

MEMORANDUM

TO: Counsel/Pro Se Parties in Criminal Cases

FROM: Judge John L. Kane

DATE: January 1, 2012

RE: Pretrial and Trial Procedures - CRIMINAL CASES

Attached are my Pretrial and Trial Procedures for use in Criminal Cases. Note that my expectations regarding courtesies and accommodation between counsel, contacting chambers, and the joint preparation of final jury instructions before trial commences are the same in criminal and civil cases. Familiarity with my general Pretrial and Trial Procedures Memorandum (available at <http://www.cod.uscourts.gov/Judges/Judges.aspx>) is expected and presumed.

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I. GENERAL PROCEDURES

A. Applicable Rules

Those appearing in the District Court must know and follow:

1. The Federal Rules of Criminal Procedure;
2. The Federal Rules of Evidence;
3. The Local Rules of Practice of the United States District Court for the District of Colorado;
4. The Electronic Case Filing Procedures (Criminal Version 3.0 or the most current version); and
5. These Practice Standards.

B. Access to Local Rules and Practice Standards

1. Copies of the local rules are available at <http://www.cod.uscourts.gov/LocalRules/Rules.aspx>, from the District Court's home page (<http://www.cod.uscourts.gov/Home.aspx>) under "Local Rules," and from the clerk of the court in Room A105.

2. Copies of these practice standards are available at <http://www.cod.uscourts.gov/Judges/Judges.aspx>, from the District Court's home page (<http://www.cod.uscourts.gov/Home.aspx>) under "Judicial Officers' Procedures," and from the clerk of the court in Room A105.

C. Communications with Chambers

1. My judicial assistant is Sara Jones, at 303-844-6118.

2. For information about the status of a motion or document, please consult CM/ECF before contacting chambers or the Clerk's Office criminal case administrator, Kathy Triplett at 303-335-2072.

3. For information about courtroom technology, trial preparation, submission of trial exhibits, and courtroom protocol, please contact my courtroom deputy clerk, Bernique Abiakam, at 303-335-2097.

4. Please do not ask to speak directly with law clerks about pending matters unless previously authorized or invited to do so.

D. Proposed Orders

Proposed orders should be transmitted via electronic mail in editable WordPerfect or Word format to kane_chambers@cod.uscourts.gov. The e-mail message should identify the case name and number in the subject line and refer to the underlying motion by CM/ECF document (Doc. #) number.

E. Motions to Continue

Motions to continue (including motions to vacate or reset) hearings and trials will be determined pursuant to *United States v. West*, 828 F.2d 1468, 1469-70 (10th Cir. 1987) unless a party seeks to continue a hearing or trial beyond or to the Speedy Trial Act deadlines, in which case it will be decided pursuant to the Speedy Trial Act. Oral or written motions to continue should not be made at the time of a hearing or trial. Stipulations for continuance are not effective unless approved by the court. When a motion to continue is granted, all parties will be notified as soon as practicable.

Motions to continue that implicate the Speedy Trial Act must include sufficient facts and procedural history of the case to support the findings necessary to support the continuance under *United States v. Toombs*, 574 F.3d 1262 (10th Cir. 2009).

F. Motions for Extensions of Time

1. Motions for extension of time require a showing of good cause, which must be established with particularity.

2. Any motion for extension of time shall be filed **before noon at least one business day before the date the filing would otherwise be due.**

II. COURTROOM PROCEDURES

A. Courtroom Protocol

1. Courtroom Decorum. Please observe traditional courtroom decorum, i.e., stand when addressing the court, make your arguments from the podium, and request permission to approach the bench. It will not normally be necessary for counsel to approach a witness on the stand. The courtroom deputy, upon request of counsel, will hand a witness an exhibit.

2. Oaths. Please note and advise all persons appearing with you in court, including co-counsel, paralegals, clients, witnesses, and spectators that oath taking is treated formally in my courtroom. The courtroom deputy is directed to administer an oath to a jury or witness **ONLY** when all other activity in the courtroom has ceased. Attorneys are directed to observe the administration of the oath and to stop all other activity such as making notes,

reading or shuffling papers, talking to others, or moving about. I usually advise juries of the reasons for this rule. If you want a more detailed explanation, simply ask.

3. Cell phones. Please place cellphones in “silent mode” or “off” in the courtroom.

B. Recording of Proceedings

1. The official record of all trials and proceedings will be taken by a court reporter. Before any courtroom proceeding, please provide the court reporter with your business card or other means of contacting you. Requests for realtime, daily, or hourly copy should be communicated as soon as practicable, preferably at least **two weeks before the proceeding**.

2. Provide the court reporter with a glossary of unusual or technical terminology, difficult-to-spell names, etc.

3. Transcripts of any court proceeding can be ordered directly from the court reporter sitting at the particular hearing. If you do not remember the reporter’s name, you may contact Charlotte Hoard, the Courtroom Services Supervisor, at 303-335-2100. Copies of forms to be filed that relate to transcripts should be mailed to: Charlotte Hoard, Clerk’s Office, 901 19th Street, Room A-105, Denver, CO 80294.

C. Exhibits

1. When to File – For motions hearings, each party must provide a copy of its exhibit list and each exhibit to opposing counsel or any pro se party before the hearing. For trials, see Section IV.A concerning the Trial Preparation Conference.

2. Format of Exhibit List – Parties must use the form of exhibit list available on the District Court website at <http://www.cod.uscourts.gov/Judges/Judges.aspx>. For trial exhibit lists, please add at least ten additional blank rows at the end of the exhibit list to accommodate any additional exhibits that may be introduced.

3. Each party must pre-mark all exhibits that will be used or identified in a hearing or trial. Exhibits not timely pre-marked or exchanged before a hearing or trial may not be admitted.

4. Exhibit labels can be obtained from the clerk’s office before trial. The Government’s exhibits should be marked with yellow labels, using numbers. Defendant’s exhibits should be marked with blue labels, using alphabetical letters for the first twenty-six exhibits. For example, if there are twenty-six or fewer exhibits, label them A through Z. If there are more than twenty-six exhibits, begin marking them as A-1 through A-99, then B-1 through B-99, etc. Do not use double or triple letters. The criminal action number should also be placed on each of the exhibit stickers.

5. Exhibits should be organized and bound in three-ring notebooks or folders, and the notebook or folder labeled with the following information: (i) caption, (ii) nature of proceeding, (iii) scheduled date and time, and (iv) “original” or “copy.” If exhibits are not bound and labeled properly, the hearing or trial may be delayed or continued until they are. If a party has fewer than five exhibits, they need not be bound. *Compare* JLK Pretrial Proc Memo in Civil cases at pp. 16-17.

6. Number of Sets of Exhibits – For hearings and proceedings other than jury trials, each party should bring separate sets of bound exhibits for (a) the court, (b) the courtroom deputy clerk, (c) the court reporter, (d) opposing counsel, and (e) the witness stand. For jury trials, see Section IV.A concerning the Trial Preparation Conference.

7. Stipulated Facts – Any stipulation of fact should be formatted as a pleading and marked as an exhibit.

8. If there is more than one defendant and an exhibit is offered by one defendant only (e.g. for a limited purpose), counsel should notify chambers at least **two days before the hearing or trial**. **[Judge, make sure this says what you want it to say . . .]**

D. Witness Lists

1. When to File – For motions hearings, witness lists should be filed via CM-ECF **two business days before the hearing**. For trials, see Section IV.A concerning the Trial Preparation Conference.

2. Format – Parties should use the form of witness list available on the District Court website at <http://www.cod.uscourts.gov/Judges/Judges.aspx>.

E. Depositions

Together with Fed.R.Crim.P. 15, this practice standard governs the use of depositions in criminal proceedings:

1. Objections to any portion of a proposed deposition shall be filed and determined pursuant to D.C.COLO.LCivR 7.1 and these Practice Standards. Any objectionable portion of the deposition shall be identified with specificity, i.e., by page and line. Objections shall be filed **two business days before the hearing** or, in the case of trial, no later than **two business days before the Final Trial Preparation Conference**. I will make every effort to resolve objections before the hearing or trial commences to speed things along and to facilitate any necessary redaction.

2. For jury trials, parties shall provide a person to read the deposition answers.

3. For bench trials depositions will not usually be read in open court. Instead, the court will read them in chambers in any requested sequence. At the beginning of the trial, the offering party shall provide the courtroom deputy clerk with two copies of the relevant deposition transcript marked as an exhibit with government's designated portions highlighted in yellow and the defendant's in blue.

F. Videotaped Depositions

Together with Fed.R.Crim.P. 15, this practice standard governs the use of videotaped depositions in criminal proceedings. Objections to any portion of a proposed videotaped deposition shall be filed and determined pursuant to D.C.COLO.LCivR 7.1 and these Practice Standards. Objections will be resolved before trial to facilitate any necessary editing.

G. Special Equipment (Audio/Video)

The court has audio-visual and other special equipment that may be used by the parties. A listing of available equipment can be found on the District Court's website at <http://www.cod.uscourts.gov/Judges/Judges.aspx> under "Courtroom Technology Manual for Attorneys." Notify my courtroom deputy clerk, Bernique Abiakam at 303-335-2097, no later than **seven days before a hearing or trial** concerning the date and time you need such equipment or need your own equipment to be brought through security for use in the courtroom. You may also schedule a time with Ms. Abiakam to visit the courtroom and run through your technology needs. Further information is available in the Courtroom Technology Manual for Attorneys, which can be found on the Court's website at http://www.cod.uscourts.gov/Documents/att_cr_man.pdf.

III. MOTIONS PRACTICE

A. Duty to confer in advance of motion.

While the local criminal rules do not include an analog to D.C.COLO.LCiv.R 7.1A imposing a duty to confer in advance of filing a motion, I expect parties and counsel in criminal cases to make every effort to do so. By this I mean that, before filing any motion, status report, statement, or other paper that includes a request for relief, the filing party shall have conferred or made a reasonable, good faith effort to confer with opposing counsel to resolve the issue in full or in part. Filings shall include a statement describing counsel's efforts in this regard and the matters on which agreement was reached.

B. Page Limitations/Font Size

It is not possible to predetermine the length of a good brief. Accordingly, I do not adhere to any prescribed page limits for briefs. Counsel are expected to exercise good judgment. Bear in mind, however, that the longer it takes to make a point, the less likely it is

to be understood, and I may disregard string citations and repetitive arguments. I prefer the body of the text to be in 13-point type while footnotes should be no smaller than 12-point type.

Furthermore, counsel should also bear in mind that sarcastic, rude, or ungrammatical briefs are not only unconvincing but often counterproductive.

C. Motions *In Limine*

Motions *in limine* are discouraged when the motion is evidence driven and cannot be resolved until evidence is presented at trial. Instead, the issue should be raised at the Trial Preparation Conference and supported with authority, orally or in writing. If motions in limine are filed, they must be filed **seven days before the trial preparation conference**.

D. Trial Briefs

Trial briefs identifying issues and legal authority with which you wish me to be familiar before trial may be helpful, as may timelines or glossaries of names or terms in a complex case. Trial briefs should be filed **five days before the Final Trial Preparation Conference** but must be filed no later than **seven days before trial**. Time lines, glossaries, or similar demonstrative aids need not be filed in CM/ECF and shall be provided to the court and opposing counsel at the Final Trial Preparation Conference.

IV. TRIALS

A. Trial Preparation Conference

A Trial Preparation Conference will be held approximately **three to ten days before trial**. Counsel who will try the case must attend. Once trial has been set, the court will issue an order that will confirm the trial date, confirm the Trial Preparation Conference date, and specify the tasks to be completed before the Trial Preparation Conference.

1. Jury Instructions and Verdict Forms

a. As described in § V of my Civil Pretrial Procedures Memorandum, I place utmost emphasis on the preparation of narrative instructions that clearly and accurately inform lay people of the law that applies in a given case. Jury instructions and verdict forms will be submitted to the court, argued, revised, and approved before trial begins.

b. At least **twenty days before the trial preparation conference**, or as otherwise ordered, the parties shall submit proposed jury instructions and verdict forms. The parties shall consult and pattern their instructions on my “Sample Jury Instructions - Criminal” included on the Court’s website at

<http://www.cod.uscourts.gov/Judges/Judges.aspx>. The jury instructions shall identify the source of the instruction and supporting authority, e.g. “Judge Kane’s Sample Instruction 2” or “§ 103, Fed. Jury Practice, O’Malley, Grenig, and Lee (5th ed.).”

The parties shall submit their instructions and verdict forms in .pdf format via CM-ECF and in electronic and editable Word or WordPerfect format to kane_chambers@cod.uscourts.gov. Verdict forms should be submitted in a separate file. The Jury Instructions file shall include all of the parties’ stipulated, proposed, and counter-proposed instructions and shall be page-numbered from p. 1 - # in a single document. Do not submit jury instructions individually or as separate word processing files. A party’s written objection to a proposed instruction may be incorporated directly into the Jury Instructions document immediately following the objected to instruction and accompanied by that party’s counter-proposed instruction, if any. Objections may also be set forth and argued in a separate filing in CM/ECF. The parties are expected to work together to craft the instructions and should exchange proposals and attempt to work through objections well before the submission due date.

c. Each instruction should be numbered (e.g., “Stipulated” or “Government’s [Defendant’s] Proposed” Instruction No. 1) for purposes of making a record at the Final Trial Preparation or supplemental jury instructions conference. The parties shall attempt to stipulate to the jury instructions, particularly my “stock” instructions and verdict forms.

d. Whenever practicable and appropriate, the parties shall use or adapt for use the Criminal Pattern Jury Instructions prepared by the Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit. The pattern instructions and updates may be found online at <http://www.ck10.uscourts.gov/clerk/rulesandforms.php>.

e. Any change or modification to any stock or pattern jury instructions or verdict form must be highlighted.

2. Exhibit and Witness Lists: **Two business days before the trial preparation conference**, the parties shall file their proposed witness and exhibit lists via CM-ECF. Defendants do not need to be listed on defendants’ witness lists. The forms of such lists are found at <http://www.cod.uscourts.gov/Judges/Judges.aspx>. For additional matters regarding exhibit and witness lists, see Sections II.C and II.D above.

3. Voir Dire: **Two business days before the trial preparation conference**, the parties may file proposed *voir dire* questions.

B. Jury Trials

1. Exhibit notebooks for individual jurors. In addition to the single complete set of exhibits provided for use by the jury, in some cases it is also helpful for counsel to provide each juror with a notebook containing copies of the parties' key exhibits. If used, individual juror notebooks should be condensed to include selected exhibits of both plaintiff and defense. At the beginning of trial, these individual exhibit notebooks should include only those exhibits admitted by stipulation. If additional key exhibits are admitted during the trial, the party offering a key exhibit shall provide the clerk with sufficient copies to include it in the individual juror notebooks.

2. Schedule. Trials are normally set to begin at 9:00 a.m. Counsel will be present to go over the attached trial checklist with the courtroom deputy at 8:30 a.m. on the first day of trial. The normal trial day begins at 9:00 a.m. and continues until 4:30 p.m. Lunch recess normally is from 12:00 noon to 1:15 p.m. We may continue beyond 4:30 p.m., but jurors have a right to rely on their being excused for the day not later than 5:00 p.m.

For the convenience of everyone, additional recesses are scheduled for 10:15 - 10:30 a.m. and 3:15 - 3:30 p.m. If you need a recess at any other time, make a request without explanation and it will be granted.

2. Juror Selection Protocol. Unless ordered otherwise, jurors and alternate jurors shall be selected using the **Juror Selection Protocol** of the court found online at <http://www.cod.uscourts.gov/Judges/Judges.aspx>.

3. Voir Dire. I will conduct a *voir dire* examination. Counsel will have 30 minutes per side to conduct supplemental *voir dire*. I do not require counsel to submit *voir dire* questions to me in advance, but they may do so if submitted at least **five business days** before trial.

4. Batson Challenges. Challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), shall be made and considered at the time challenges for cause are made, before the jury is sworn. A party who wants to preserve a *Batson* challenge should request the Court not to release any jurors subject to the challenge.

5. Note-taking and Questions. Jurors will be permitted to take notes during the trial and submit at recesses questions for the court or for counsel in writing. Copies of juror questions will be provided to counsel and a record made outside the presence of the jury before an answer is given.

6. Jury Instructions. I will use the Statement of the Case or Preliminary Instruction during *voir dire* and will read all but the closing instructions to the jury after they are sworn in. After being sworn in, each individual juror will also receive a notebook of instructions, which unless otherwise ordered will be compiled by my staff. Counsel may use the instructions in opening statements and in presenting their case. In addition to any record

created at the Final Trial Preparation Conference or other supplemental jury instruction conference(s), counsel will be provided the opportunity to make a record of objections before final arguments and after the close of evidence.

7. Oaths. As previously stated, attorneys are directed to observe the administration of the oath and to stop all other activity such as making notes, reading or shuffling papers, talking to others, or moving about.

C. Trials To Court

Trials to court will begin at 9:00 a.m. For a trial to the court, a resumé or *curriculum vitae*, marked as an exhibit, generally will suffice for the qualification of an expert witness.

V. PLEA AGREEMENTS

A. Treatment of Notice of Disposition

Any notice of disposition filed pursuant to D.C.COLO.LCrR 11.1A shall be considered to be a pretrial motion within the meaning of 18 U.S.C. § 3161(h)(1)(F) for the purpose of computing time under the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74.

B. Content of Plea Agreement

1. Rule 11(c)(1)(C) Pleas. Plea Agreements containing a Rule 11(c)(1)(C) provision seeking to bind the court to a specific sentence or sentence range will not be accepted. Do not submit them.

2. Appellate Waivers/Recommended Sentence Reductions or Departures. I strongly disapprove of the use of appellate waivers in plea agreements and will accede to one only if there are specific articulated factors justifying its inclusion in a particular case. *See* Order, *United States v. Aguirre*, Crim. Action No. 11-cr-149-JLK, 2011 WL 3036126, 2011 U.S. Dist. LEXIS 80802 (July 25, 2011). Similarly, case-specific reasons for the inclusion of recommended sentence reductions and departures must be stated with particularity. Without them, the plea agreement, and defendant's plea, may be rejected.

VI. SENTENCING STATEMENTS AND HEARINGS

I encourage the filing of detailed and individually tailored sentencing statements and will conduct evidentiary hearings related to sentencing upon request of either party.