PRACTICE STANDARDS

(Revised December 30~~4~~, 201~~3~~4)

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, Motions and Briefs

Counsel are encouraged to plead their claims and defenses with care, asserting only those claims and defenses that they truly believe in when the pleading is filed. ~~You might take a look at the proposed Pilot Rules for commercial cases in Denver metro state courts, 40 THE COLORADO LAWYER 123 at ¶¶2.1-2.2 and Appendix B (January 2011) to get an idea of what I think a good complaint or answer would look like.~~ I realize that you may not have had an opportunity fully to explore all possible claims and defenses when you submit your initial pleading, and I will liberally allow amendments of pleadings as the case is further developed.

We will enforce local rule 7.1A regarding the duty to confer. Before filing a non-dispositive motion, counsel should confer with opposing counsel by telephone or in person. Counsel should give opposing counsel a reasonable opportunity to respond to a request to confer, and opposing counsel should be timely in responding. All counsel should make a sincere, good faith effort to resolve disputes before filing a motion.

Please avoid filing dispositive motions where there is little realistic probability of success. The Court must construe well-pled allegations (not vague and conclusory allegations) in the claimant's favor on a motion to dismiss for failure to state a claim. ~~Once again reflecting a concept in the state Pilot Rules,~~

I intend that pleading, disclosure and scheduling requirements will continue unaffected by the filing of a motion to dismiss, so it is unlikely that I will grant a motion to stay unless required by statute. The Court must deny a motion for summary judgment if there is a genuine dispute of one or more material facts. The concepts are well known to trial lawyers but are often overlooked.

I like **short** motions and briefs. Short briefs that get right to the point suggest confidence in your position and are generally more effective. Please limit motions for summary judgment ~~(which should include your brief in one document)~~ and responses to 20 pages (replies 5 pages), fewer if possible. Filing the motion and a supporting brief separately does not increase the number of pages. Using small Roman numerals to number pages containing tables of contents or authorities does not increase the number of pages. I really do mean 20 (and 5) total pages. Please limit other motions and responses, such as Rule 12(b) motions, to 15 pages (replies to 5 pages). I will grant an exception for good cause shown, but 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.

Formatted: Font: Bold

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 Court and jury at trial.

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.

Develop a reputation with my staff and me for citing cases accurately, not overstating their holdings, and for being candid in your arguments.

One commonly filed motion that I will single out for comment is a **motion for a protective order** that seeks to restrict public access to "confidential" information. The standard form protective order often used in this District, typically submitted with a joint motion, is generally not going to be acceptable here. I have no problem with whatever restrictions you wish to place on one another's treatment of such material. However, I consider anything filed with the court to be 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

Formatted: Font: Bold

critical that I see the information, then request a narrow order restricting public access and show good cause. It is unlikely that I will grant a motion for a protective order of the usual type, whether joint or not, if you have not indicated that you have reviewed the Court's practice standards and have tailored your proposed order accordingly.

My law clerks can answer questions about the status of motions (~~Ben Brysacz~~Lindsey Beckett, 303-335-2254, for odd numbered cases; ~~CiCi Cheng~~Laura Wolf, 303-335-2253, 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 feel that oral argument would be ~~particularly~~ beneficial, you should note this on the motion, and it probably will be granted. ~~We enjoy seeing counsel and hearing arguments, but the time and expense involved may not be justified if the issues have been well briefed.~~ Motions in criminal cases are handled differently – nearly always ~~The exception is criminal motions, which normally are~~ 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. You will impress me if your disclosures are fair and complete, your discovery is reasonable, and disputes are rare. 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. If court intervention is needed, you are encouraged to involve us early in the process. If possible, instead of preparing and filing motions and briefs, contact Chambers and set ~~up~~ a telephone hearing, which we can typically set quite quickly. I find that usually we can resolve the issues relatively ~~with me where the problem can be resolved~~ quickly and ~~relatively~~ inexpensively that way. Occasionally I might refer a discovery dispute (such as one that involves extensive review of documents) ~~If that is not possible, I might refer the dispute~~ to a Magistrate Judge. I have great confidence in their abilities.

FINAL PRETRIAL/TRIAL PREPARATION CONFERENCE

I have not found a Final Pretrial Order to be particularly helpful. Instead, the Trial Preparation Conference will be a working session to discuss any disputes concerning exhibits, witnesses, jury instructions and ~~Although I have no objection to your preparing exhibits, witnesses, jury instructions and~~ in limine ~~issues~~ matters (an exception being Daubert motions which should generally be set for a separate evidentiary hearing). I request that counsel meet and confer about these issues before the conference. Please email one set of ~~hard copies of~~ proposed jury instructions in Word format to Chambers at least three business days before the Trial Preparation Conference, separated to show those which are agreed and those which are disputed. 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. Lead trial counsel should attend the Trial Preparation Conference absent unusual circumstances. Out of town counsel may attend by telephone if they wish.

~~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. Lead trial counsel should attend absent unusual circumstances. Out of town counsel may attend by telephone if they wish.~~

~~Well before the conference you should have exchanged proposed instructions, met, and attempted to reach agreement. Please email a set of your agreed instructions and your respective versions of disputed instructions to Chambers before the conference (not the evening before). Please bring supporting authority for the disputed instructions to the conference. You should also have conferred about witnesses and exhibits before the trial preparation conference, and we will address any disputes at that time.~~

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. Please use Word format.

Counsel should exchange witness lists, in expected order, with reasonable estimates of the length of direct testimony, before the conference. You should be able to have your actual trial exhibits listed and pre-marked by that time as well.

BEFORE TRIAL

PLEASE CONTACT OUR COURTROOM DEPUTY, JULIE DYNES (303-335-2054) AT LEAST ~~DURING THE WEEK~~ONE WEEK PRIOR TO ~~BEFORE~~ TRIAL WITH ANY QUESTIONS REGARDING EXHIBITS, COURTROOM PROTOCOL, OR TO SCHEDULE TECHNICAL TRAINING. THE COURT HAS A VCR, DVD PLAYER, MONITORS, SCREENS, WHITE PADS, EASELS, AND AN ELMO. OTHER EQUIPMENT MUST BE PROVIDED BY COUNSEL.

Formatted: Indent: First line: 0", Line spacing: Double

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.

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 length of residence in Colorado, spouse occupation, children, 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 generally do not place time limits on it. I caution you, however, based on interviewing many jurors over the years, that this is one part of the trial that jurors sometimes look back on unhappily. They frequently believe that the voir dire process took too long. If I believe that your voir dire has become too repetitive, irrelevant, boring, condescending, etc., I will probably interrupt you and ask you to 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 lecturn (and to speak slowly enough that the reporter will not have to struggle to keep up). You should also encourage your witness not to speak rapidly. But so ~~or at other times during the~~

~~trial. 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 may but 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 who prefers to move with her machine to the bench when you do, and they can be annoying to the jury.

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.

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 necessary, 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. However, copies of any exhibits including demonstratives 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

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 but only for very good cause. I generally exercise my discretion not to grant "beyond the scope" objections. I prefer to have the witness testify one time and, if possible, be excused.

Objections should be succinct, i.e., not speaking objections. If you need to speak to your objection, we will generally do it during a recess unless an immediate bench conference is critical. 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 may 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, 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.

It is very important to speak clearly and reasonably slowly for the court reporter and the jury. If the reporter is having trouble hearing you or your witness, or if you or your witnesses speak so rapidly that the reporter is having trouble keeping up, she probably will say so, sometimes rather sharply. It's best to avoid this. ~~The reporter will appreciate a copy of your witness and exhibit lists.~~ In technical trials, it would help her to have a list of unusual words and terms. If you want Realtime, daily or hourly transcripts, she needs 30 days' notice. Contact Kara Spitler at 303-623-3080.

Exhibits

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.

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. At a minimum you should have a notebook with hard copies of documentary exhibits for the witness stand and 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.

Formatted: Indent: First line: 0"

~~B~~Bench Trials

Much of this is equally applicable to bench trials. I do not require or expect~~I invite~~ you to submit proposed findings and conclusions in advance, although you may do so -if you wish. Sometimes t~~T~~his might enable me to rule from the bench, and even if not, to get you a decision more promptly.

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.

If there is a particular need to run after 5:00 p.m. to accommodate a witness, and if the court reporter has advance notice and can accommodate such a special request, we may occasionally continue until 5:15 or 5:30. That will be the exception, since the reporter, the lawyers, the litigants, the jurors and the court staff all will need a break after a long and full trial day.

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.