CIVIL JURY TRIAL PREPARATION CHECKLIST

FOR UNITED STATES DISTRICT COURT

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September 11, 2024

Introduction

When practicing in federal court, trial preparation for the plaintiff really begins with the drafting of the complaint. Each of your well-pleaded factual averments may be the basis for a stipulation of fact at trial. The recitation of your substantive claims should track the points for charge ultimately read to the jury at the end of the case. If you are the defendant, then the same applies to the drafting of your answer, affirmative defenses, and any counterclaims or cross-claims. Asking yourself "What is going to happen at trial?" at these earliest moments of the case will help guide you through discovery, dispositive motion practice, and trial preparation.

As trial approaches, however, you will need to specifically plan for the presentation of your case to the jury. Each case is different, every practitioner is different, and most importantly, every district court and judicial officer is different in respect to the specific steps they require parties to take before trial. This checklist endeavors to identify common district court and judicial preferences for meeting parties' obligations from the time of final pretrial conference through the moments before picking a jury. (What happens next – picking a jury, opening statements, examination of witnesses, qualifying experts, moving exhibits into evidence, objections, Rule 50 motion practice, the defendants' case, charging conference, closings, and taking the verdict – are all matters for another day and another checklist.)

Entire day-long CLEs can be taught on discrete issues in pretrial practice, for example, effective *voir dire* questioning or best practices for motions *in limine*. This checklist is more for practical use in preparing the lawyer for important milestones leading up to trial, and for ensuring the lawyer has the tools they need in their toolbox for effective trial advocacy. Readers are encouraged to closely review the Federal Rules, Local Rules and standing orders, as well as applicable case law.

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TRIAL PREPARATION CHECKLIST

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A. Final Pretrial Conference

1. Consult the Federal Rules. Federal Rule of Civil Procedure 16 states:

> Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.
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> Fed. R. Civ. P. 16(e).

2. Consult the Local Rules. Most federal courts have local rules (usually enumerated around rule 16) detailing what is required of litigants at the final pretrial conference, as well as the contents of any memoranda or final pretrial order to be submitted in advance.

3. Consult your judge's policies and procedures. The Local Rules of Civil Procedure for the Eastern District of Pennsylvania states: "Attorneys and *pro se* litigants shall consult the pretrial practices and procedures of the judge to whom their case is assigned." E.D. Pa. Loc. R. 16.1.[2] It is a must to familiarize yourself with your judge's preferences and requirements.

[2] This Local Rule, which was amended in May of 2023, formerly included detailed "Instructions for Preparation of Proposed Final Pretrial Order." The current Local Rule is shorter and directs litigants to individual judges' preference for the submission of final pretrial material.

B. Meet and Confer with Opposing Counsel

1. Final pretrial statement or order. Some courts' rules require individual submission of final pretrial statements. Others require the parties to submit a joint final pretrial order. In either event, the parties should meet and confer before submission to determine, at a minimum:

    a. Potential for settlement
    b. Stipulations
    c. Names and addresses of witnesses
    d. Use of expert witnesses
    e. Exhibit lists
    f. Use of deposition testimony
    g. Length of trial

2. Joint submissions. Pursuant to court or judges' rule, parties might be required to meet and confer to submit joint:

    a. Exhibit list
    b. *Voir dire*
    c. Jury instructions
    d. Verdict slip

3. You should not treat the obligation to meet and confer with opposing counsel as static. Conferences at any time before or during trial can result in stipulations, agreements on admission of evidence, and/or drawing battle lines over motions *in limine*.

C. Submitting Proposed *Voir Dire*, Jury Instructions, and Verdict Slip

1. *Voir dire*. Some courts use a standard jury questionnaire for *voir dire* in civil cases, and allow the parties to supplement it with additional questions germane to the case.[3] Others may require the parties to submit their questions. The submission of *voir dire* questions may be joint or submitted separately. When drafting *voir dire* questions, the practitioner should take care to craft neutral, open-ended questions.

[3] See e.g. W.D. Pa. Loc. R. 47.

This also often involves the parties crafting a neutral statement of what the case is about to be read to the jury.

2. Jury instructions**.** Courts will generally require the parties to submit either a separate or joint proposed set of jury instructions. A local rule or pretrial order will detail how the parties should present contested jury instructions. Generally, each point for charge shall be numbered and on a separate sheet of paper and submitted with corresponding legal authority. Model instructions can be found here:

    a. Third Circuit Model Instructions: https://www.ca3.uscourts.gov/model-jury-instructions

    b. State substantive law instructions for Pennsylvania: https://libguides.law.villanova.edu/PA_legal_materials/juryinstructions

    c. State substantive law instructions for New Jersey: https://www.njcourts.gov/courts/civil/model-civil-jury-charges

3. Verdict slip. Courts will generally require the parties to submit either a separate or joint proposed verdict slip.

D. Mark and Exchange Exhibit and Witness Lists

1. Format**.** Follow federal and local rules to ensure proper formatting of exhibit list and witness list. Typically, exhibit lists should be formatted as a table and specify:

    a. Who is designating the exhibit ("P" or "D")
    b. Exhibit number
    c. Description of exhibit
    d. Cross reference to Bates-stamped document exchanged in discovery or deposition exhibit
    e. Whether there is an objection to the exhibit

2. Impeachment. Exhibit list does not need to list exhibits that counsel plans to use solely for impeachment.

3. Authenticity and Admissibility**.** While compiling the exhibit list, the practitioner should make a separate list (not to be exchanged or submitted) identifying how they intend to get the exhibit admitted under the Rules of Evidence.

4. Exhibit binders**.** If using hard copies of exhibits, it is usually best to prepare exhibit binders for:
    a. Yourself
    b. Court (may require more than 1)
    c. Witness stand
    d. Opposing counsel
    e. For publication to the jury (of exhibits admitted into evidence)

5. Electronic exhibits - prepare shared file or zip drive of exhibits.

6. Exchange exhibits with opposing counsel.

7. Deliver a copy to the court (if required by rules).

8. Just ask. Most courts will allow communication with a clerk or courtroom deputy if you have questions about the preferable way to submit exhibits.

E. Notify Witnesses; Subpoenas

1. Client. Alert your client well in advance of trial, arrange time for trial prep.

2. Non-party witnesses. Send "save the date" letters to non-party witnesses advising of trial dates, arrange time for trial prep (if applicable).

3. Adverse witnesses. You may wish to make an attempt to reach agreement with opposing counsel about what adverse witnesses will be present at trial without a subpoena. If a subpoena is required, attempt agreement over acceptance of service. This give-and-take may allow the parties to negotiate days and times of attendance that are most convenient for the witnesses and parties.

4. Subpoenas for trial testimony

    1. Form federal trial subpoena available here: https://www.uscourts.gov/sites/default/files/ao088.pdf

    2. Trial subpoena must issue from the federal court where the action is pending. Fed. R. Civ. P. 45(a)(2).

3. Note well the jurisdictional requirements of Rule 45 of the Federal Rules:

> Subpoena… For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
> (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
> (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
> (i) is a party or a party's officer; or
> (ii) is commanded to attend a trial and would not incur substantial expense.
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> Fed. R. Civ. P. 45(c).

4. If a witness is outside the subpoena power of the court, then you may need to identify a different means to admit that witness' testimony. Is the witness "unavailable" such that a deposition can be used? Is remote testimony an option? See below.

F. Planning for Witness Testimony

1. It is important to identify issues concerning witness availability early, so you can adequately prepare to lay an appropriate foundation for admission of a deposition transcript, videotaped deposition, or request a trial deposition.

2. Is witness "unavailable," such that a party may use their deposition pursuant to Federal Rule 32? That rule states:

> Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:
> (A) that the witness is dead;
> (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
> (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
> (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

> (E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.
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> Fed. R. Civ. P. 32(A)(4).

3. Can you take a trial deposition ("*de bene esse*")? While not specifically mentioned in the federal rules, you may be able to take a trial deposition of an unavailable witness. Local rules or judicial preferences may provide for this. In any event, you will want to propose taking such depositions as early as possible before trial.

4. Deposition designations. Most final pretrial orders require the parties to identify portions of deposition transcripts by page and line number (as well as running time if using a video deposition). Some judicial officers require these designations to be highlighted. So, this often-time-consuming process should be completed as early as possible before trial. Any deposition designations should include the pages or the video demonstrating the witness being sworn under oath.

5. Remote testimony. Is remote testimony an option upon a showing of "good cause in compelling circumstances and with appropriate safeguards"?

    a. Federal Rule of Civil Procedure 43 states:

    > At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.
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    > Fed. R. Civ. P. 43(a).

    b. Courts employ a "strong default" for live testimony under Rule 43. *See J.D. v. Price*, 619 F. Supp. 3d 523, 530 (W.D. Pa. 2022) (denying motion *in limine* for remote testimony of several witnesses, finding good cause not shown).

    c. Is there a Local Rule or Judge preference speaking to remote testimony? See e.g. Chambers Procedures for U.S. District Judge John T. Dorsey (revised Jan. 11, 2024), https://www.deb.uscourts.gov/judge-john-t-dorsey ("The remote

attendance of live witnesses is permitted only upon a showing of good cause and in compelling circumstances. See Fed. R. Civ. P. 43 (a)."

d. Any remote testimony, if allowed by the court, should strictly adhere to court protocols for remote proceedings. See e.g. Protocols for Remote Video Proceedings in the United States District Court for the Eastern District of Pennsylvania, February 2024, available at https://www.paed.uscourts.gov/sites/paed/files/documents/Protocols%20for%20Remote%20Proceedings.pdf

6. Other Miscellaneous Witness Needs

   a. Phone numbers and emails – so you can keep in close touch with witnesses to make sure they will find the courthouse and testify on time
   b. A/V for video depositions
   c. Do you need someone to read a deposition transcript at trial?
   d. Do you need an interpreter?

G. Courtroom Technology

1. Every case has different needs. Every practitioner has different preferences. Every courtroom has different capabilities and different views from the bench and the jury box. Some modern courthouses offer everything you may need to present a visually impressive, technologically savvy trial. Others have not yet been modernized. *Be prepared for your courtroom.*

2. Follow the local rules and judge preferences as to courtroom capabilities. Be aware that those rules and/or the final pretrial order may set deadlines for you to request particular technology for your courtroom.

3. Most judges will allow you to consult a clerk or courtroom deputy with questions. Most will also allow you to enter the courtroom in advance of trial (by appointment) to arrange your A/V needs.

4. Generally, practitioners will want to ensure the courtroom will allow use of:

   a. Trial management devices and software, e.g. Trial Pad for use with an iPad and Apple TV
   b. A/V cables such as HDMI, USB, adapters for displays and projectors
   c. Extension cords and power strips

d. ELMO or other document display
e. Projector
f. Projector screen/ display
g. Whiteboard or flip-board
h. Blow-up exhibits or posters
i. Tripod for whiteboard or posters

H. Other Courtroom Necessities

1. Hard copies. In addition to case-specific documents and materials, counsel may also wish to include the following hard-bound material at trial for easy reference:

    a. Federal Rules with annotations
    b. Local Rules with annotations
    c. *Federal Trial Handbook: Civil*, Arthur (West 2023)
    d. *A Practical Guide to Federal Evidence*, Bocchino and Sonenshein (NITA 15th ed. 2023)
    e. Subject matter treatises
    f. Printed copies of important cases

2. Helping hands. Do you need:
    a. Second-chair trial counsel
    b. Paralegal support at trial
    c. A/V or IT assistance at trial
    d. Law clerk to assist with document management or arranging witness attendance

3. Necessary office supplies
    a. Pens
    b. Legal pads
    c. Stapler
    d. Exhibit stickers
    e. Folders
    f. Three-hole punch for binders

I. Motions in Limine

1. Consider the Purpose. "The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence." *United States v. Tartaglione*, 228 F. Supp. 3d 402, 406 (E.D. Pa. 2017). A motion *in limine* should not act as a substitute for "an improper motion for summary judgment." *See Bowers v. Nat'l Collegiate Athletic Ass'n*, 563 F. Supp. 2d 508 (D.N.J. 2008); *see also Davis v. Gen. Accident Ins. Co.*, No. 98-4736, 2000 WL 1780235 (E.D. Pa. Dec. 4, 2000).

2. Judicial preferences for motions *in limine* vary considerably, so special care must be taken in abiding the court's rules. Some judges require all disputes that can be anticipated prior to trial to be raised in motions *in limine*. Others limit the number of motions *in limine* to be filed by any party. Others require counsel to attempt to resolve objections to exhibits and testimony before the motion *in limine* deadlines, leaving for the court only those objections the parties could not resolve.[4]

3. Motions *in limine* must be accompanied by a brief, usually with a page limit. Judicial preferences may indicate that all motions be filed separately, submitted together in one document, or in groups (i.e. relevance, expert, authenticity, etc.).

4. If the court does not provide a deadline for motions *in limine*, consider asking for one.

5. Scrutinize the opposing party's exhibit list.

6. Scrutinize the opposing party's witness list, including experts designated to testify at trial.

7. Common bases for moving *in limine* on evidentiary issues include, but are certainly not limited to:
    a. Lack of relevance (Fed. R. Ev. 401-402)
    b. Probative value outweighed by a danger of unfair prejudice (Fed. R. Ev. 403)
    c. Character evidence; prior bad acts (Fed. R. Ev. 404)
    d. Privileges (Fed. R. Ev. 501-502)
    e. Witness competence or personal knowledge (Fed. R. Ev. 601-602, 701)
    f. Inadmissible expert testimony (Fed. R. Ev. 702-705)

[4] Compare the policies of Judge Anita Brody (https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/bropol.pdf), with Judge Joshua D. Woolson (https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/wolpol.pdf), and Mark A. Kearney (https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/keapol.pdf).

g. Hearsay (Fed. R. Ev. 801-807)
h. Authenticity (Fed. R. Ev. 901 and 902)
i. Best evidence rule / summary evidence (Fed. R. Ev. 1001-1008)

8. Whether or not required by court rule or judicial preference, it is a good practice to meet and confer, if possible, on anticipated motions *in limine* in order to identify items that are not disputed or can be resolved by stipulation, thereby limiting the number of motions submitted to the court.

J. Prepare Examinations

1. Opening statement (mindful of any time limits imposed by court)
2. Direct examinations
3. Cross-examinations
4. Expert examinations
5. Closing statement (mindful of any time limits imposed by court)

K. Legal Briefs for Trial

1. Trial brief. Some judges require the submission of a trial brief or memoranda identifying the important legal questions in the case. Others allow such briefing only upon request or by separate order. Check the judge's policies and procedures for information on what specifically is required, as well as the timing of submission and page length of any such brief.

2. Bullet briefs. Some lawyers prepare 1-2 page "bullet briefs" on discrete issues of law that may arise mid-trial.

3. Judgment as a Matter of Law. Federal Rule of Civil Procedure 50 states: "A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury." Rule 50 motions are routine in civil trials at the close of the plaintiff's case-in-chief and then again at the end of trial. Generally, the parties can anticipate the arguments to be made at this stage of the case and can prepare legal briefing in anticipation of the argument of Rule 50 motions during and after trial.

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