

## TRIAL GUIDELINES FOR U.S. MAGISTRATE JUDGE JAMES P. O'HARA

**JURY UTILIZATION:** Among the most common complaints expressed by jurors are that trials are boring, disjointed, and plagued by disorganization and ensuing delays. Beyond the paramount objective of ensuring that the parties get a fair trial, the court desires efficient and cost-effective jury utilization. Specifically, the court's goal is that the jury will hear at least six solid hours of uninterrupted testimony every single day of trial. The chief cause of trial delay is the bench (side bar) conference, which often needlessly interrupts the presentation of evidence to the jury. With thoughtful planning, and without prejudice to any party, the court hopes to hear and decide all legal issues without disrupting the continuity of trial. To accomplish this goal, counsel are advised that:

- a. The court understands that sometimes bench conferences are necessary and unavoidable. But absent extraordinary circumstances, the court strongly prefers to avoid *repeated* bench conferences. As much as possible, trial testimony should be presented without interruption. Toward that end, the vast majority of significant evidentiary issues should be anticipated by counsel and raised before trial with a timely filed motion in limine.
- b. If reasonably unanticipated matters need to be raised during trial outside the presence of the jury, they should not be resolved while the jury is left to twiddle their thumbs. Therefore, the court may require counsel temporarily to proceed to other matters or call a different witness. The court may elect to rule on disputed matters at a convenient time, outside the presence of the jury. That is, if a lawyer believes an evidentiary issue is extremely critical to the case, and it is absolutely necessary to hear argument on that matter, the court may ask counsel to defer questioning the witness on the objectionable area until the court rules on the objection at the next recess.
- c. Any matters to be considered outside the presence of the jury should be scheduled for 8:30 a.m. or a recess, during lunch, breaks, or after the conclusion of that day of trial, *with reasonable advance notice given to the court and all counsel*.
- d. To make sure counsel have sufficient opportunity to anticipate legal issues, witnesses (and preferably, all exhibits as well) that are expected to be used in the trial should be disclosed to opposing counsel no later than 5:30 p.m. the day before (unless the final pretrial order specifically calls for a different deadline). In this way, counsel will have time to raise an issue the next day

either before the jury is seated or during one of the recesses.

**EXHIBITS:** As many exhibits as possible should be pre-admitted into evidence by stipulation during the limine conference the court conducts shortly before trial begins.

**COURTROOM TECHNOLOGY:** Counsel are encouraged (but not required) to use the court's electronic evidence display devices, e.g., ELMO, DVD player, large screen TV, etc. Of course, blow-ups and/or exhibit notebooks for jurors also are permissible. But if counsel plan to use the court's evidence display devices, counsel are expected to practice with those devices and become proficient with them before trial so that delays and logistical problems are avoided.

**WITNESSES:** Counsel must ensure sufficient witnesses are present to guarantee a full day of testimony. There should be no dead time caused by running out of witnesses. If a witness is still on the stand at the time of adjournment or recess, that witness should be back on the stand when the court reconvenes and before the jury is brought back into the courtroom. If a new witness is to be called when court is reconvened, that witness should be seated in the front row, ready to be sworn.

**DEPOSITION TRANSCRIPTS:** Before counsel uses any deposition to impeach a witness, counsel shall provide an extra copy of the transcript to the judge, so immediate, informed rulings can be made on any objections to the propriety of the attempted impeachment.

#### **TRIAL PROCEDURE AND HOUSEKEEPING MATTERS:**

**First day of trial:** On the first day of trial, unless specifically ordered otherwise, counsel are expected to be present at 8:30 a.m. At that time, counsel will review court procedures with the courtroom deputy.

**Court reporting:** To facilitate record-taking in the courtroom:

- a. Give your business card to the court reporter before the proceeding begins.
- b. If your witnesses will present testimony containing any unusual or technical vocabulary, provide a typed list of such correctly spelled names and terms to the court reporter.
- c. Make certain audible verbal responses are elicited from all witnesses or that some audible indication is made.

**Jury selection:** In a civil trial, the court ordinarily seats fourteen prospective jurors. Each side ordinarily will have three peremptory challenges, and thus the court ultimately will

seat eight jurors. All eight jurors will deliberate the issues in the case; none will be designated as alternates. Absent advance agreement of the parties and with approval of the court for a largely attorney-controlled voir dire, the court will conduct most of the voir dire process, with counsel allowed approximately 30 minutes per side for supplemental interrogation. The court typically inquires concerning the following subjects:

- a. Biographical information, including each prospective juror's job, spouse's job, marital status, number of children, and educational background;
- b. Whether jurors have personal knowledge of the case;
- c. Any knowledge of attorneys or law firms trying the case;
- d. Any knowledge of witnesses likely to testify;
- e. Prior service as jurors;
- f. Prior involvement in litigation as plaintiff, defendant, witness, etc.;
- g. Personal experience with the subject matter of the lawsuit; and
- h. Medical circumstances or personal reasons why a prospective juror cannot serve.

Unless a particular topic or question is reasonably anticipated to be extremely controversial or sensitive, counsel need *not* file proposed voir dire questions.

Counsel are cautioned that, in conducting their portion of the voir dire process, they should not:

- a. Repeat questions asked by the court;
- b. Argue to the jury while discussing the specifics of the case;
- c. Ask for any promises from the jury other than to decide the issues in the case based on the evidence admitted during trial and the court's jury instructions;
- d. Examine jurors concerning matters of law;
- e. Examine jurors concerning jury instructions;
- f. Examine jurors concerning opinions based on hypothetical facts; or
- g. Otherwise attempt to ingratiate or indoctrinate the jury.

**Opening statements:** Unless otherwise ordered, the court typically will allow 20 minutes for each party's opening statement. *If* all counsel agree, the court will consider allowing their opening statements to be made to the entire panel of prospective jurors.

**Closing arguments:** Unless otherwise ordered, the court typically allows 30-45 minutes for each party's closing argument. The court will instruct the jury *before* closing arguments are made by counsel.

**Hours of trial:** Arrive promptly for all court sessions. Unless notified to the contrary, the jury portion of the trial will be conducted each trial day from 9:00 a.m. to 12:00 p.m. and from 1:15 p.m. to 4:45 p.m.

**Courtroom etiquette:** Stand as court is opened, recessed, and adjourned; when the jury enters or retires from the courtroom; when addressing or being addressed by the court; and when making opening statements or closing arguments. (Counsel with physical disabilities are excused from these requirements.)

Counsel are *not* required to stand at the lectern while examining witnesses. Counsel do *not* need to request permission from the court to approach a witness if there is an obvious reason to approach the witness, e.g., to simply hand the witness an exhibit. But counsel should not perch near the witness box without permission of the court. Nor should counsel get within more than a few feet of the jury box or make concerted, direct eye contact with any member of the jury at any time other than voir dire, opening statement, and closing argument,

Avoid disparaging personal remarks or acrimony toward opposing counsel, and remain detached from all ill feeling between the litigants or witnesses.

Refer to all persons, including witnesses, other counsel, and the parties, by their surnames (preceded by Mr., Ms., or other title), not by their first names or nicknames.

**Objections:** Absent the parties' agreement or advance permission of the court, only one attorney for each party will examine or cross-examine a witness. The attorney stating objections, if any, during direct examination will be the attorney recognized for cross-examination.

In making objections, counsel:

- a. Shall state only the legal grounds for the objection and withhold all further comment or argument unless the court requests elaboration; and
- b. Shall not argue further after the court has rendered its decision on the objection.

**Sequestered witnesses:** If witnesses are sequestered in accordance with Fed. R. Evid. 615, counsel must assure each witness called or to be called understands that:

- a. The witness may not discuss the testimony which he or she expects to give or has given in the matter before the court;
- b. The witness may not discuss with another witness (or anyone else who has

knowledge of proceedings in the courtroom) the testimony any other witness has given or expects to give in this matter;

- c. The witness may not discuss his or her testimony or expected testimony in the case; if anyone attempts to discuss such testimony with the witness, the witness must notify the court as soon as possible; and
- d. The witness, however, *may* discuss his or her testimony or prospective testimony with counsel.