

## GUIDELINES FOR CIVIL TRIALS

(\*\*Revised July 12, 2011)

**Trial Days.** Trial days generally run from 9:30 a.m. to 4:30 p.m., with two 15-minute breaks (morning and afternoon) and a 30-minute lunch break. To the extent practicable, the morning break is taken at approximately 11:00 a.m., the lunch break is taken at approximately 12:30 p.m., and the afternoon break is taken at approximately 2:45 p.m.

**Timed proceedings.** Civil trials are timed. Counsel must complete their case (opening statements, examination of witnesses, closing arguments) in the allotted time. Note that if evidentiary disputes have to be resolved by the court – whether before, during or after the trial day – the time the parties take to present the dispute will be charged against them (unless I determine that the dispute was frivolous or brought in bad faith, in which case the losing party may be charged for all the time dedicated to resolving the issue).

**Exchange of Witness and Exhibit Information.** The parties are responsible for exchanging final witness and exhibit lists at least 72 hours before trial is scheduled to begin. With respect to the order of presentation, a list of the witnesses to be called and exhibits to be offered through a party's direct examinations shall be given to opposing counsel at least 48 hours before their proffer. Formal notice need not be given regarding the documents to be used for cross-examination. Please keep in mind, however, that surprises in the courtroom generally consume valuable time and my patience; therefore, it is prudent to bring to my attention any expected controversies over a document prior to its use on cross-examination in the courtroom.

**Exhibit Lists and Exhibits.** On the first day of trial, each party shall give to the courtroom deputy that party's exhibit list (a preferred form is on the website). All exhibits shall be pre-marked. To the extent practicable, the parties shall identify duplicate exhibits and decide on an appropriate form of identification, whether as a joint exhibit or otherwise. In a jury trial, the "original" exhibits are given to the courtroom deputy once they have been admitted. In a bench trial, the "original" exhibits are maintained by the parties, as discussed *infra*. Demonstrative exhibits may be admitted by agreement of the parties, or if such exhibits accurately reflect and illustrate a witness' testimony and may be useful to the court and jury to understand said testimony.

**Witnesses.** Generally, individuals may be called as trial witnesses if their names are disclosed by any party during discovery, even if they are not deposed during discovery. If not deposed during discovery, however, the party offering such a witness must provide a proffer of the witness' proposed testimony and the witness then must be made available for a short (limited to two hours) deposition prior to testifying at trial.

**Sequestration** of witnesses is required, unless otherwise ordered or agreed to by the parties in advance. Parties are exempt from the court's sequestration order, as are corporate representatives and experts that were identified before jury selection.

**Documents.** Generally, documents may be used at trial if they are: (1) disclosed during discovery; or (2) not requested during discovery. Documents that are not in the possession or control of any of the parties may be used at trial if the nonparty custodian is disclosed during discovery and the documents are either disclosed or never requested. Documents shall not be admitted except through the testimony of a witness, and shall not be published to a jury until they are admitted exhibits. The "original" exhibits shall not be in binders.<sup>1</sup> The deputy clerk shall accept original exhibits in manilla folders labeled with the exhibit number.

**Impeachment.** Documents that constitute extrinsic evidence of prior inconsistent statements may not be shown to a jury unless they are admitted exhibits, pursuant to Fed. R. Evid. 613(b). If a lawyer believes that a trial witness has testified at trial inconsistently with his/her deposition testimony, the lawyer must: (1) give the witness and opposing counsel a copy of the deposition transcript; and (2) identify for same the alleged inconsistent statement to allow confirmation that the identified testimony in context is, in fact, inconsistent. If confirmed, the lawyer may then either read into the record or show electronically the identified statement.

**Evidentiary Disputes.** If proper notice of the witnesses and exhibits has been given, opposing counsel are expected to bring potential evidentiary disputes to my attention (prior to or at the end of a trial day) before the witness takes the stand and/or the exhibit is offered. Failure to conform to this procedure will result in having the objection denied without hearing.

**Deposition Excerpts.** Deposition designations shall be provided to opposing counsel at least 72 hours before their proffer. Counter-designations shall be provided within the next 24 hours. All disputes shall be brought to my attention before the deposition is to be offered. Unless otherwise permitted upon application by the parties, deposition excerpts must be read into the record (or, in the case of electronically recorded depositions, played for purposes of the record) and count toward a party's allotted trial time.<sup>2</sup> **To the extent possible, a copy of the designated excerpts should be give to the court reporter.**

**Demeanor of Counsel.** Counsel may not approach opposing counsel's table or the witness stand without court permission. Objections to evidence shall be limited to a

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<sup>1</sup>Counsel may present exhibit binders to witnesses, but the court will not accept exhibit binders as admitted exhibits.

<sup>2</sup>The deputy clerk will charge time to the party reading in the deposition or playing the electronic version thereof, unless informed of an alternate agreement.

short statement, e.g., “Objection, hearsay.” Sidebars are kept to a minimum. Counsel may move from the podium, but in no event shall get within three feet of the jury box.

**Transition Statements.** Counsel are encouraged to make transition statements, to introduce witnesses and their role in the litigation.

**Witness Demeanor.** Witnesses on cross-examination are expected to give “Yes” or “No” answers first, then may give a further explanation. Witnesses who abuse their opportunity to give explanations by giving long, irrelevant answers will have their time charged to the party offering them as witnesses.

**Expert Testimony.** If a party objects on the record to an expert’s testimony based on claims that the testimony falls outside the scope of his/her expert report, such objections shall be addressed during post-trial proceedings. If I determine that the expert’s testimony was impermissibly broad, the party proffering such testimony may be sanctioned, e.g., by having to assume the costs for a new trial.

**Mode and Order of Presentation.** Examination of witnesses shall be limited to direct, cross, and redirect examinations.

**Opening Statements.** So long as the parties agree on exhibits (demonstrative or to be admitted) to be used during opening statements, I will have no objection. If the parties cannot agree, the exhibits cannot be used. The parties shall exchange such exhibits by 8:30 a.m. the first day of trial.

**Closing Arguments.** Even if a party has more than two (2) hours remaining of its allocated time, no party’s closing argument may exceed two (2) hours in total (i.e., for both opening and rebuttal arguments). In order to help the jury, counsel shall identify evidence by exhibit number.

**Jury Instructions.** The parties must submit a joint set of proposed final jury instructions specific to their case. I use a standard set of general instructions, therefore, the parties need submit only those instructions that relate to a particular case. The courtesy copy of the instructions must be accompanied by a CD/DVD (the court is presently using WordPerfect x4 format; searchable .pdf files are also permitted).<sup>3</sup> During jury deliberations, each party is responsible for providing my courtroom deputy with a telephone number by which counsel can be accessed quickly.

**Post-Trial Briefing Following a Non-Patent Jury Trial.** Briefing shall conform to D.Del. LR 7.1.3, unless otherwise ordered.

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<sup>3</sup>Documents submitted in Word (.doc or .docx format) will not be accepted.

## **Post-Trial Briefing Following a Non-Patent Bench Trial.**

(a) **Content generally.** Briefing that follows a bench trial shall proceed as follows, consistent with the format for closing argument at a jury trial: 1) the party having the burden of proof on an issue shall file an opening brief that contains a statement of facts and argument as to the application of the relevant law to the facts; 2) the opposing party shall file its responsive brief, containing a statement of counter-facts and argument as to the application of the relevant law to the facts; and 3) the party having the burden of proof may file a reply brief.

(b) **Format.** No opening or answering brief shall exceed 40 pages, and no reply brief shall exceed 20 pages, in each instance, exclusive of tables of contents and citations.<sup>4</sup> All briefs shall otherwise comply with LR 5.1.1 and LR 7.1.3.

(c) **Schedule.** Counsel should address the timing of post-trial submissions with the court at the close of trial. If the parties cannot agree to a schedule to submit the above papers within a reasonable time, the following schedule shall be effective: (1) the opening brief(s) shall be due within 90 days of the filing of the last trial transcript; (2) the responsive brief(s) shall be due within 60 days thereafter; and (3) the reply brief(s) shall be due within 30 days of the responsive briefs.

### **(d) Specific rules for content.**

(i) Only **admitted trial exhibits** should be relied upon in post-trial briefing.

**\*\***(ii) Parties should not submit appendices with post-trial briefing. Admitted trial exhibits shall be identified by exhibit number (PTX-, DTX- or JTX-). The trial transcripts are given docket item numbers and should be referred to by this designation, *e.g.*, D.I. 400 at 123:1-10.

**(iii) If exhibits admitted at trial are not specifically addressed in the parties' post-trial submissions, they shall be deemed stricken from the record.**

(iv) The original admitted exhibits addressed in the post-trial submissions shall be delivered to the court in banker boxes, accompanied by an agreed-upon exhibit list, no later than two weeks following the submission of the last brief. Such exhibit list shall be docketed by the parties.

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<sup>4</sup>Absent prior consent, the court will not grant leave to exceed these page limitations; the court will automatically deem pages in excess of these limitations stricken from the record.

(e) **Electronic Media.** The parties may, but are not required to, file with the court an electronic version of their post-trial papers (on CD or DVD) **with** their courtesy paper copy (required per L.R. 5.3); if so elected, such electronic versions must be **searchable**. Electronic briefs may contain hyperlinks to copies of **admitted exhibits** or to legal authorities located on the same disc. All discs must be clearly labeled. Discs containing copies of highly confidential trial exhibits or briefs filed under seal shall so indicate. The court will apply the same limits of availability to the public with respect to the digital version of sealed documents as applies to paper copies.