

Trial Procedures and Suggestions Magistrate Judge Lisa Margaret Smith

1. Proposed *voir dire* questions must be filed via ECF, with courtesy copy submitted in an envelope marked with my name (to avoid having courtesy copy go to the assigned DJ), 15 days before jury selection, in accordance with my individual practices. Proposed *voir dire* questions need not include standard boilerplate questions, just those that specifically relate to the case on trial.
2. Proposed jury instructions must be filed via ECF, with courtesy copy submitted in an envelope marked with my name, 15 days before commencement of trial, in accordance with my individual practices. Proposed jury instructions need not include boilerplate general instructions, just those that specifically relate to the case on trial. If there is a need to supplement the proposed jury instructions based on issues that come up during trial, counsel should immediately bring to the Court's attention the issue on which they intend to request supplemental instruction, and promptly submit proposed supplemental instructions. Proposed jury instructions received on or near the day jury instructions are to be given will be disregarded.
3. Proposed verdict sheets must be filed via ECF, with courtesy copy submitted in an envelope marked with my name, 15 days before commencement of trial, in accordance with my individual practices. If there is a need to supplement a proposed verdict sheet based on issues that come up during trial, counsel should immediately bring to the Court's attention the issue on which there is an intent to request supplemental interrogatories, and promptly submit the proposed supplemental verdict sheet. Proposed verdict sheets received on or near the day jury deliberations are to begin will be disregarded.
4. Complete witness lists are required to be filed via ECF by each party, with courtesy copy submitted in an envelope marked with my name, 30 days after completion of discovery, as required by Federal Rule of Civil Procedure 26(a)(3), in accordance with my individual practices. Counsel should not rely on those witness lists for production or availability of witnesses whose names appear on the adversary's list. If any party desires the testimony of a given witness, that party must take the appropriate steps to obtain the witness's presence at an appropriate time and in an appropriate fashion, and no party should assume a given witness will be produced by another party simply because that witness's name appears on the witness list, or has previously been identified as a potential or likely witness. Counsel may rely on their adversary's representation that a witness will be produced only if such representation is made in writing, separate and apart from the witness list. Plaintiff may not rely on a witness who will be called by the adversary to make out the elements of the required *prima facie* case.
5. Exhibit lists are required to be served and filed by each party, with courtesy copy submitted in an envelope marked with my name, each party 30 days after completion of

discovery, as required by Federal Rule of Civil Procedure 26(a)(3), in accordance with my individual practices. Amended or revised exhibit lists **must** be provided to your adversary and the Court promptly upon such amendment or revision, **and a copy of any such amended or revised exhibit list must be immediately provided to the Courtroom Deputy**. For those exhibits which are documentary and are not voluminous, copies of the exhibits are to be provided to the Court on or before the first day of trial, preferably in one or more three ring binders, or some other similar format. Exhibits, including the copies provided to the Court, **must** be pre-marked, and the pre-marked designation **must** correspond to the designation on the Exhibit List. Plaintiff is to use numbers and defendant is to use letters. If there are additional parties, confer with the Courtroom Deputy well before trial for instructions on how to designate your exhibits.

6. Counsel must arrange with one another to view and/or examine the opponent's exhibits prior to the commencement of trial. It is suggested that if such review is done physically, rather than by exchange of copies of pre-marked exhibits, a court reporter should be hired to mark each exhibit that has been viewed. Except for exhibits which are not anticipated and are used only during cross-examination or rebuttal, the Court will not allow the use of exhibits that have not been previously shown to the adversary. **Documents not produced during discovery, or otherwise provided to the adversary prior to trial, are unlikely to be allowed for any purpose.** Counsel are encouraged to share and pre-mark exhibits which are reasonably anticipated for use during cross-examination and rebuttal, so that the Court does not waste time during trial for these purposes. If exhibits are particularly detailed, or will be the subject of substantial analysis by a witness, counsel may prepare sufficient copies of the pre-marked exhibits for the jury to have the exhibits during the testimony, although no exhibits are to be published to the jury until after admission into evidence, and only with the Court's permission. Exhibits are to be handed to the Courtroom Deputy for marking at the time they are offered for identification and again at some convenient time after they have been admitted into evidence. Exhibits are to be handed to the Courtroom Deputy for transmittal to the Judge or to the jury. Under no circumstance is counsel to approach the jury.
7. Counsel are responsible for retaining custody of their own exhibits during trial. There is a small evidence closet where items may be left by counsel during trial, but the Court does not take custody of exhibits. Counsel must apprise the Courtroom Deputy immediately of any additions to the exhibit list, and both counsel and the Courtroom Deputy must note which of the items on the exhibit list are received in evidence during trial. At the conclusion of trial, counsel must confer with the Courtroom Deputy to confirm the identity of admitted exhibits, which will then be sent to the jury during deliberations. After the verdict has been rendered, counsel must take custody of their own original, marked exhibits, and are responsible to retain them for appellate purposes.
8. Counsel are to insure that all exhibits are redacted in compliance with Federal Rule of Civil Procedure 5.2. If there is a particular need to refrain from redaction, a motion *in*

limine (or consent order) must be filed in accordance with my individual practices.

9. Counsel are to have copies of any and all depositions which counsel may use at trial to provide to the Court in the event that such depositions are utilized.
10. Counsel are to insure that they have witnesses to fill the time in each and every trial day. In the event that a party runs out of witnesses prior to the end of a trial day, the Court may direct that that party has rested its case. Where scheduling problems can be anticipated in advance, counsel is to bring those problems to the Court's attention immediately. The Court will consider taking witnesses out of order, particularly to accommodate experts who may have limited availability, although such accommodation will not be allowed if its result would be to confuse the jury. If counsel intends to call more than one expert on any given issue, counsel should expect that the Court will provide a time limit for the entirety of the expert testimony, and counsel can then apportion the time as counsel deems appropriate.
11. Counsel are to refrain from theatrics in front of the jury; in addition, physical or verbal responses to questions or answers will not be permitted. Counsel are to instruct their clients to refrain from such facial or hand gestures, or from making verbal response to the testimony of other witnesses.
12. Counsel are to refrain from repeating or restating a witness's prior testimony during the course of examination of the witness. Similarly, when referring to an exhibit which has already been admitted in evidence, counsel should refrain from summarizing the substance or contents of that exhibit, and should simply identify the exhibit by its number or letter designation. During direct examination counsel are to take care not to ask leading questions, except in preliminary or foundation questions where leading is normally allowed.
13. Counsel are to make objections simply, in one or two words, and counsel **must** stand when making objections. No argument will be permitted in front of the jury. If the Court requests the basis for an objection, or a response to the objection, such basis or response must be stated simply, clearly, and succinctly. Argument should be reserved to sidebar conferences, which may or may not be granted with regard to objections. If counsel wishes to make a record with regard to objections for which a request for sidebar was denied, such record should be made at the next break. If a sidebar takes place without a court reporter's presence, then counsel should make a record of the substance of the sidebar at the next break.
14. It is presumed that counsel will review the anticipated scope and subject of the testimony with the witnesses prior to calling them to the stand. In the event that an unprepared witness causes substantial delay in the presentation of evidence because that witness has been insufficiently prepared by counsel, the Court will consider striking the testimony of

that witness.

15. Except for party witnesses, who would include one representative of a business or corporation, witnesses will not be permitted to remain in the courtroom during the trial, unless counsel for all parties consent. The party representative must remain the same throughout the course of the trial, unless special permission is obtained from the Court to change party representatives. Witness rooms are available near the courtroom, and the Courtroom Deputy will direct you to the room(s) available.
16. In the usual case, and unless directed otherwise, counsel are required to be in the courtroom no later than 9:30 am each trial day. If there are issues which need to be addressed before the jury enters the courtroom, bring the issues promptly to the Courtroom Deputy's attention. Any such issues not dealt with by 10:00 am will be taken up at the mid-morning break. The jury will not be kept waiting except in extraordinary circumstances.
17. The usual trial day is 10:00 am to 2:30 pm, with two breaks, usually approximately 10 to 15 minutes long. If circumstances necessitate, and if the jury does not object, the trial day may begin as early as 9:00 and may last until 3:00 pm. During deliberations, the jury will be asked to deliberate at least from 10:00 am to 5:00 pm, and they may choose to extend their deliberating time from as early as 8:30 am to as late as 6:30 pm.
18. In bench trials, proposed findings of fact and conclusions of law are required to be served and filed, with courtesy copy submitted in an envelope marked with my name, 15 days before commencement of trial, in accordance with my individual practices. In addition, counsel are to email a copy of the proposed findings of fact and conclusions of law, in Word or WordPerfect format, to ChambersNYSdSmith@nysd.uscourts.gov, at least 15 days before commencement of trial.
19. Counsel should prepare a word list to assist the court reporter, and provide it to the reporter on the first day of trial, before opening statements. The word list should include names of your witnesses, other names and locations which are likely to be mentioned during testimony, and any other words peculiar to the case, such as words involving medical conditions or technical analyses, or words and phrases used in a particular business setting.
20. If records will be subpoenaed prior to trial, the return date for delivery of such records to the Clerk's Office should be one week (5 business days) prior to the start of trial. Trial counsel are required to check the subpoenaed records at least 3 business days before trial, in order to insure that all records that have been subpoenaed have been provided. **If records are missing or the subpoena has not been honored, a renewed subpoena must be submitted to chambers by 5:00 pm 3 business days before trial to be "So Ordered." The new subpoena must require personal appearance by the custodian of records on the first day of trial and must be served no later than 5:00 pm 2 business days before trial.** Unless this procedure is followed, no adjournments or other

delay will be permitted in order to seek or obtain missing subpoenaed records.

21. Counsel trying the case must be familiar with and abide by these rules, even if that counsel has not appeared for any given pretrial conference.
