

Guidelines for Conduct of Trials

Northern District of Alabama

These guidelines reflect the standard practices of this court in the trial of cases. They do not alter the rules of civil or criminal procedure, the rules of evidence, or local rules. They do not purport to teach the skills of effective trial advocacy. Rather, they are intended as general guidance for counsel and, as appropriate, for their clients and witnesses regarding the normal expectations of this court in the absence of other directives, including those contained in pretrial orders. They focus on those matters commonly arising in civil jury trials, but for the most part also apply to civil non-jury trials and to the trial of criminal cases.

1. Hours. Trials ordinarily commence at 9:00 a.m. and continue until approximately 4:30 to 5:00 p.m., Mondays through Fridays. Trials are occasionally conducted on weekends and holidays.

a. Punctuality. You, your client, and your witnesses should be present and ready to proceed promptly at the appointed time, both at the beginning of the day and after recesses. Counsel should be present at the courthouse at least 10 minutes before the beginning of each trial day to avoid delays and to be available to discuss unanticipated problems.

b. Recesses. A witness whose examination has not been completed at the time of a recess or adjournment should be back in the witness box at the time trial is scheduled to resume.

c. Requests for changes. Make known to the court as soon as can be anticipated any requests for changes in the trial schedule, including those relating to religious holidays or arising because of unavailability of witnesses.

d. Conferences. In jury cases, the judge may hold a brief conference in chambers at the end of the trial day or before the trial commences or resumes, or both, at which time counsel can discuss the schedule of witnesses and documents and any anticipated evidentiary problems. Alert the court reporter if you want to have some motion, argument, proffer, or other matter placed on the record during the conference.

e. Settlement discussions. Although settlements should occur to the extent possible before the trial is scheduled to begin, counsel are encouraged to discuss settlement as the trial progresses. These discussions should, however, ordinarily be conducted during recesses and adjournments. Do not assume that the court will delay the start or resumption of trial for such discussions. Advise the court if at any point you believe the court's assistance might be helpful in arriving at a settlement.

2. Selection of jury.

a. Size. The size of the jury in civil trials ranges from six to twelve, with alternates to be set by the judge, taking into account such factors as the expected length of trial and the number of jurors available for that and other scheduled trials. Absent special agreement by the parties, only a unanimous verdict of all selected jurors not excused or discharged for good cause may be received.

b. Peremptory challenges. The number of peremptory challenges to be allowed will depend upon (1) the number of jurors not excused or challenged for cause and (2) the size of the jury

to be selected. For example, if 18 jurors remain after any challenges for cause, the court might allow each side five peremptory challenges to select a jury of 8 or might allow each side four peremptory challenges to select a jury of 10. Peremptory challenges are exercised by indicating on a form (provided by the court) the name and juror number of the person(s) so challenged. When completed, these forms are shown to the court and opposing counsel at the bench, outside the hearing of the panel; at this time, the court can consider any "Batson" issues. Subject to consideration of any "Batson" issues, the peremptory challenges shown on the lists will be accepted by the court. Jurors not peremptorily challenged by either side will, in the order in which they were presented, be deemed as selected, up to the number of jurors previously determined by the court. As an example, for a jury of eight, the first 8 jurors not peremptorily challenged by either side will constitute the jury.

3. Opening statements. Use opening statements to summarize objectively the key facts which you expect the evidence to show, perhaps indicating who may be called as witnesses and in what sequence. Although a description of the basic claims and defenses and of the principal factual disputes between the parties is usually helpful, do not be argumentative and do not in jury cases refer to disputes about questions of law. Show opposing counsel any exhibits you intend to use which have not previously been disclosed or whose admissibility is in dispute. Except when necessary (for example, to display a large exhibit), make your statement while standing at the lectern. In most cases, each side should be able to present its opening statement in 10 to 15 minutes. In non-jury cases, opening statements are frequently omitted or limited to stating what claims and defenses are being pursued and what witnesses will be called.

4. Witnesses. Cooperative witnesses not immediately needed should, to the extent practical, be placed "on call." However, you remain responsible for having sufficient witnesses available in court so that, absent developments that could not have been reasonably anticipated, the trial may proceed during the normal trial hours without the need for adjournments or lengthy recesses to obtain further witnesses. If a significant delay will occur before you can proceed with further evidence and the problem should have been avoided, the court may deem that you have rested. Since defendants should be ready to proceed with their evidence promptly at the conclusion of the plaintiff's presentation, plaintiff's counsel should keep defendants' counsel advised as to when they expect to complete their presentation of evidence.

a. Order. Counsel are expected to cooperate in resolving scheduling problems, including agreement in most circumstances for a witness to be called out of the normal order, even if the testimony of another witness is interrupted. Such accommodations are the norm for physicians and other similar professionals called as witnesses and may be appropriate for other witnesses with personal, family, or occupational conflicts. Counsel are also expected to cooperate in placing "on call" those employees of another party whose absence would disrupt such party's normal business activities.

b. Production. Do not ask opposing counsel to produce a witness or a document in a way that might suggest to the jury that such counsel would be concealing evidence if the witness or document is not produced. Address such requests to opposing counsel (or, if necessary, to the court) in a manner that will not be heard by the jury.

c. Oaths. The courtroom deputy ordinarily administers an oath/affirmation to the witnesses and immediately asks their name and place of residence. If you know that the standard questions might be inappropriate (for example, the witness is in prison), so advise the deputy before the witness is called to the stand.

d. Release. Witnesses should be released from further attendance or subpoena as soon as they are no longer needed. After testifying, a witness shall be deemed as released by consent unless counsel or the court indicates that the witness should not be so excused. You should not consent to release of a witness if you will later offer in evidence a prior inconsistent statement about which the witness was not examined or if you wish to make a proffer of testimony of that witness to which an objection was sustained.

e. Exclusion. Requests under Fed. R. Evid. 615 for exclusion of witnesses from the courtroom should be made before examination of the first witness begins, preferably before opening statements. Be alert for witnesses arriving during trial and inadvertently coming into the courtroom. Although the Rule does not prevent talking with excluded witnesses during recesses about their expected testimony, do not in such discussions disclose the courtroom testimony given by other witnesses. After testifying and provided they will not be recalled, witnesses are no longer subject to the Rule and may remain in the courtroom.

5. Examination of witnesses. Absent physical disabilities, examination of a witness should ordinarily be conducted while the witness is seated in the witness box and counsel is standing at the lectern.

a. Approaching clerk's desk or witness box. Permission of the court to approach the clerk's desk or the witness box is not necessary if for the purposes of submitting or obtaining an exhibit, handing an exhibit to the witness, or conducting examination about an exhibit when counsel needs to be next to the witness during the examination. Return to the lectern after such examination is finished.

b. Other locations. Request permission of the court if (1) you wish to conduct your examination from another location (for example, you want to write on the blackboard, or you need to be at counsel's table because of the extensive number of documents involved or because you need the assistance of an expert or co-counsel) or (2) you wish the witness to step from the witness box (for example, to display an injury, to prepare a sketch, or to identify objects in a photograph). Assist the court in assuring that your voice and that of the witness are sufficiently loud to be heard and that opposing counsel's view is not obstructed.

c. Depositions. As you use or read from a deposition, indicate the page and line number of the starting and stopping points. Colloquies and objections of counsel should ordinarily be omitted, as should questions that are rephrased or changed prior to the answer being given. If opposing counsel wish to read portions being skipped, it is usually more satisfactory to do so in the same sequence as when the deposition was taken, rather than waiting for the offering party to finish reading all its selections from the deposition. When the deposition refers to an exhibit, counsel may, in lieu of or in addition to the identification used in the deposition, indicate the exhibit number used during the trial. Persons asked to read the deponent's testimony should do so fairly and impartially. Depositions are not ordinarily read aloud in non-jury cases; you should submit to the court well before the trial is completed a list of the portions you want the court to read.

d. Using depositions to impeach testifying witness. When using a deposition to impeach a witness, you may wish to conduct that examination by asking if the witness recalls having given such testimony or by asking the witness to read that testimony. Note, however, that this is not required and often results in communications problems between the witness and the examiner. An alternative and frequently more satisfactory method is to simply identify the page and line number of the deposition and read to the jury the selected questions and answers, perhaps followed by questions regarding the inconsistencies. Regardless of which

method is used, opposing counsel may immediately read other directly-related portions needed to put the deposition testimony in fair context. Additional portions of the deposition, including portions in which the witness may have changed his or her testimony on the subject, may be read after the testifying witness is tendered to opposing counsel for further examination.

e. Harassment. Treat witnesses with courtesy, even when conducting vigorous impeachment. Do not shout at, ridicule, harass, or unfairly embarrass a witness. Use temperate language when requesting the court's assistance to control or direct a witness who is giving unresponsive or argumentative answers.

f. Improper emphasis of evidence. Requests for the re-reading of a question or answer except when trial is resumed after a recess or adjournment or when a question may be forgotten because of an objection or other interruption should be addressed to the court rather than the court reporter.

g. Leading questions. Leading questions may generally be used (1) when permitted under Fed. R. Evid. 611(c), (2) to expedite the presentation of background or uncontroverted matters, (3) to steer a witness away from disclosing inadmissible matters, (4) to establish that the witness has made a prior inconsistent statement, and (5) to refresh the memory of a witness. Do not, however, attempt to recite or summarize testimony given by a prior witness.

h. Voir dire examination. Limit requests for voir dire examination of a witness to situations in which your examination may affect the admissibility and not merely the weight of potential testimony.

6. Exhibits. Except in cases with only a very few exhibits or when surprise is important to impeach a witness, exhibits should, in advance of their use for any purpose, be marked with labels, listed on an exhibit list, and shown to opposing counsel. Rarely should the trial have to be interrupted for an exhibit to be marked, listed by the courtroom deputy, or reviewed by other counsel. (Note that, unlike the practice in state courts, exhibits, to the extent not prepared, are marked by the courtroom deputy and not by the court reporter.) When commencing your examination about a document, indicate its exhibit number.

a. Display to jury. Once received in evidence, an exhibit may ordinarily be displayed to, or passed among, the jurors for their inspection while you examine the witness. Do not wait to submit exhibits to the jury until your opposing counsel is about to begin examining the witness. Extra copies, enlargements, or projections may generally be used, particularly if the witness is to be examined about portions of the exhibit.

b. Inadmissible documents. Guard against the disclosure to the jury of the content of inadmissible documents. In some circumstances, disclosure of the existence of a document would also be improper; for example, when examining a witness under Fed. R. Evid. 608(b) about a matter you are not allowed to prove by extrinsic evidence, do not indicate to the jury that you are conducting your examination by reading from the inadmissible document.

c. Custody. Exhibits once offered in evidence, unless withdrawn, are in the custody of the courtroom deputy and should be returned to the deputy promptly after use during examination of a witness unless other counsel wish to use the same document in their examination. For guidance on return of exhibits after a trial is completed, see Local Rule

LR5.2(b).

7. Objections. Rise before (or as) you object; this draws the attention of the court and other counsel to you and should alert the witness not to answer until your objection is ruled upon. While standing, state that you are objecting and specify concisely the ground(s) of your objection (for example, "hearsay," "irrelevant," "lack of personal knowledge," "leading question"). Do not make a speech or argument to the jury. Do not disparage opposing counsel or the witness. Do not attempt to summarize other evidence. Do not suggest an answer to the witness. Do not take "exception" to the court's ruling.

a. Timing. Ordinarily you should wait to state your objection until counsel has finished the question or offer. Interruptions may, however, be appropriate if an obviously leading question is being asked, if the question itself will disclose or suggest inadmissible matters, or if the witness is likely to respond before the objection can be stated and ruled on.

b. Response by offeror. The person who asked the question should not interrupt the person making the objection except to withdraw the question or if the objection itself is being made in an improper manner (for example, as an argument to the jury or to suggest an answer to the witness). After the objection has been stated, you may indicate if the evidence is being offered only for a limited purpose or only against certain parties.

c. Argument on the objection. Neither counsel should present arguments regarding the objection unless authorized or invited by the court. If you wish to be heard in argument, request the court's permission.

d. Federal Rules of Evidence. Be familiar with the Federal Rules of Evidence. Several grounds of objection often raised in state courts (for example, "impeaching his own witness," "undisclosed mental operation of the witness," "a self-serving declaration," "the question involves an ultimate issue") are not valid objections under the Fed. R. Evid. Do not take "exception" to the court's ruling.

e. Multi-party cases. The court may direct that an objection by one party will be considered as made by all similarly situated parties unless disavowed. If so, do not repeat objections and grounds specified by other counsel. You may, of course, state additional grounds and may indicate any special circumstances that might make the objection valid on behalf of some parties but not on behalf of others.

f. Continuing objection. In some circumstances you may be allowed to have a "continuing objection" to a particular line of inquiry, and therefore, you may not have to repeat your objection to a series of questions. Typically, this occurs when your objection on the grounds of relevancy is overruled and you wish to make a relevancy objection to further questions on the same subject.

g. Bench conferences. A bench conference can be useful if the statement or explanation of an objection or of the proffered evidence might disclose inadmissible and prejudicial matters to the jury. For example, if a question calls for information whose probative value you believe is substantially outweighed by the risk of unfair prejudice, you might state in substance, "Your Honor, I have an objection under Rule 403. May I be heard at the bench?" Side-bar conferences should, however, be minimized. Do not request such a conference merely because you do not want the jury hearing you object if it is going to be overruled.

h. Making a record. Let the court know if you need to state on the record some explanation or elaboration of an objection or offer. In jury cases the judge will, if requested, ordinarily provide an opportunity at the next recess (or at the close of the trial day) for such matters to be placed on the record.

i. Anticipating evidentiary problems. Evidentiary questions which may involve extended discussion and argument should be anticipated and called to the court's attention at the start or end of the trial day so that the question can be adequately considered without having to interrupt the trial schedule.

8. Special equipment. Special equipment (for example, video or audio tape players and overhead projectors) should be brought into the courtroom and tested before or after trial hours or during a recess. You are responsible for seeing that the trial is not substantially delayed while such equipment is being set up. Make arrangements with the courtroom deputy if you need special access to the courtroom.

9. Closing arguments. Unless otherwise allowed by the court, closing arguments are limited to 30 minutes to the side. Counsel for the party having the burden of proof (which ordinarily is counsel for the plaintiff if there are issues to be submitted on which each side has the burden of proof) shall be the first to present closing argument and may reserve a portion of the allotted time (not in excess of initial time taken) to respond to the other parties' arguments. A party seeking damages and who is permitted to divide its time of argument should address both liability and damages issues in its initial argument. Do not express your own personal opinions about the facts. Do not invite jurors to return a verdict as if they were in the position of one of the parties. You may leave the lectern, but keep your voice sufficiently loud to be heard by other counsel, the judge, and the court reporter. Do not hover over the jury or make gestures that could not be seen by other counsel and the judge.

10. Instructions. Persons are not ordinarily permitted to enter or leave the courtroom during the time the court is instructing the jury. The court will provide counsel with an opportunity to present objections or exceptions to the instructions outside the hearing of the jury and before the deliberations begin either at the bench or after excusing the jurors from the courtroom. Counsel are expected to remain in general attendance at the courthouse while the jury is deliberating; the failure to do so may be treated as a waiver of any right to object should the jury request and be given supplemental instructions.

11. Other Matters of Proper Decorum and Conduct.

a. Arguments; colloquy. Do not argue with or disparage other counsel in the hearing of the jury. In most situations, the court's permission should be obtained before counsel engage in dialogue between themselves in the courtroom. Side comments between counsel should be limited to situations in which such conversations are intended to facilitate the fair and efficient conduct of the trial and not for any tactical advantage; they should, moreover, be done in a respectful and courteous manner that does not detract from the dignity of the proceedings. In-court offers to stipulate should ordinarily be made only if previously agreed upon or if counsel has reason to believe the offer would have been accepted if made outside the courtroom.

b. Standing. All should rise and remain standing and quiet while court is being formally opened. Counsel should rise and remain standing while examining a witness, making an

objection, presenting a motion, request, or argument, or otherwise addressing the court. At other times while court is in session, remain seated.

c. Inappropriate familiarities. Addressing or referring to witnesses or other parties by their first names is ordinarily inappropriate. Do not use derogatory terms except when justified during closing arguments.

d. Respect for other counsel. While opposing counsel is presenting a matter to the court or the jury or is examining a witness, other counsel and their clients or associates should not engage in conversation or activity at counsel table or otherwise move about the courtroom in a manner that might be distracting.

e. Indicating agreement and disagreement. No one should by words, facial expressions, or other conduct indicate personal agreement or disagreement with what is being said by the court, the jury, an attorney, or a witness. Counsel are responsible for assuring that their clients and the friends or supporters of their clients are warned about such behavior.

f. Attendance. Parties are not required to remain in continuous attendance during civil trials. To facilitate arranging for the attendance of witnesses and procuring documents, attorneys may, without need for permission from the court, enter and leave the courtroom during the trial from time to time if their client remains represented by co-counsel. Such movements should, however, be done in an unobtrusive and non-distracting manner. Paralegals not expected to testify may, without the need for special permission from the court, be inside the railing to assist counsel.

g. Findings under Fed. R. Evid. 104(a). Do not disclose to the jury in any manner the findings of the court made under Fed. R. Evid. 104(a) in connection with questions of admissibility. For example, do not argue to the jury that you were allowed to present evidence of A's statement because the court found under Fed. R. Evid. 801(d)(2)(E) that A and B were engaged in a conspiracy. Similarly, do not ask in the presence of the jury for the court to "recognize" a witness as an "expert" or as "hostile."

h. Smoking, eating, and drinking. Smoking, eating, and drinking (other than water) are never permitted in the courtrooms.

i. Cellular telephones; recording devices. Keep cellular telephones in an "off" position while in the courtroom. Recording devices may be used in the courthouse only with express permission of the court.

12. Use of Judge's office. Telephone facilities in the judge's office or in the attorneys' conference room may be used by counsel on a limited basis. Make your calls brief. Promptly complete your call if requested or if others are waiting to use the telephone. Any long-distance calls or calls involving special charges must be made collect or billed to your office or credit card. Personnel in the judge's office will receive a limited number of messages for you, but do not treat them as your answering service. Make sure that you do not interfere with their work.

13. Communications.

a. With court. Trusting in the professional integrity and ethics of members of the bar, this court does not require that each and every communication with the judge or members of the

judge's staff be made in the presence of or with the advance approval of other counsel. For example, if you need a few extra minutes before trial resumes because the next witness was late arriving, you may communicate your request to the court even before you are able to alert opposing counsel to your problem. Of course, do not make any ex parte communications which relate to the merits of the case or which, although only of an administrative or procedural nature, may create tactical advantages or disadvantages.

b. With jurors. Under Local Rule LR47.1 counsel and parties are precluded from initiating any conversations with jurors (including any alternate jurors) until the day after such persons have been fully released from further jury service.