Rule 56's mandate ('summary judgment **shall** be granted . . .'), the losing party may blame the court, or the federal system. Doing so misses the point: when faced with a properly supported summary judgment motion and a factually or legally inadequate response, the court has no discretion: it must grant summary judgment.

A great practice is to draft your jury instructions at the beginning of your case instead of the night before trial. The instructions set out what you have to prove and can be your discovery road map. It will also help you screen out cases that have initial appeal or sympathetic claimants where, having reviewed the necessary elements you must prove, you realize your client doesn't have that proof and if you go forward you do so with the hope the defendant(s) will supply it for you.

#### **7. Motions Hearings Are Granted In Many Instances, Set for Hearing On Two - Three Weeks Notice, And Often Ruled On Immediately.**

Motions practice is designed to ensure that when motions are made, they are disposed of promptly. The court grants hearings in open court on nondispositive motions on two week's (10 business days) notice to the opposing counsel, three weeks (15 business days) for dispositive (e.g. summary judgment) motions. Counsel may schedule a motion for hearing

simply by filing a notice of hearing, motion, and memoranda on the Friday two weeks before the Friday the attorney wants the motion heard, giving oral or facsimile notice to opposing counsel no later than the time of filing. This procedure is designed to quickly resolve the disputes that sidetrack lawyers and stop case progression. If motions were only decided on the pleadings in chambers when the court has time to consider your motion, you might have to wait a while for a decision.

The drawback of this system is that lengthy written opinions on motions will be the exception, not the rule. In almost every instance the court has read the briefs and the cases before argument and will try to rule at the hearing. It is fair to say that your writing becomes critical because the written submissions are going to be the first impression you make. It is not the court's job to find the needle in your haystack. If the written product is thrown together, poorly cited, disorganized or worse, you are gambling that your oral presentation can win the day. Motions hearings are not jury trials: you may be disappointed.

The facts of a case won't get any better or more clear than they are the day of the hearing. The court believes that the lawyers and litigants want a decision - up or down. It will hear oral argument (that doesn't repeat what's in the filings) and try to explain the ruling but once a decision is reached, the court will rule.

The court believes its role is to decide the issues presented by the litigants. The court will not write opinions or memoranda except when the case is sufficiently novel or complex to warrant it. There is little demand for written opinions from the district court beyond the litigants, who are deciding whether or not to appeal. If the motion hearing raises unanticipated questions, or the issues are sufficiently complex, the court's practice will be to issue a written Order within fourteen (14) days. Counsel not receiving an Order by then should immediately contact the Courtroom Deputy to inquire.

8. **Brief is a term of art.** The rules allows each side to file motions up to 30 pages of memoranda or briefs in support of a motion. Do not submit a 30 page opening and reply brief unless the facts and law are complex enough to justify it. Keep it simple. Brevity

remains the essence of good writing. Skip the non-essential details and get to the point. If you do not write well, ask someone who does to assist. A well written 10 page brief outlining your argument and citing the court to the top three or four five cases (if there really are that many) is received with appreciation. Effective “briefs” are usually less than twenty (20) pages.

Provide courtesy copies of briefs and the key cases that are cited in your briefs to chambers on the Monday before the Friday your case is heard. The case files are generally pulled on Monday, which gives the court and staff until Thursday to prepare for the hearing. In a complex or complicated case (e.g, antitrust, product liability, patent, Lanham Act, ERISA), it saves the court and court staff time if copies of the key cases and the briefs are provided directly to chambers. It also avoids the problems caused when cases are incorrectly cited. Direct excerpts from the cases that support your position are very helpful; string citations are not.

#### **9. Say Something New In A Reply Brief.**

Motions practice allows reply briefs to be filed in response to the opposition to a motion. Most often reply briefs are a regurgitation/reiteration of what was said in the opening brief. It’s better not to file such a reply at all under the “do no harm” rule. Effective reply briefs are succinct summaries that rebut what was said by the opposition in their briefs, and stop.

#### **10. Even If You Are Not the “Lead” or “First Chair” Lawyer, You Must Be Ready to Step In Without Special Notice.**

It is common to have two or more attorneys on a file in federal court. Or you may be approached about acting as local counsel for foreign attorneys who have cases pending in the Northern District. Please know, and make sure the client and “lead/first chair” counsel know that in both instances, you too are required to be ready to argue the motion and, if worst comes to worst, try the case. If a matter is scheduled for hearing or trial, and the lead or foreign counsel do not appear, the court will require any other counsel who have appeared

in the case to go forward.

### SUMMARY

The goal is a fair trial. At first blush, some of the rules may seem tough and unforgiving. However, lawyers who practice in our court know that a case in federal court demands your attention and vigilance to prepare for trial. The benefit for the plaintiff is that you will get your day in court before the evidence is stale, the witnesses unavailable or having little memory of events. The benefit for the defendant is that the case will be promptly tried and the costs of discovery will be limited by the court's rules and trial date. If the case is going to settle, a firm trial date with the attendant uncertainty over the outcome, along with legal defense costs will encourage the parties to engage in serious discussions early rather than waiting years until the trial date finally arrives. Continuances permit lawyers to put the file on the back burner, and they do. Finally, both sides will be better off if in the cases where summary judgment for one side or the other is proper, it is granted, because needless litigation will be avoided and the uncertainty and expense of litigation end.

Trial lawyers know the limits of their capacity and time. The stories are legion of lawyers who encounter difficulty with courts, and eventually the Bar, because they take on more work than they can competently handle. If you like to be in federal court, or find yourself there anyway, consider careful screening in undertaking other representation in conflicting time-scheduled cases which may drain your time from the federal case, and consider making the necessary business arrangements to compensate for the lost opportunity(ies) associated with undertaking representation in the federal action.

Finally, these Guidelines are not static. The court anticipates adjustment(s) based on experience. Litigants and counsel may request adjustment(s) in a particular case for good cause shown. The court will also consider suggestions intended to make the docket run better for all. Expect this question: does what you suggest help secure the just, speedy, and inexpensive determination of the case?