UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
HONORABLE RICHARD P. MATSCH

Courtroom A, the Byron White United States Courthouse,
18th and Stout Streets, Denver, Colorado

TRIAL PROCEDURES

This is a summary of the procedures which I use in the trial of civil and criminal cases. If you will take the time to familiarize yourself with these few points, and follow the attached checklist, it will be of great assistance in helping me and my staff to provide you with a more effective and efficient opportunity to present your case.

The official record of all trials and proceedings will be taken by electronic sound (audiotape) recording. The advantages of this technology have been proven. It requires the lawyers to use microphones which are strategically placed in the courtroom. There is a single lectern from which you will address the court, witnesses and the jury. Microphones are on the counsel tables, which are arranged parallel with the bench, the plaintiff's table being on your right as you face the bench. **Please be sure to speak into the microphone when you stand to make your objections and address the court.**

The courtroom deputy clerk will present the exhibits to the witnesses. Instead of the traditional "I hand you what has been marked for identification as plaintiff's exhibit number...", you may simply say "Please look at exhibit number one..." and the exhibit will be placed before the witness. You need not move from the microphone at the lectern.

The official court recorder operator is Ms. Kathy Terasaki. Transcripts of all proceedings may be ordered from Ms. Kathy Terasaki in the Clerk's office at telephone number (303) 335-2095. Copies of the Tapes and CDs may be ordered from her at a cost of $30 per Tape or CD. Requests for daily copy must be made at least twenty five (25) days before the trial date. Please take special note of paragraph 1 of the attached checklist to facilitate record taking in the courtroom.

On the first day of trial, counsel are expected to be present at 8:30 a.m. (8:00 a.m. for jury trial). At that time, counsel will go over the attached checklist with the courtroom deputy clerk. Jury impaneling begins at 8:30 a.m. Bench trials will begin at 9:00 a.m.

If you have any questions, I suggest that you call my secretary, Ginger Wentz at (303) 844-4627. The law clerks working with me are instructed that they may speak to counsel only pursuant to my specific instructions. Please do not call the law clerks on procedural or scheduling matters. Thank you for your cooperation in working with each other and with us to try to achieve the common objective of a fair trial of the issues in your case.

CHECKLIST FOR TRIAL

1. There are a number of steps you can take to facilitate record taking in the courtroom (or conference room).

   * Give your business card to the court recorder operator before the proceeding begins.

   * Give the court recorder operator a complete list of the witnesses you will call during the proceeding.

   * **If any of your witnesses will present testimony containing unusual or technical vocabulary, prepare a list of such correctly spelled names and terms for the court recorder operator**.

   * Make certain that verbal responses are elicited from all witnesses or that some audible indication be made by you through the microphone.

   * **SPEAK DIRECTLY INTO THE MICROPHONES.**

   * Do not move from the lectern and be careful to make objections into the table microphones.

   * You must speak directly into the sidebar microphone which is not connected to the amplifier system.

   * Do not move or pick up microphones unless otherwise directed. They are expensive.

2. **EXHIBIT LISTS**. Please prepare an index of exhibits which you expect to offer, using the attached form. If you will provide an original and three copies of this form for the court and a copy for opposing counsel, there will be no requirement to offer exhibits in sequence.

3. **EXHIBITS**. Exhibit labels can be obtained from the Clerk's office before trial. Plaintiff's exhibits should be marked with the yellow labels, using numbers. Defendant's exhibits should be marked with the blue labels, using alphabetical letters. If there are more than twenty-six exhibits for the defendant, please mark them as A-1 through A-26, B-1 through B-26, etc. Do not use double or triple letters. The civil action number should also be placed on each of the exhibit stickers.

4. **COPIES OF EXHIBITS**. It is expected that copies of all exhibits will be provided to opposing counsel and that you will have copies of your exhibits. Exhibits should be placed, if possible, in 3-hole notebooks not more than 3" thick, tabbed appropriately. Exhibit notebooks should be provided for the witness and the court. These books should be given to the courtroom deputy the first day of trial.

5. **WITNESSES**. Please provide the court with an original and three copies of the list of your witnesses. One copy will be provided to the recorder operator.

6. **VOIR DIRE QUESTIONS AND PROPOSED INSTRUCTIONS. Two copies of reasonably anticipated jury instructions will be submitted to chambers five days before trial. COPIES MUST BE DOUBLE SPACED**. There will be an additional opportunity to submit proposed instructions during the trial. **Written instructions will not be given to the jury. Instructions will be read to the jury after closing arguments. Please number the copies of proposed instructions e.g., "Plaintiff's Instruction No. 1," to facilitate reference to them during the instructions conference. Sources should be shown on all copies. Requested voir dire questions should also be submitted with the proposed instructions, five days before trial.**

   Do not submit stock instructions - they are attached.

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These submissions must be delivered on paper, original and one copy, directly to chambers. DO NOT USE ELECTRONIC FILING.

7. **WRITTEN CURRICULUM VITAE**. In trial to the court, a written curriculum vitae, marked as an exhibit will usually suffice for the qualification of expert witnesses.

8. **DEPOSITIONS**. Counsel are reminded that pursuant to Fed.R.Civ.P. 5(d), depositions, interrogatories, requests for admissions, and the answers and responses thereto are not filed with the Clerk unless on special order of the court. The original deposition transcripts should be in the possession of the party to whom they were delivered and must be brought to the trial. If you are going to use deposition testimony, you should advise opposing counsel of your proposed offer by page and line reference to enable the preparation of objections and the offer of additional portions of the transcript. In jury trials, you are also requested to provide a person (who may be co-counsel) to read answers. **In trials to the court, depositions will not be read in open court. The court will read them in chambers in any sequence which is requested.** The preferred practice is to provide the court with a copy of the transcript with the plaintiff's designations highlighted in yellow and the defendant's designations highlighted in blue and objections marked and identified in red in the columns.

9. **VIDEOTAPE DEPOSITIONS**. If videotaped deposition testimony is to be used, the court must be given at least ten (10) days advance notice, with objections marked on a copy of the written transcript. Objections will be ruled on before trial and excluded material must then be removed from the tape.

10. **SPECIAL EQUIPMENT**. If you intend to bring any special equipment to use such as models, videotapes, movies, slides or tape recorders, or if any necessary Americans with Disabilities Act accommodations need to be made, you are asked to call Ginger Wentz at (303) 844-4627 a week before trial to make arrangements for set-up.

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EXHIBIT NUMBER	BRIEF DESCRIPTION	OFFER	STIP.	IN	OUT	REMARKS

Members of the jury:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law is, or what the law ought to be, it would be a violation of your sworn duty to apply any view of the law other than that contained in these instructions, just as it would be a violation of your sworn duty as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury depends upon each juror's commitment to seek the truth as to the facts, based upon the evidence presented and to arrive at a verdict by applying the rules of law given in these instructions to the facts as you find them.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the court in these instructions, you are of course to be governed by the court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to anyone.

The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Please listen carefully to these instructions. You will not receive a copy of them and you must rely on your recollection of what is said in the instructions just as you will rely on your memory of the testimony you heard at this trial.

The party asserting a claim has the burden of proving the essential elements of the claim [or affirmative defense] by a preponderance of the evidence. To "prove by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proven is more likely true than not true. This rule does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence -- proof of facts or circumstances that point to the existence or non-existence of other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from all the evidence.

Any finding of fact you make must be based on probabilities, not possibilities. You should not guess or speculate about a fact.

It is your duty to determine the facts, and in so doing, you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proven.

Unless you are otherwise instructed, the term "evidence" includes the sworn testimony of the witnesses, regardless of who may have called them; all the exhibits admitted in the record, regardless of who may have produced them; and the facts which have been agreed to or stipulated.

Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

Although you should consider only the evidence in the case, you are permitted to draw such reasonable inferences that you feel are justified in the light of your experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts established by the evidence in the case. You bring with you to this courtroom all of the experiences of your lives. In

your everyday affairs you determine for yourselves the reliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests that you should apply in your deliberation.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent mis-recollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

The testimony of a witness may be discredited, or, as we sometimes say, impeached by showing that he or she previously made statements which are different from or inconsistent with his or her testimony here in court. Earlier inconsistent or contradictory statements not made under oath are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during the trial. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If the prior statements were made as testimony under oath, as in a deposition, or in an earlier court appearance, you may consider those statements as if they were made at this trial and rely on them as much, or as little, as you think proper.

If any witness is shown to have testified falsely concerning any material matter, you have the right to distrust such witness' testimony in other particulars and you may reject all of the testimony of that witness or give it such credibility as you may think it deserves.

You are not to decide any issue of fact based solely upon the number of witnesses that present testimony directed to that issue. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witnesses, and which evidence, you believe are most accurate and trustworthy.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

In this case I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

During the trial of this case, certain testimony has been read to you by way of deposition, consisting of testimony taken under oath before trial and preserved in writing. You have also heard testimony by videotape. Such testimony is entitled to the same consideration, and is to be judged as to credibility, weighed, and otherwise considered by you, insofar as possible, in the same way as if the witness were present and had testified from the witness stand.

Upon retiring to the jury room, you will select one of your number to act as the presiding juror. The presiding juror will preside over your deliberations, and will speak for you here in court.

A form of verdict has been prepared for your convenience. You will take this form to the jury room. You must carefully follow the instructions that are included in the verdict form. You will note that each question calls for an answer. The answer to each question must be the unanimous answer of the jury. The presiding juror will write the unanimous answer of the jury in the space provided opposite each question. The presiding juror will then date and sign the verdict form and return with it to the courtroom.

It is your sworn duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is incorrect. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the court security officer, signed by the presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the court security officer that he, too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person -- not even to the court -- how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.