

## **PRACTICE STANDARDS**

*Revised 12/8/2020*

Judge R. Brooke Jackson

It may be helpful to counsel to have some idea in advance as to the procedures I generally follow on matters not covered by the rules and local rules. These “guidelines” are not intended to cause unnecessary expense or to impose any particular style of trial advocacy. Deviation from these guidelines will always be considered for good cause in a particular case.

### **PRETRIAL**

#### **Scheduling Conference**

We will issue an order when a civil case is filed asking that the parties set a scheduling conference. That order should be self-explanatory. Among other things, we will set a trial date and a trial preparation conference at this conference.

#### **Pleadings**

Counsel are encouraged to plead their claims and defenses with care, asserting only those claims and defenses that they truly have support for when the pleading is filed. I discourage the automatic use of lists of 10-20 affirmative defenses. I realize that you have not yet had an opportunity fully to explore the facts when you submit your initial pleading, and I will liberally allow amendments of pleadings as the case is further developed.

#### **Motions and Briefs<sup>1</sup>**

Motion practice can be a critical part of the prosecution or defense of a case. However, it also can be costly, time consuming, a cause of delay, and a burden on the court. In an effort to improve dispositive motion practice in civil cases (excluding pro se inmate cases), I am going to try using the following recommendation of the Institute for the Advancement of the American Legal System (“IAALS”): **Before filing a motion to dismiss, the parties should meet and confer in a good faith, substantive, and meaningful way.**

The meet and confer need not be in person, although in-person meetings are encouraged. However, it is not enough for counsel to call opposing counsel simply to ask that the case be dismissed, nor is email a substitute for talking with opposing counsel. The key is that there be a good faith commitment to a

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<sup>1</sup> The new motion rules apply to cases filed after December 1, 2019.

meaningful discussion. Per IAALS’s recommendation, counsel on both sides must be prepared to discuss:

- The issues that the movant intends to raise in the motion to dismiss;
- Whether the parties could resolve all of some of those issues without a motion;
- The reasons that the movant believes those issues are legally meritorious;
- The reasons that the non-movant believes the motion should be denied;
- Whether there are any alternatives to the motion that would suffice (for example, could the plaintiff simply amend the complaint?); and
- Whether the motion could be resolved through a streamlined process (for example, letters instead of briefs, or in a conference with the court).

After the meet and confer process has been completed, the moving party will file and serve a short letter (not to exceed three pages including signature block) setting forth the basis for the anticipated motion, and the opposing party may file a similarly short responsive letter within seven days. The Court will then evaluate the parties’ positions and determine what the next steps should be. The Court will not consider motions to dismiss unless the moving party has complied or at least attempted to comply with these requirements. Defendant’s deadline to respond to the complaint will be stayed pending the Court’s consideration of the letter(s). If the Court responds to the letters by granting permission to file a motion to dismiss, the motion should be filed reasonably promptly, but in no case later than seven days after the Court’s response. The Court will not impose this conferral/letter protocol in pro se prisoner cases.

This expands on local rule 7.1(a) which imposes a duty to confer on non-dispositive motions. There, too, “confer” means talking with opposing counsel, not exchanging emails. Counsel should give opposing counsel a reasonable opportunity to respond to a request to confer, and opposing counsel should be timely in responding.

With respect to motions for summary judgment, during the initial Scheduling Conference the Court will set a date by which a party may file a motion for summary judgment (often called the “dispositive motions deadline”). Prior to submitting a motion for summary judgment, a party must file with the Court a letter or notice of intent to file for summary judgment. The notice of intent must be filed no later than twenty-one days prior to the dispositive motions deadline. Response letters are due within seven days after the moving party files a notice of intent. These dates will typically be at or shortly after the discovery cutoff. The notice will be a short (not to exceed three pages) indication as to why the

party believes that summary judgment is appropriate. The response will be a similarly short response indicating material issues of fact that the respondent believes to be genuinely disputed. The Court will not preclude a party from filing a motion for summary judgment but will be able to make suggestions regarding issues and briefs based on the notice and response.

With the exception of summary judgment motions, the motion and response should not exceed 15 pages (replies 5 pages). Summary judgment motions and responses should not exceed 20 pages (replies 10 pages). I count pages starting with the top of the caption and finishing with the bottom of the certificate of service. Filing the motion and a supporting brief separately does not increase the number of pages. Please do not ask for an exception unless you have very diligently tried to confine your paper to the foregoing limits and simply cannot. Finally, please limit the number of exhibits you attach to your papers. When I see a motion for summary judgment with 20 exhibits comprising 300 pages of material, for example, my first thought is that there likely are material factual disputes.

String citations should be avoided whenever possible. I am more interested in knowing the one or two authorities that best support your position. It is always helpful to me to have a **timeline** of the key events included with your brief. A good, easy to follow timeline will also be very helpful to the jury at trial. Develop a reputation with my staff and me for citing cases accurately, not overstating their holdings, and for being candid in your arguments.

Please avoid such expressions as “counsel conveniently overlooked,” “counsel attempts to mislead the court by stating,” the opponent’s argument is “outrageous” or “absurd,” etc. Life is too short for that stuff.

Parties frequently, often jointly, file a **motion for a protective order concerning the treatment of information they regard as confidential. I do not simply adopt** the standard form protective order often used in this District.

I have no problem with whatever restrictions you wish to place on one another’s treatment of such material. **However, I will presume that anything filed with the court is public information.** Restriction of public access is appropriate for such things as Social Security numbers, residential addresses and **true** trade secrets and may be appropriate for other categories such as criminal histories and medical information. If documents containing truly personal or trade secret information must be filed, then consider redacting that information. If it is critical that I see the information, then request a narrow order restricting public access and show good cause. Please certify in your motion that you have reviewed the Court’s practice standards and have tailored your proposed order accordingly, and I will grant it.

My law clerks can answer questions about the status of motions (303-335-2253, for odd numbered cases; 303-335-2254, for even numbered cases). When the motion is ripe, the law clerk will bring it to my attention as soon as possible, frequently with a memo or draft order giving me their initial impressions of the issues and the merits. If a motion has been fully briefed and seems to have fallen through the cracks, feel free to alert the law clerk. We want to get you a decision as soon as we can.

I do not ordinarily set hearings on motions in civil cases unless you ask for oral argument. If you ask for oral argument it usually will be granted. Motions in criminal cases are handled differently – nearly always decided from the bench at the conclusion of a hearing.

### **Discovery Disputes**

We all know that discovery can be contentious, and that large amounts of time and money can be spent propounding and responding to discovery, despite the mandatory disclosure rules and other procedural reforms. This can be minimized if your disclosures are fair and complete, your discovery is reasonable, and disputes are rare. I suggest that you avoid such practices as including lengthy sets of instructions and definitions with your questions and, in responses, asserting general objections and then including “Subject to the general objection, [the party] responds as follows:” in most or all individual responses. Instead, try to ask straightforward questions and either answer or object, rarely both.

I particularly urge you to be forthcoming in your disclosure of experts and expert testimony. I do not wish to deprive you, your client, the court or the jury of information that might be helpful in resolving the case. However, I will enforce the disclosure requirements, even if it means witness preclusion.

I will probably handle most discovery disputes myself. Please do not file motions or briefs. Instead, if you have conferred but cannot resolve the dispute, contact Chambers and set a telephone hearing. I find that usually we can resolve the issues relatively quickly and inexpensively that way. Occasionally I might refer a discovery dispute (such as one that involves extensive review of documents) to a Magistrate Judge or to a Special Discovery Master.

### **FINAL PRETRIAL/TRIAL PREPARATION CONFERENCE**

I have not found a Final Pretrial Order to be particularly helpful, so I will not require that you prepare one. Instead, the Trial Preparation Conference will be a working session to discuss any disputes concerning exhibits, witnesses, jury instructions and in limine matters (an exception being Daubert motions which should generally be set for a separate evidentiary hearing). Please file motions in limine and Daubert motions far enough in advance of the Trial Preparation Conference that the other side has the opportunity to respond before the

conference. Counsel should exchange essentially final lists of witnesses and exhibits and confer before the conference.

Please email your single set of joint proposed jury instructions in Word format to Chambers one week before the Trial Preparation Conference. It will help me if you can pair disputed instructions on each subject, indicating which is plaintiff's and which is defendant's proposed version, so that I can more easily compare your respective positions on the instruction. For further ease of reference, please insert page numbers on the proposed instructions.

Supporting authorities should be provided for disputed instructions. I do not use stock instructions that are sometimes given at the beginning of the case ("Good morning, my name is Judge Jackson, this is a civil case," etc.). I generally need an instruction briefly summarizing the positions of the parties; basic stocks on the burden of proof, evidence, credibility, etc.; the elements of the claims and defenses; miscellaneous things like causation and definitions; damages; and verdict forms. To the greatest extent possible, consistent with the law and the elements set forth in standard jury instruction books, instructions should be written in plain, understandable English. Generally speaking, the fewer instructions the better. Try to avoid very short instructions by combining instructions concerning similar subject matter.

Lead trial counsel should attend the Trial Preparation Conference if possible. Out of town counsel may attend by telephone if they wish.

## **BEFORE TRIAL**

Please contact our Courtroom Deputy, Julie Dynes (303-335-2054) at least one week prior to trial with any questions regarding exhibits, courtroom protocol, or to schedule technical training. The court has monitors, screens, white pads, easels, and an ELMO. The courtroom is equipped with HDMI and VGA plug-ins for displaying exhibits electronically. Other equipment must be provided by counsel.

## **TRIAL**

### **Jury Selection**

When potential jurors are seated in the courtroom, I will give them a brief statement of the case. I will probably use my own words to describe the case.

On the first day of trial you will receive a list of the jurors with basic information (name, occupation, age, education). I will likely conduct a limited initial voir dire, including putting up a few additional basic questions on a screen for prospective jurors to answer (such as occupation, spouse/partner occupation, length of residence in Colorado, prior jury service, any reason he or she cannot serve).

I will then turn it over to you. I believe in attorney voir dire, and I do not place time limits on it. However, if I believe that your voir dire has become too repetitive, irrelevant, boring, condescending, etc., I might ask you to move on or wrap it up. I encourage you to ask open-ended questions designed to get jurors talking and to examine possible prejudices or biases, to keep it moving, and not to be afraid to mix in a little humor.

Counsel are not required to remain behind the lectern during voir dire, opening statements, closing arguments, or any other time when they need to be away from it. During routine witness examinations the reporter usually finds it to be helpful for you to use the microphone at the lectern. **Please speak slowly enough that the reporter will not have to struggle to keep up. You should also encourage and remind your witnesses not to speak too rapidly.** You will find a note about this from the reporter on the lectern. But so long as you are easy to hear without the microphone and do not invade the jurors' "space," you may move around the courtroom at will. You are not required to ask the Court for permission to approach a witness. Please do ask for permission to approach the bench. Try to limit bench conferences to those where an immediate ruling is necessary. They are inconvenient to our court reporter.

In particularly lengthy, complicated or highly publicized cases, I will be happy to work with you on putting together a short written questionnaire to be filled out by prospective jurors before voir dire begins. If you want something like this, please confer with opposing counsel and be prepared to discuss specifics at the Trial Preparation Conference. A final proposed juror questionnaire should be filed at least one week before the start of trial for the Court's final approval as jury staff will need to prepare copies for the jurors the Friday before trial.

I tend not to like to select alternate jurors, because I do not like to ask people to spend several days as a juror only to be sent home without the opportunity to participate in the deliberations. Generally in civil cases we will go with seven jurors, all of whom will deliberate if they are all still present. In criminal cases we generally will go with 12. If you believe that an alternate juror is necessary in a given case, we can discuss this and, if I agree, discuss the method of selection of an alternate at the Trial Preparation Conference.

### **Opening Statement**

I am willing to pre-instruct the jury, i.e., give them a full but preliminary charge, before opening statements. This can only be done, however, if we have worked out the instructions in advance. My view is that this gives you the opportunity, if you wish, to address what you have to prove as you are summarizing what you anticipate the evidence will be. I also believe that if jurors understand the elements of the claims and defenses up front, they can better understand the possible significance of the evidence as it comes in. Any

pre-instructions can be modified, supplemented or deleted based upon developments during the trial.

Generally, I do not place time limits on opening statements, but again, I might interrupt if it is tedious or argumentative. The use of charts, graphs, photographs, and other demonstrative aids in opening statements will be permitted and encouraged. Counsel may use white pads, overhead projectors, Power Point slides, or any other means of display that you desire. The key to the foregoing, however, is advance disclosure. Counsel need not disclose in advance bullet points that they may wish to use on white pads, slides or otherwise, i.e., their outlines for their speeches. However, copies of any exhibits including demonstrative exhibits should be exchanged before trial as required by the rules. If there are objections, they will be resolved at the Trial Preparation Conference.

In long or complicated trials, I am open to permitting brief interim non-argumentative statements by counsel between discrete segments of the trial. These statements can be used to help the jury understand what part of your evidence has been completed and what is coming next. The number of these should be discussed at the Final Pretrial/Trial Preparation Conference.

### **Jury Aids**

For emphasis I repeat here that a good timeline is generally very helpful. Jurors will be permitted to take notes if they wish. Jurors will be permitted to submit written questions for witnesses to the courtroom deputy while the witness is on the stand.

My practice has been to invite counsel to approach the bench in order to read the proposed questions and raise any objection you have. If I agree, the question either will be modified or not asked. If I am satisfied that the question is proper, I will read the question to the witness.

### **Witnesses**

Final witness lists are to be filed by noon the Friday before trial.

Counsel should use their best efforts to have witnesses available so that there will be no significant interruption of the trial waiting for a witness to arrive. If you anticipate an unavoidable break in the chain of witnesses, please let us know as far in advance as possible. I will try to work with the schedules of experts and other witnesses to accommodate their needs and require as little wasting of time as is possible. Taking witnesses out of order, meaning a defense witness during plaintiff's case and vice versa, will be permitted for very good cause. I generally exercise my discretion not to grant "beyond the scope" objections. Both sides may, if they so choose, ask their questions, and the witness can be excused. That is up to you, but generally, once a witness has testified, he or she will be permitted to remain in the courtroom notwithstanding a sequestration order.

Objections should be succinct, *i.e.*, not speaking objections. If you need to speak to your objection, we will generally do it at the bench or during a recess. If an objection is sustained and counsel wishes to make a record, this will be done during a recess or, if absolutely necessary, at the bench.

I probably will not sustain objections to leading questions when you are going through background matters, undisputed matters, transitions, etc. When a witness has a lapse of memory, you will be permitted a little leeway to lead to jog his memory. You will generally be permitted to put anything in front of the witness that might jog his or her memory. But, I will sustain objections to leading questions when the witness is testifying about important facts that are or might be disputed.

When using depositions or other writings to impeach, please be prepared to do it quickly and crisply. For example, if you wish to impeach with a deposition, have your copy in front of you and know where the impeaching material is. You may, the first time, ask a few non-argumentative questions designed to educate the jury on what a “deposition” is, when it occurred, who was present, an oath was given, etc. Alternatively, you may ask that I explain to the jury what a deposition is, and I’ll be happy to do so.

There are different ways to impeach with a deposition, depending on counsel’s style and preference. One way is to place the deposition in front of the witness and call his or her attention to a specific page and line. Give opposing counsel a brief but reasonable time to find the page and line in counsel’s copy of the deposition. Then counsel may read the question and answer given in the deposition. Alternatively, you may ask the witness to read his or her answer. Assuming that there really is an inconsistency, you may, if you wish, follow up with a question about which version is correct. I recommend that you avoid trying to impeach on minor, unimportant matters or when there is no material contradiction between the live testimony and the deposition testimony.

Depositions or excerpts as substantive evidence, whether video or not, should be tightly edited to be as short as possible. Deposition testimony tends to drag after about 15-20 minutes. If there is a dispute about excerpts of depositions to be presented to the jury as substantive evidence, I will appreciate receiving, at least one week before trial, a hard copy marked or highlighted to show which parts each party wishes to present, objections, and a brief marginal notation indicating the nature of the objection. Please confer with opposing counsel before the Conference and resolve as many of these disputes as possible. If the disputes are voluminous and cannot be resolved at the conference, then it might be difficult or impossible for you to edit a video to comply with the Court’s rulings in time for use during trial. The use of stipulated summaries in lieu of actual testimony is encouraged.



In technical trials, it would help the court reporter to have a list of unusual words and terms. If you want Realtime, daily or hourly transcripts, she needs 30 days' notice. Contact Sarah Mitchell at 303-335-2108.

### **Exhibits**

Final exhibit lists are to be filed by noon the Friday before trial. Parties are to label their exhibits with numbers for the plaintiff and letters for the defendant. If the parties can agree on a different numbering system, that is fine with the Court as long as we do not have a Plaintiff's exhibit number 1 and a Defendant's Exhibit number 1, for example. I do not distinguish between "demonstrative" exhibits and other exhibits. All exhibits are marked and, if admitted, may be published to the jury and will be provided to the jury during its deliberations.

Exhibits that are used solely for impeachment, where "surprise" is an important element of the impeachment, need not be listed in advance. Otherwise, all exhibits must be disclosed in compliance with the rules. Full and fair disclosure is important to me. The "surprise" exception should be used sparingly and will be strictly scrutinized so as not to become a means of hiding evidence that should be disclosed.

Once an exhibit is shown to a witness and admitted, the courtroom deputy will immediately publish it to the jury unless you provide a very good reason not to. Imagine being a juror and watching lawyers and witnesses talking about a map or a photo or any other exhibit but not being able to see it yourself. The flip side of this is to use only those exhibits or portions of exhibits that you actually want the jury to see or read. There usually is no reason to place a voluminous document in evidence when only a few pages or just a paragraph is all you wish to use. You may highlight the portion that you particularly wish to call to the jury's or the Court's attention. You should have a notebook with hard copies of documentary exhibits for the witness stand (this is the original and will go back to the jury during deliberations) and one for the Court. You may have individual notebooks for the jurors if you wish, but you will be responsible for providing copies and notebooks. This tends to be less important in cases where documents are displayed electronically, but it is up to you.

Counsel will be permitted to have the witness go to the edge of the jury box in order to point out things on an exhibit, but another and generally preferred method is to use the monitors. Basically, how best to use visual evidence to make your case clear and interesting is up to you.

### **Closing Arguments**

I generally will not place time limits on closings. Counsel will be given a great deal of latitude to argue their case. Counsel must, of course, adhere to the evidence actually admitted during the trial. However, counsel will be permitted

liberally to argue inferences from the evidence, to use analogies, and otherwise to make their closings more interesting and useful for the jury. I recommend against your making a closing argument that is just a lengthy rehashing of all the evidence.

### **Bench Trials**

Much of this is equally applicable to bench trials. I do not require or expect you to submit proposed findings and conclusions in advance, although you may do so if you wish.

### **The Court Day**

We will generally start with the jury at 9:00 a.m., take a mid-morning break, and stop around noon. Occasionally we recess around 11:45 and occasionally we run into the noon hour, depending on how the witnesses break. We will generally take about an hour, sometimes a little longer, for the lunch break. We will take at least one mid-afternoon break. I have found that ending the jury's trial day in the range of 4:00 to 4:30 is welcomed by the jurors and by court staff. If there is a particular need to run a little later to accommodate a witness, we might occasionally continue until 5:00 or so.

Please try to plan so that motions that come up during trial can be handled during recesses or before or after the jury's trial day. Plan so that disputes about instructions can be handled without wasting the jury's time.

One exception I will sometimes make is that if, at the close of the evidence, particularly in a long or complex trial, counsel needs some time to prepare for closing argument, I might excuse the jury for "the rest of the morning," or "the rest of the day," for that purpose. So long as this does not unduly impose on the jurors' time, or give an advantage to one side or the other, I understand that it often takes some time to prepare your summation.

### **Settlements on Eve of Trial**

Please inform us of a settlement as soon as possible. At a minimum, we need to know by noon of the business day before trial in order to call off prospective jurors. I cannot reject your settlement even if it occurs on the morning of trial, although we probably will require payment of jury costs. But I make this request to you as a matter of courtesy to prospective jurors and accommodation to the Court.

## **MISCELLANEOUS**

Finally, look for ways to have fun in the practice of law. Things that made the practice fun for me: cases where I got along well with opposing counsel even though I was doing my level best to prevail in the case; spending more time on trial preparation and trial, less on motions and discovery; being creative with evidence and with legal arguments; being allowed freedom in the courtroom to be an advocate; the satisfaction one gets from disclosing contrary authority candidly and then figuring out an argument that might prevail anyway; getting to know the judge and feeling comfortable in his or her courtroom; having a good relationship with the court's staff.

We will look forward to working with you. If you have any other questions, feel free to contact our Judicial Assistant, Mary DeRosa at (303) 844-4694 or by email at [Jackson\\_Chambers@cod.uscourts.gov](mailto:Jackson_Chambers@cod.uscourts.gov).