GUIDELINES FOR PARTIES AND COUNSEL ON PRETRIAL AND TRIAL MATTERS REVISED OCTOBER 2019

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Please take a few minutes to review these guidelines and the latest edition of our court's Rules of Practice and Procedure. Lawyers regularly ask about practice here, and these guidelines are an effort to answer those questions while promoting reasonable flexibility and efficiency in preparing and trying cases.

I encourage and welcome thoughtful criticism and suggestions regarding any of these practices and our district's rules.

I. SCHEDULING

With few exceptions, scheduling is done with the United States Magistrate Judges. **As you do this scheduling, everything works off the trial date.** Absent a compelling reason, your trial date is set in stone.

The deadlines are firm dates, and each date is important relative to the others. Every extension of time reduces the time to accomplish other pretrial tasks. This is particularly true of dispositive motions. The magistrate judges and I will always work with you where circumstances necessitate changes. Circumstances necessitating changes do not include a failure on counsel's part to plan carefully, or to adjust actions to the time allocated for it at the outset. We expect counsel to keep the case moving, as counsel have significant input in formulating the schedule.

II. PRETRIAL

1. Expert Opinions. Review Rule 26(a)(2) of the Federal Rules of Civil Procedure. I require all Rule 26(a)(2) disclosures to be made in a timely fashion. In the absence of strict compliance with Rule 26(a)(2), the witness's testimony will be excluded pursuant to Rule 26(e)(1).

2. Doctors as Experts. In my view, a treating physician is not an expert witness for purposes of Rule 26 if the doctor's testimony is limited to her or his treatment of the patient. That is, the doctor may testify to her or his contact with the patient and matters which fall within the realm of a diagnosis, treatment, anticipated future course of treatment, and prognosis without having to make Rule 26 expert disclosures. However, once the doctor moves into other issues, *e.g.*, standard of care, evaluation of a person's condition obtained outside of a treatment context, other opinion testimony, all Rule 26(a)(2) disclosures must be made. Factors which may not be determinative,

but which I will look at carefully, are whether the patient saw the doctor before being advised to do so by a lawyer, and how the referral came about.

3. Depositions. Review Fed.R.Civ.P. 28-31. Depositions are not contests to see how much information a witness and her or his lawyer can avoid disclosing.

4. Pretrial Conference and Order. Review D. Kan. Rule 16.2. Discovery should be completed and your case ready for trial at the time of the pretrial conference. If you agree on a pretrial order, you may submit it to the court on or before the time scheduled for the pretrial conference. The court has a standardized form available on its public web site at www.ksd.uscourts.gov/wp-content/uploads/2018/01/F-PTO12-1-15.docx.

5. Settlement Conference. Review D. Kan. Rule 16.3. In conformity with our court's alternative dispute resolution plan, I require a mediation in every case unless I am convinced it would be futile. It takes a very strong showing to convince me of such futility. The conference generally will be scheduled between disposition of summary judgment motions and trial, although I may schedule a conference earlier, or direct a second conference. **With rare exception, lead counsel and the client must appear personally for the settlement conference. An insurance company or other business must have a representative personally present who has complete authority to settle the case without having to check with anyone else**. It is also a good idea to check with the proposed mediator to be certain there are no possible conflicts of interest.

6. Final Witness and Exhibit Lists. Final witness and exhibit lists are to be limited to those witnesses you intend to call and exhibits you intend to use at trial. They are not to be comprehensive recitations of all persons who have knowledge of some aspect of the case and all documents and other items in your possession or which were produced in discovery. If a previously disclosed witness or document is not included in the final witness and exhibit list, but something else occurs in the trial requiring that witness's testimony or that document's use, I will not penalize you for trying in good faith to accurately state which witnesses and exhibits you will use.

7. Deposition Testimony. Any party wishing to offer testimony by deposition, whether by reading transcript or by videotape, should designate those portions of all depositions sufficiently in advance of use at trial to give the opposing party at least one day to object/offer counter-designations, and to give the court one night to rule on objections. The designations and objections should be made by reference to page and line in the transcript. If the parties plan to use videotaped depositions, the party offering the deposition will have the obligation to edit the tape in accordance with the designations and court's rulings so it can be played for the jury in an uninterrupted manner.

8. *In Limine* Conference. An *in limine* conference typically is scheduled the week before trial begins. Lawyers are expected to have consulted with each other before the *in limine* conference about each motion and to be prepared to discuss each contested issue at the conference. In addition to matters set out previously, the parties should have completed the tasks

set out below before the *in limine* conference:

A. Exhibits. The parties should have prepared an exhibit list, provided the list to all other parties, reviewed the other exhibit lists and noted objections to exhibits, stipulated to the admissibility of all exhibits not being contested, and eliminated duplicate exhibits (*e.g.*, duplicate medical records, photographs, diagrams, etc.). As many exhibits as possible will be pre-admitted into evidence at the *in limine* conference. The parties should also have shown all exhibits they plan to use during opening statements to all other parties sufficiently ahead of the *in limine* conference that objections can addressed at the conference. Our court has a standardized exhibit list format available on the court's public web site at www.ksd.uscourts.gov/wp-content/uploads/2015/10/EXHIBIT-LIST.docx.

B. Numbering of Exhibits. All exhibits are to be numbered sequentially without any designation as to plaintiff's or defendant's exhibits. There will be no duplicative exhibits. Each exhibit will be deemed admitted into evidence if no objection to that exhibit is filed by the close of business on Wednesday before the start of trial on the following Tuesday. The court will consider the admissibility of any exhibit to which a party objects. If the objection, in the discretion of the court, is groundless, frivolous, or without significant merit, the court will impose costs on the objecting party.

C. Schedule of Witnesses. The parties should have a schedule of witnesses prepared and exchanged prior to the *in limine* conference so that scheduling can be discussed on something more than an ethereal basis at the conference.

D. *In Limine* Motions and Instructions. File all *in limine* motions and requested instructions **(elements, contentions and other special instructions only – we have all of the boilerplate pattern instructions here already)** at least one week prior to the *in limine* conference. Instructions should be submitted by email in Word format to chambers and filed through CM/ECF.

E. Instructions to the jury at the beginning of trial. The court will give elements instructions and other standard instructions to the jury immediately before the first witness takes the stand. The court will provide a draft of those instructions to counsel at the *in limine* conference.

9. Assist the Court and the Court Reporter. If you will be using technical, medical, or unusual terms in your case, please provide a glossary of those terms to the court and the court reporter at the *in limine* conference.

III. MODIFIED TRIAL PROCEDURE

1. Pretrial. I intend to start doing my own pretrial work in **some, but not all, cases**, which

would include scheduling conferences, discovery issues, expert issues, and anything else that might arise. Unless I specify that counsel are to be present live and in person, a telephone conference is presumed.

2. Motions. I want to begin having oral argument on motions, and would prefer that you have counsel with five years or less experience argue them. Argument does not mean standing up and saying, "I've said it all in my brief, so unless the court has questions, I'll not take the time to argue it." I am talking about coming in and selling me on why your position is correct and fair.

3. Jury Information. The parties will be provided the jury information you typically receive the day of the trial one week before trial, unless I enter a different order. If the parties agree that certain jurors are unacceptable for their case, the court will summarily dismiss those jurors pretrial without need for voir dire.

4. Number of Jurors. The court seats 12 jurors in civil trials. In criminal trials, depending on the length of the trial we seat 13 or more jurors. One or more will become alternate jurors at the end of the trial, but before deliberations begin.

5. Time Limits. I **may** impose time limits in some trials. If I do, the presumption will be an equal amount of time per side, which the parties may agree to modify. Each side's allotment will include: opening statement, voir dire, direct examination of the party's witnesses, cross examination of the opponent's witnesses (if a witness is testifying for both sides, the parties will note when the examination switches from cross-examination to a direct examination), argument on motions during trial, and closing argument.

6. Trial Schedule. No change from my current practice. Day 1 is 9:00 am to 5:00 pm. Thereafter, presumably 8:30 am to 1:30 pm, unless the court announces otherwise. Have enough witnesses at the courthouse to fill your day.

7. Opening Statements. No change from my current practice. The parties will give full opening statements before we begin jury selection. This applies only to civil trials, unless the parties agree otherwise.

8. Jury Selection. In civil cases, the lawyers and I begin by telling the jury some basic information about ourselves (approximately 2-3 mins/person). The panel then does the same. I will cover some things with the panel, then the lawyers voir dire the panel. In criminal trials, we forego this practice. Lawyers will not rehash areas I have covered, including, but not limited to, matters such as burden of proof. Further, counsel will not be permitted to ask the jurors to commit to anything other than listening and viewing the evidence with an open mind, while following my instructions. Once all parties pass the panel for cause, the court will, in alternating fashion, begin with the earliest juror called and ask if either party has an objection to that juror. If one party has an objection, that juror will be excused, and it will be a peremptory charged to the objecting party. Once twelve jurors are approved, the jury will be seated, even if one or more parties have peremptory challenges remaining.

9. Instructions. I give the jury a complete set of instructions before the parties begin presenting evidence. The instructions will include a Table of Contents. Each juror receives a copy of the instructions. Each keeps her or his copy and may take notes on the instructions during the trial. The jurors take the instructions to the jury room during deliberations. I do not instruct at the end of the trial, except as to changes, if any, to those given at the outset. Continuing current practice, the court shreds juror notes at the end of deliberations.

10. Juror Discussions During Trial. In civil cases, during the trial, I allow the jurors to discuss what they have seen and heard whenever all twelve jurors are present and have an opportunity to participate. I give the following instruction to the jury about not reaching any conclusions until presentation of the evidence is complete:

> For those of you who have served as jurors before, you may recall the judge admonishing you before each break and recess that you were "not to discuss this case or any aspect of it among yourselves or with any other person until you hear all of the evidence and instructions, and I give the case to you for decision."
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> However, I am giving you a different instruction here. You may discuss any aspect of the case any time all twelve of you are together in the jury room, and present to participate in the discussion. If any one juror is not present for any reason, including using the restroom, discussions must stop. If any questions arise during these discussions, write each question down and give the questions to my law clerk before she brings you back into the courtroom. If the question relates to appropriate evidence, I will share the question with the lawyers so they can address it during the trial.
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> You are not to decide any issue until the conclusion of the case, when you have heard and seen all of the evidence. Any issue can turn on a single answer from a single witness, so, again, you are not to make any decisions or reach any conclusions concerning this case until the parties have presented all the evidence to you and I have submitted the case to you for deliberation and decision.

Before jurors leave the courthouse each day, I will give the standard comprehensive admonishment, which includes not only the prohibition on discussing the case, but prohibits independent research of any kind.

11. Questions from Jurors. Jurors are permitted to submit written questions to ask of witnesses. The court will review those questions with counsel, who may object on any recognized basis to each question. The court will rule on each. The court will ask the jurors' questions.

12. Sidebars. I never much cared for them. Unless there is a matter of huge urgency or red flags are waving all over the place, there will be no sidebars.

IV. TRIAL ETIQUETTE

1. Addressing the court. Stand when making an objection or addressing the court.

2. Addressing the witnesses. A witness should be addressed by an appropriate "Mrs.," "Ms.," "Miss," "Mr.," or "Dr.," and not by her or his first name, no matter how familiar the witness is to you. Do not address a medical doctor or expert witness holding a Ph.D. in a manner other than "Dr." Stand when questioning a witness.

3. Addressing opposing counsel. Do not address opposing counsel during a trial. All remarks should be directed to the court.

4. No narrative objections. State only "objection" followed by the basis. Unless the court requests it, objections will not be argued.

5. Exhibit notebooks or discs. If you are using hard copies of exhibits, I would appreciate a notebook with exhibits, as well as one for my law clerk. I trust that you all will present most of your documentary evidence electronically, so juror notebooks are no longer necessary. The court prefers that you use the district's Jury Evidence Recording System (JERS) to present exhibits to the jury at the close of trial. Lawyers are expected to follow the rules regarding correct naming conventions and format of electronic exhibits located on the district's website at http://www.ksd.uscourts.gov/wp-content/uploads/2019/01/JERS-Instructions-for-Counsel-9-7-18.pdf. Electronic exhibits should be submitted to the court on a thumb drive no later than the *in limine* conference. JERS will not import electronic exhibits that are named incorrectly. In the event that exhibits are not named correctly, the lawyer will be responsible for correcting the exhibit and submitting a new thumb drive to chambers within 24 hours.

6. Approaching the witnesses with a document, deposition, or exhibit. You need not ask permission to approach the witness to hand the witness a document or to assist the witness in some manner.

7. Using the courtroom. The courtroom is yours to use as you see fit. Unless you attempt to either harass or intimidate a witness by moving up to the witness stand, you are not chained to the podium. Just be certain the court reporter, the jury, the witness, opposing counsel, and I can see and hear you and the witness at all times.

8. Making a record. Absent a compelling need to do so immediately, records will be made during a recess or at the end of the day.

9. Audio/visual equipment. If you will be using equipment, set it up and test it ahead of time. Various kinds of audio-visual equipment are available in the courtroom for your use. For instruction in its use and to arrange pre-trial tests of courtroom equipment, please contact the clerk's office.

10. Be time conscious. Be on time for all court sessions. At the beginning of the day and after a recess, have your witness in the courtroom and ready to take the stand. Have all of the exhibits you plan to use with the witness ready when each session of court begins.

11. Limitations on numbers of witnesses. No more than three witnesses per side to testify to any given fact. No more than two experts per side to testify on any given point.

12. End of the day conference. At the end of each trial day, counsel and the court will discuss witnesses to be called, exhibits to be identified or offered and issues which may arise during the next trial day. The purpose is to address and resolve as many potential problems as possible without imposing on jury time.

13. Consult with each other first. Please consult with opposing counsel about any matter of concern before asking me for a conference. My experience is that counsel can resolve nearly all potential problems without my help. If you request a conference, my first question will always be, "Have you talked to opposing counsel?" If you have not, you will before I hear the matter.

If you have any questions, please contact my chambers at the email address shown above. Thank you in advance for your cooperation in working toward a prompt and fair resolution of your case.