

FOURTH CIVIL JUSTICE REFORM SUMMIT

CREATING THE JUST, SPEEDY, AND INEXPENSIVE
COURTS OF TOMORROW

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MATERIALS

Presented by:



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THE ROLE OF LAWYERS IN ACHIEVING A JUST SPEEDY, AND INEXPENSIVE SYSTEM MATERIALS

- Stephen D. Susman, Pretrial Agreements with Opposing Counsel
- Stephen D. Susman, Trial Agreements with Opposing Counsel



(Style of Case)**PRETRIAL AGREEMENTS WITH OPPOSING COUNSEL**

Here is a list of pretrial agreements to try to reach with the other side before discovery begins. These agreements will make life easier for both sides and do not advantage one side over the other. Waiting until you are in the heat of battle to try to reach these agreements, one side or the other will feel disadvantaged. Place a check mark in the "Agreed" column for all the agreements that are reached. Any modifications or additions should be noted.

Item No.	Description	Agreed	Source of Agreement
1.	As to any discovery dispute, the lead lawyers will try to resolve by phone and no one will write letters to the other, including letters attached as pdf's to emails: just e-mails and phone calls. Each side will copy all of its emails to the email group distribution list provided by the other side		
2.	Before depositions begin, we will try to agree on how long the trial will last and ask the Court to give us a firm trial setting and to establish the length of the trial. Whatever time is allotted will be divided equally.		
3.	Depositions will be taken by agreement, with both sides alternating and trying in advance to agree upon the dates for depositions, even before the deponents are identified. Each side gets ___ hours to depose fact witnesses and only one of such depositions can last more than 3 hours. This does not include 30(b)6 depositions.		
4.	At depositions, all objections to relevance, lack of foundation, non-responsiveness, speculation or to the form of the question will be reserved until trial, so there will be no reason for the defending lawyer to say anything other than to advise the client to assert a privilege or to adjourn the deposition because the questioner is improperly harassing the witness. If counsel violate this agreement, the other side can play counsel's comments/objections to the jury		
5.	The parties will use the same court reporter/videographer, who agrees to provide specified		

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	services at discounted prices for the right to transcribe all depositions.		
6.	All papers will be served on the opposing party by e-mail. For purposes of calculating the deadline to respond, email service will be treated the same as hand-delivery		
7.	Documents will be produced on a rolling basis as soon as they have been located and numbered; if copies are produced, the originals will be made available for inspection upon request.		
8.	<p>If the case is in federal court, the parties will seek an order from the court, under FRE 502(d), providing: Each side must initially produce electronically stored information from the files of 5 custodians selected by the other side during an agreed period of time. Only documents which have a lawyer's name on them can be withheld from production and only if they are in fact privileged. Production does not waive any privilege and documents can be snapped back whenever the producing party recognizes they are privileged. After analyzing the initial production, each side can request electronic files from 5 other custodians. Beyond that, good cause must be demonstrated.</p> <p>Whether in federal court or not, the parties will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook/PST, Concordance or Summation, so it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made available to the other side. The parties will produce a Bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire e-mail (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail—so it's stand-alone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from whence</p>		

Item No.	Description	Agreed	Source of Agreement
	it came, (2) the directory or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension.		
9.	If agreement cannot be reached on the form of a protective order within 48 hours of the time they are exchanged, both sides will write a letter to the Court including each other's preferred version and, without argument, ask Court to select one or the other ASAP.		
10.	All deposition exhibits will be numbered sequentially X-1, X-2, etc., regardless of the identity of the deponent or the side introducing the exhibit and the same numbers will be used in pretrial motions and at trial.		
11.	The parties will share the expense of imaging all deposition exhibits.		
12.	We will exchange expert witness reports that provide the disclosures required by the Federal Rules. Neither side will be entitled to discovery of communications between counsel and expert witnesses or to drafts of experts' reports. There will be no depositions of experts unless an expert's report is incomprehensible or incomplete, in which case the party seeking clarification is required to establish the same by motion filed with the Court		
13.	The production of a privileged document does not waive the privilege as to other privileged documents. Documents that the other side claims are privileged can be snapped back as soon as it is discovered they were produced without any need to show the production was inadvertent.		
14.	Each side has the right to select 20 documents off the other's privilege list for submission to the court for in camera inspection.		
15.	We will agree to a briefing schedule and page limitations for all pretrial motions.		
16.	We will agree upon jury questionnaire.		

TRIAL AGREEMENTS

1. Real live witness lists will be exchanged on _____. Any witness who appears on a party's live witness list whom the other side has not deposed, can be deposed before the final pretrial
2. The length of the trial (excluding openings and closings) will be ___ days and that time will be split equally. Each party will get ___ to open and ___ to close.
3. Deposition designations will be deferred until 48 hours before a party intends to read or play a deposition. The opposition then has 24 hours to object and counter-designate, and the originally designating party has 4 hours to object to any counter-designations. The deposition may be used as soon as the Court rules on the objections.
4. Deposition counter-designations will be counted against the designator's time. Counter-designations for optional completeness will be played during the "direct examination" portion of the video playback. All counter-designations will be played in full after the "direct examination" portion of the video playback is completed.
5. An agreed Motion in Limine (see Exh. A) plus a briefing schedule for contested limine motions

6. We will exchange lists of exhibits (with each exhibit entitled simply Trial Exhibit and numbered sequentially as in the deposition transcripts) on ___ that will be limited to exhibits we in good faith intend to show to the jury during trial. Deadlines for exchanging exhibit objections and a time for lead counsel to meet and confer on them
7. All un-objected-to trial exhibits listed on the exhibit lists at the time the trial begins are deemed admitted when mentioned by any party during trial
8. All exhibits produced by a party are deemed authentic. All exhibits produced by certain third-parties are authentic
9. The parties will exchange proposed jury questionnaires on _____ and try to reach agreement before the final pretrial conference
10. An agreed juror notebook containing a glossary, cast of characters, chronology and any key documents
11. The jurors can take notes, can use their own notes during deliberations. When each witness takes the stand, the party calling that witness will provide each juror with a lined sheet of looseleaf paper with a photo and the name and title of the

witness, suitable for taking notes on and placing in the juror notebook.

12. Jurors can direct, through the judge, questions to each witness before he leaves the stand. Attached as Exhibit B is a protocol of doing this.
13. The parties shall notify opposing parties of the order in which they plan to call live witnesses each Friday by 5pm for the following week. The parties shall further notify opposing parties 36 hours before any particular witness is called live
14. Demonstratives (i.e., charts, power point slides, models and the like, that do not go back into the jury room) need not be listed on the parties Trial Exhibit lists. Those to be used on direct examination, opening or closing will be provided to opposing counsel before the session (morning or afternoon) in which they will be used.
15. The parties will exchange proposed preliminary and final jury instructions on _____ and _____, respectively; will ask the Court to give preliminary instructions; and will try to reach agreement on preliminary instructions before the trial begins and on final instructions before the court sets a charge conference. If a pattern instruction is available, it will be used.
16. The parties will ask the court to instruct the jury before final arguments

17. The parties will jointly request real-time reporting
18. The parties will share any courtroom audio-visual equipment and will provide each other electronic versions of whatever they display immediately after the display
19. Each side will be allowed ____ minutes of interim argument that can be used in increments no greater than ___ minutes when no witness is on the stand

EXHIBIT A

AGREED MOTION IN LIMINE

1. Privileged communications.

The intent or understanding of any parties' counsel, and the content of any attorney-client privileged or confidential communications, or lack thereof. FED. R. EVID. 501; TEX. R. EVID. 503. (Oral or written communications between any third party and counsel for one of the parties, which are non-privileged and non-confidential, may be inquired into, subject to objection on relevancy or other ground.)

Counsel shall refrain from asking questions that may tend to require an attorney or witness to divulge a client confidential or privileged communication, or which may tend to require an attorney or witness to have to object to answering on such grounds. FED. R. EVID. 403.

2. Questions about trial preparation.

Questions about how counsel prepared witnesses who they represent for their trial testimony.

3. References to the filing of a motion in limine.

Reference to the filing of any Motion in Limine by any party because such references are inherently prejudicial in that they suggest or infer that a party sought to prohibit proof or that the Court has excluded proof of matters damaging to a party's case. FED. R. EVID. 401-403.

4. Exclusion of evidence.

Any reference in any manner by counsel or any witness that suggests, by argument or otherwise, that a party sought to exclude from evidence or proof any matters bearing on the issues in this cause or the rights of the parties to this suit. FED. R. EVID. 401-403.

5. Statement of any venire person.

After the close of voir dire, reference to the statement of any venire person. FED. R. EVID. 401-403.

6. Questioning attorneys.

Any question by a witness, in front of the jury, directed to the adverse party's counsel. FED. R. EVID. 401-403.

7. Probable testimony of unavailable witnesses who will not be called by deposition.

That the probable testimony of a witness, who is absent, unavailable or not called to testify in the cause would be of a certain nature. FED. R. EVID. 401-403.

8. Any reference to any exhibit not being offered by any party.

Any reference to any exhibit not being offered by any party. FED. R. EVID. 401-403.

9. Pre-trial motions or matters.

Any pre-trial motions or matters, specifically including but not limited to summary judgment motions and the Court's rulings on such motions. FED. R. EVID. 401-403.

10. Attorney's objections.

In reading or playing videotaped depositions, any attorney's objections, comments, side bars, or responses to objections. FED. R. EVID. 401-403.

11. Settlements and settlement discussions.

Settlements entered into or discussed with any party, including a party to this lawsuit or to any other action and proceeding, as well as any and all statements made by any party in the settlement discussions during the course of those discussions. FED. R. EVID. 408.

12. Stipulating to any matter.

Any reference to the fact that counsel for any party may have declined or refused to stipulate to any matter. FED. R. EVID. 401-403.

13. References to any anyone sitting in the courtroom.

Any reference to any anyone sitting in this courtroom other than witnesses, counsel, the party's corporate representatives, or Court personnel. FED. R. EVID. 401-403.

14. Reference to other suits.

Any reference, comment, or statement by counsel, or by any witness called to testify, regarding any other suit, litigation, arbitration, or other legal or administrative proceeding. This would be irrelevant, confusing, misleading and unfairly prejudicial. FED. R. EVID. 402 & 403.

15. Alternative pleadings, theories, and requests for relief.

Any reference, comment, or statement by counsel, or any witness called to testify, regarding the fact that one party or the other may have had alternative pleadings, other theories of liability, or other requests for relief in this lawsuit than those contained in the latest pleading. Those matters are irrelevant and would be confusing, misleading and unfairly prejudicial.

16. Opinions not disclosed in expert report.

Eliciting any opinion from an expert that is not contained in that expert's written report. *See* FIRST AMENDED SCHEDULING ORDER ¶ 4 ("Any opinion or testimony not contained in the summary will not be permitted at trial.") [D.E. #43].

17. Location or size of any law firm.

Any suggestion as to where a particular lawyer or firm is from or how big it is.

18. The Wealth, Religious or Political Beliefs or Sexual Preferences of any party

Any reference to the wealth, religious or political beliefs or sexual preferences of any party.

EXHIBIT B

Questions by the Jurors During Trial

1. The court will read the attached instructions included to the jury after the jury is seated and may repeat any or all of these instructions to remind the jury of its role. These instructions explain the procedure that will be used to allow jurors to submit written questions.
2. After the parties have asked their own questions of each witness who appears and testifies, jurors will be given the opportunity to write any questions they may have for the witness on the attached juror question form.
3. To the extent possible, the court will take steps to maintain the anonymity of any juror who asks a question. The court will instruct jurors not to put their names on juror question forms. The court will provide each juror a juror question form in the jury box and ask each juror to pass the form to the bailiff at the end of the witness examination. The court will have every juror pass down his or her juror question form—even if the juror did not write a question on the form—in order to preserve anonymity.
4. Upon receipt of a written question from the jury, the court will allow the parties, outside the hearing of the jury, to make objections to the question on the record and obtain a ruling. On its own initiative or upon a party's request, the court may remove the witness from the courtroom before reviewing the question or allowing the parties to object to the question.
5. In its discretion, the court may reword the question or decide that the question should not be asked. If the court rewords the question, the court should read the reworded question and allow the parties to make objections to the reworded question on the record and obtain a ruling outside the jury's hearing.
6. If the court allows a verbatim or reworded juror question, the court may either ask the question or allow a party to ask the question of the witness. The parties will be allowed to ask any follow-up questions.
7. The court will include any completed juror question form in the record.

Attachments: 1) Instruction on Juror Questions
2) Juror Question Form

Attachment 1

INSTRUCTION ON JUROR QUESTIONS

After the parties have asked their own questions of each witness and before each witness is excused, you may submit in writing any questions you have for that witness. Any questions you submit should be about the testimony the witness has given. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You should not argue with the witness through a question.

I will review all your questions with the parties privately. Keep in mind that the rules of evidence or other rules of court may prevent me from allowing some questions. I will apply the same rules to your questions that I apply to the parties' questions. Some questions may be changed or rephrased, and others may not be asked at all. If a question you submitted is not asked, do not take it personally and do not assume it is important that your question is not asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give to particular testimony.

Remember that you are neutral fact finders and not advocates for either party. You must keep an open mind until all the evidence has been presented, the parties have finished their summations, and you have received my instructions on the law. Then, in the privacy of the jury room, you will discuss the case with the other jurors.

Any question you submit should be yours alone and not something you got from another person. That is because of my overall instruction that you must not discuss the case among yourselves or with anyone else until you have heard my final instructions on the law, and I have instructed you to begin your deliberations.

