

FINAL PRETRIAL & TRIAL POINTERS
Civil Cases

Final Pretrial:

The form for the joint final pretrial order can be found on the Court's website. Separate submittals are not permitted. Please come prepared to address any remaining issues associated with the form of final pretrial order and pending motions. Please feel free to ask any follow-up questions concerning the information on this sheet. Please be ready to answer questions concerning the time requested for voir dire, opening statements, and closing arguments. Please be ready to answer questions concerning whether there are any objections to jurors taking notes during the course of trial, and whether jurors should be permitted to ask questions. Be prepared to justify any request that a witness be permitted to step off the witness box for demonstrations or otherwise. Also, please be prepared to justify any request for counsel to use a lavalier or portable microphone. Please be prepared to discuss witness needs or issues (such as travel complications, any need to take a witness out of order, disability accommodations, requests for remote testimony, or issues with deposition designations). Please be prepared to discuss any request that witnesses be sequestered. Please be prepared to discuss progress with settlement.

Jury Selection:

For civil cases, the Court typically seats 14 prospective jurors for voir dire, unless the length of case suggests more, which, after peremptory strikes, will result in 8 jurors to try the case. There are no alternates.

- Do not refer to jurors by name – use the jurors' assigned numbers only.
- The Court typically allows 15 minutes for attorney-conducted voir dire. Attorneys may use the small podium to face the jury. Please don't argue the case or provide a mini-opening statement. Don't offer hypothetical questions which seek to bind any prospective juror to agree with your client's position or theory of the case. If the Court has addressed issues of hardship with potential jurors, please do not address these issues again.
- For Cause Challenges – these are all determined by the Court with input from counsel at sidebar. If there are no cause challenges, please articulate "pass for cause" to avoid unnecessary side bars. Please don't articulate a cause challenge before the jury.

Trial Days/Hours:

8:30 – 5:00 with a morning break, lunch recess (approximately 1 hour 10 minutes to 1 ½ hours) and an afternoon break.

Opening Statements:

Typically, 30 minutes is afforded per side unless the Court allows additional time.

Evidence Presentation:

- Re-read U.S.D.C.L.R. 84.1(a) on courtroom decorum
- Stand to object
- If the trial is estimated to take more than two weeks, the Court may photograph witnesses and prepare a book for the jurors to review, which provides the photos and names of witnesses.
- Exhibit notebooks are not given to jurors. The Court instead uses an electronic system for submission of exhibits to jurors (JERS), as described in the Court's form of initial pretrial and final pretrial orders.
- At least one week prior to trial, all parties must provide to the court reporter (jbd.davis@gmail.com) a list of names for all anticipated witnesses, and keyword indices to include technical terminology, proper names, acronyms, and case citations. The court reporter will maintain the confidentiality of the submittal so as not to reveal trial strategies.
- Do not greet witnesses on their way to the witness stand; do not use first names.
- Request permission to approach witness box, at least for anything beyond just handing exhibits to witnesses.
- Stay at the main podium unless the Court gives you permission to approach; do not address the jury, address the witness; request prior permission to use a lavalier or portable microphone.
- Be cognizant of the use of hearing devices by our jurors. If we have one or more jurors utilizing the hearing assistance devices offered to them by our Courtroom Deputy, these devices get their feed directly from the microphone system in the courtroom so counsel should make sure they mute their microphones at counsel table if having discussion(s) with their co-counsel or client. Muting the microphones will eliminate the possibility that discussion(s) that would normally be inaudible to the jury being directly fed into their hearing devices.
- In making objections and responding to objections to evidence, counsel must state the legal grounds for their objections with reference to the specific rule of evidence upon which they rely. For example, "Objection . . . irrelevant and inadmissible under Rule 402" or "Objection . . . hearsay and inadmissible under Rule 802." Speaking objections which suggest the answer to the witness are objectionable.
- Address all remarks to the Court, not to opposing counsel. Do not make disparaging or acrimonious remarks toward opposing counsel or witnesses. Counsel must instruct all persons at counsel table that gestures, facial expressions, audible comments, or any other

manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

- Only one attorney for each party shall examine, or cross-examine, each witness. The attorney stating objections during direct examination shall be the attorney recognized for cross-examination and the attorney recognized at side bar.
- Please review the guidelines for “Creating the Best Transcript Possible” with your entire trial team and witnesses before trial. This is available here:

https://www.wyd.uscourts.gov/sites/wyd/files/Creating_the_Best_Transcript_Possiblejbd.pdf

- If you desire an attorney room within the courthouse, please contact the Courtroom Deputy Abby Logan at least two weeks in advance of the trial date to check availability and to reserve the room.
- Avoid repeated, time-consuming side-bar conferences if at all possible; anticipate problems and address them with the Court before the jury arrives, or during regular breaks.
- Judge Freudenthal does not admit expert reports into evidence. They are hearsay and usually duplicative of trial testimony. The Judge also does not admit charts or summaries done by an attorney to capture a witness’ testimony unless the witness endorses the chart and there is a basis for admitting evidence that may duplicate trial testimony.
- “Demonstrative exhibits” cannot be used to get inadmissible information (like hearsay) before the jury.
- During jury deliberations, be available to return to court within 15 minutes or so. Counsel will be expected to provide two phone numbers for contact purposes to Abby Logan, the Courtroom Deputy.
- Privacy and Redaction Policy – counsel should be proactive in redacting from exhibits and avoiding testimony of the following: SS#’s, tax id #’s, financial account #’s (each of these should limit the number to the last four digits), names of minor children (use only initials), dates of birth (limit to year), and in criminal cases, the street addresses of witnesses, victims, parties, jurors and others (use only city and state).
- Use of wireless devices – see Court’s General Order.
- Counsel must inform the other party of the next day’s witnesses. Counsel must provide each other, the Courtroom Deputy, and the Court Reporter with a list of exhibits to be used with each witness every morning of trial. Failure to provide these lists may result in a fine.

- The following may **not** be said to the jury **at any time during the course of the case**:
 - The Golden Rule argument – improper appeal to sympathy that occurs when an attorney asks the jurors to place themselves “in the shoes of” the client.
 - Any statement of personal knowledge or opinion on the evidence, culpability, credibility of a witness, or justness of the cause.
 - Any blatant appeals to decide the case on sympathy, prejudice or bias, which would include comments about the relative size or wealth of a party.
 - Unjustified comments on the other side. Along this line, I consider it a violation to characterize the defense position as one of calling the plaintiff a “liar, cheat and fraud” unless the evidence supports such a comment.
 - In short, if what you are saying has nothing to do with the merits of the case, then you are treading on thin ice.

Address technology issues with the Courtroom Deputy ahead of trial. Also, at any time up to and including trial break periods, the Courtroom Deputy may request that special equipment used by counsel be tested in order to troubleshoot potential problems and avoid inefficiency and delays.