

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**GUIDELINES FOR TRIAL AND FINAL PRETRIAL CONFERENCE
IN CIVIL BENCH CASES
BEFORE THE HONORABLE WILLIAM ALSUP**

FRCP 26(A)(3) DISCLOSURES

1. All parties are reminded of their disclosure duties under FRCP 26(a)(3), which begin **THIRTY CALENDAR DAYS** before trial. The FRCP 26(a)(3)(A)(ii) requirement for designating deposition transcripts, however, need not be done until later, as set forth below, although the name of each trial witness to appear by deposition must be so designated at least **THIRTY CALENDAR DAYS** before trial.

FINAL PRETRIAL CONFERENCE

2. At least **SEVEN CALENDAR DAYS** in advance of the final pretrial conference, please file the following:

(a) A joint proposed final pretrial order, signed and vetted by all counsel, that contains: (i) a brief description of the substance of claims and defenses which remain to be decided, (ii) a statement of all relief sought, (iii) all stipulated facts, (iv) a list of all factual issues which remain to be tried, (v) a joint exhibit list in numerical order, including a brief description of the exhibit and Bates numbers, a column for when it is offered in evidence, a column for when it is received in evidence, and a column for any limitations on its use, and (vi) each party's separate witness list for its case-in-chief witnesses (including those appearing by deposition) providing, for all such witnesses other than an individual plaintiff and an individual defendant, a short statement of the

1 substance of his/her testimony and, separately, what, if any, non-cumulative testimony
2 the witness will give (to be used to set time limits). Items (v) and (vi) should be
3 appendices to the proposed order.

4 (b) Any motion *in limine*, with the opposition, filed as follows: At least
5 **TWENTY CALENDAR DAYS** before the conference, serve, but do not yet file, the moving
6 papers. At least **TEN CALENDAR DAYS** before the conference, serve the oppositions.
7 When the oppositions are received, the moving party should collate the motion and the
8 opposition together, back to back, and then file the paired sets at **LEAST SEVEN**
9 **CALENDAR DAYS** before the conference. Each motion should be presented in a separate
10 memo and numbered as in, for example, “Plaintiff’s Motion in Limine No. 1 to Exclude .
11 . . .” Please limit motions *in limine* to circumstances that really need a ruling in advance.
12 In bench trials, usually three or fewer motions per side is sufficient at the conference
13 stage (without prejudice to raising matters *in limine* as the trial progresses). Each motion
14 should address a single topic, be separate, and contain no more than seven pages of
15 briefing per side.

16 (c) Copies of the Rule 26(a)(3) disclosures.

17 (d) Each side’s proposed findings of fact and conclusions of law.

18 (e) Trial briefs are optional.

19 3. *The above shall be submitted in Word format to whapo@cand.uscourts.gov and*
20 *in hard copies. All hard-copy submissions should be three-hole punched on the left, so the*
21 *judge’s copy can be put in binders. Please provide them at least seven calendar days prior to*
22 *the pretrial conference for the judge’s study and review* — THIS IS IMPORTANT.

23 4. At the final pretrial conference, counsel must take notes on rulings and promptly
24 submit a joint summary of all rulings in proposed-order format.

25 **PRETRIAL ARRANGEMENTS**

26 5. Should a daily transcript and/or real-time reporting be desired, the parties shall
27 make arrangements with Kristen Melen, Court Reporter Supervisor at
28 Kristen_Melen@cand.uscourts.gov.

1 examination (even if not offered in evidence and even if not noticed for use with the witness),
2 then in any follow-up examination by others, the exhibit may be used to the same extent as if it
3 had been timely noticed, subject to substantive objections. All notices shall be sent by fax or
4 electronically and be time-and-date verifiable. If counsel decides not to call a noticed witness,
5 then prompt written notice of the cancellation must be given. Impeachment exhibits are
6 ordinarily limited to statements signed by or adopted by the witness. Compliance with a two-
7 day notice period, of course, will not satisfy compliance with FRCP 26 or any other disclosure
8 rule.

9 10. The official tagged exhibit should be shown to witnesses — not supposed copies
10 or notebooks of supposed copies. Before the examination begins, retrieve the official tagged
11 exhibits to be used and have them at the ready. Using copies leads to discrepancies between
12 the exhibit actually introduced into the record (*always* the official tagged exhibit) versus the
13 stray before the witness. The required procedure also helps find any glitches in the official
14 tagged exhibits.

15 11. Always have your next witness ready and in the courthouse. Failure to have the
16 next witness ready or to be prepared to proceed with the evidence will usually constitute
17 resting. If counsel plans to read in a transcript of a deposition anyway, it is advisable to have a
18 deposition prepared and vetted early on to read “just in case.”

19 12. When there are multiple parties, counsel are responsible for coordination of the
20 cross-examination to avoid duplication. Stand at or near the microphone to ask questions,
21 straying only to point out material on charts or overheads. Please request permission to
22 approach the witness or the bench.

23 EXPERTS

24 13. A recurring problem in trials is the problem of expert witnesses trying to go
25 beyond the scope of their expert reports on direct examination. FRCP 26(a)(2) and FRCP
26 37(c) limit experts to the opinions and bases contained in their timely reports (absent
27 substantial justification or harmlessness). The Court regularly enforces these rules. FRCP
28 26(a) also requires that any “exhibits to be used as a summary of or support for the opinions”

1 be included in the report. Accordingly, at trial, the direct testimony of experts will be limited
2 to the matters disclosed in their reports. New matter may not ordinarily be added on direct
3 examination. This means the reports must be complete and sufficiently detailed. Illustrative
4 animations, diagrams, charts and models may be used on direct examination only if they were
5 part of the expert's report, with the exception of simple drawings and tabulations that plainly
6 illustrate what is already in the report, which can be drawn by the witness at trial or otherwise
7 shown to the jury. If cross-examination fairly opens the door, however, an expert may go
8 beyond the written report on cross-examination and/or re-direct examination. By written
9 stipulation, of course, all sides may relax these requirements. Material in a "reply" report must
10 ordinarily be presented in a party's rebuttal (or sur-rebuttal) case *after* the other side's expert
11 has appeared and testified.

12 14. Another recurring problem is the retained expert who seeks to vouch for the
13 credibility of fact witnesses and/or to vouch for one side's fact scenario. Qualified experts, of
14 course, are always welcome to testify concerning relevant scientific principles, professional
15 standards, specialized facts known within a trade or discipline and the like (so long as it is in
16 the report). They are also welcome to apply those principles and standards to various assumed
17 fact scenarios. This is so even if an opinion is given on the "ultimate issue." But they should
18 not try to vouch for one side's *fact* scenario. *i.e.*, witness believability.

19 15. There is an important exception. Experts and doctors who perform scientific
20 tests, site visits or treat victims, among other possibilities, may testify to their findings within
21 the scope of their firsthand knowledge. This is because they have made personal observations
22 and have reached professional judgments based thereon. Carrying this one step further, even a
23 retained expert may read a financial statement in evidence, watch a video in evidence, listen to
24 a recording in evidence and so on, and offer opinions based on the contents. This is because
25 the contents themselves are clearly defined.

26 16. As to damages studies, the cut-off date for *past damages* will be as of the date of
27 the expert report (or such earlier date as the expert may select). In addition, the experts may
28 try to project *future damages* (*i.e.*, after the cut-off date) if the substantive standards for future

1 damages can be met. With timely leave of Court or by written stipulation, the experts may
2 update their reports (with supplemental reports) to a date closer to the time of trial.

3 **USE OF DEPOSITIONS TO IMPEACH AND SHORT READ-INS**

4 17. Depositions can be used at trial to impeach a witness testifying at trial or, in the
5 case of a party deponent, “for any purpose.” Please follow the following procedure:

6 (a) On the first day of trial, be sure to bring the original and clean copies of
7 any deposition(s) for which you are responsible. Any corrections must be readily
8 available. If you are likely to need to use the deposition during a witness examination,
9 then give the Court a copy with any witness corrections at the outset of your examination.
10 This will minimize delay between the original question and the read-ins of the
11 impeaching material. Opposing counsel should have their copy immediately available.

12 (b) When you wish to read in a passage, simply say, for example: “I wish to
13 read in page 210, lines 1 to 10, from the witness’s deposition.” A brief pause will be
14 allowed for any objection.

15 (c) When reading in the passage, state “question” and then read the question
16 exactly. Then state “answer” and then read the answer exactly. Stating “question” and
17 “answer” is necessary so that the judge and court reporter can follow who was talking at
18 the deposition.

19 (d) The first time a deposition is read, state the deponent’s name, the date of
20 the deposition, the name of the lawyer asking the question, and if it was FRCP 30(b)(6)
21 deposition, please say so.

22 (e) Please do NOT ask, “Didn’t you say XYZ in your deposition?” The
23 problem with such a question is that the “XYZ” rarely turns out to be exactly what the
24 deponent said and is part spin. Instead, ask for permission to read in a passage, as above,
25 and read it in exactly, without spin.

26 (f) Subject to FRE 403, party depositions may be read in whether or not they
27 contradict (and regardless of who the witness is on the stand). For example, a short party
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1 deposition excerpt may be used as foundation for questions for a different witness on the
2 stand.

3 (g) Rather than reading the passage, counsel are free to play an audiovisual
4 digitized version of the passage but counsel must have a system for immediate display of
5 the precise passage.

6 **DEPOSITION DESIGNATION**

7 18. The following procedure applies only to witnesses who appear by deposition. It
8 does not apply to live witnesses whose depositions are read in while they are on the stand. To
9 save time and avoid unnecessary work, it is not necessary to make all deposition designations
10 before trial (as normally required by FRCP 26(a)(3)(A)(ii)). In the Court's experience, by the
11 time the read-in occurs, the proponent has usually reduced substantially the proposed read-ins.
12 Instead, the following steps should be followed.

13 (a) To designate deposition testimony, photocopy the cover page, the page
14 where the witness is sworn, and then each page from which any testimony is proffered.
15 Line through or x-out any portions of such pages not proffered. Also, line through
16 objections or colloquy unless they are needed to understand the question. Please make
17 sure any corrections are interlineated and that references to exhibit numbers are
18 conformed to the trial numbers. Such interlineations should be done by hand. The
19 finished packet should then be the actual script and should smoothly present the
20 identification and swearing of the witness and testimony desired. The packet should be
21 provided to all other parties at least **FIVE CALENDAR DAYS** before it will be used in court.
22 For the rare case of voluminous designations, more lead time will be required. Please be
23 reasonable.

24 (b) All other parties must then promptly review the packet and highlight in
25 yellow any passages objected to and write in the margin the legal basis for the objections.
26 If any completeness objection is made, the objecting party must insert into the packet the
27 additional passages as needed to cure the completeness objection. A completeness
28 objection should normally be made only if a few extra lines will cure the problem. Such

1 additions shall be highlighted in blue and an explanation for the inclusion shall be legibly
2 handwritten in the margin. Please line out or x-out any irrelevant portions of the
3 additional pages.

4 (c) The packets, as adjusted, must then be returned to the proffering party,
5 who must then decide the extent to which to accept the adjustments. The parties must
6 meet and confer as reasonable. Counsel for the proffering party must collate and
7 assemble a final packet that covers the proffer and all remaining issues. At least **TWO**
8 **CALENDAR DAYS** before the proffer will be used, the proponent must provide the Court
9 with the final packet, with any objected-to portions highlighted and annotated as
10 described above. If exhibits are needed to resolve the objections, include copies and
11 highlight and tag the relevant passages. Alert the Court on the record that the packet is
12 being provided and whether any rulings are needed. *Tag all passages that require a*
13 *ruling.* The Court will then read the packet and indicate its rulings. Ordinarily, argument
14 will not be needed.

15 (d) Counter designations must be made by providing a packet with the
16 counter-designated passages to the proponent at the same time any objections to the
17 original proffer are returned to the first proffering party, who must then supply its
18 objections in the same manner.

19 (e) When the packet is read in court, the examiner reads the questions (and
20 any relevant colloquy) from the lectern and a colleague sits in the witness stand and reads
21 the answers. When a video-taped deposition is to be played instead, the packets must still
22 be prepared, as above, in order to facilitate rulings on objections. The video should omit
23 any dead time, long pauses, and objections/colloquy not necessary to understand the
24 answers.

25 **REQUESTS FOR ADMISSIONS AND INTERROGATORIES**

26 19. Please designate responses to requests for admissions and interrogatory answers
27 in the same manner and under the same timetable as depositions.
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EXHIBITS

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2 20. As stated, FRCP 26(a)(3) disclosures regarding proposed exhibits must be made
3 at least **THIRTY CALENDAR DAYS** before trial and any objections thereto must be made within
4 **FOURTEEN CALENDAR DAYS** thereafter (or waived unless excused for good cause). The joint
5 list must be filed **SEVEN CALENDAR DAYS** in advance of the final pretrial conference (as per
6 paragraph 2 above). By designating an exhibit, a party waives any objection to authenticity
7 and any reciprocal objection, meaning any objection mutually available to both the designating
8 party and the opposing party if and when offered by one against the other. Therefore, the non-
9 designating party may offer the exhibit subject only to non-reciprocal objections. For example,
10 if P designates a record from a non-party, such as a telephone company, then D can equally
11 offer the same exhibit save for any objection that would be unique against D. To take a contra
12 example, if P designates D’s internal email, it will usually *not* be admissible at the instance of
13 D, there being a non-reciprocal hearsay hurdle when offered by D. If the designating party
14 states that the exhibit is only for a limited purpose, then the waiver extends only to the same
15 limited purpose. Notwithstanding the foregoing, FRE 403 objections are never waived. And,
16 any party may always attempt to lay full foundation to admit any exhibit designated by itself or
17 by any other party without regard to any waiver.

18 21. Prior to the final pretrial conference, counsel will please meet and confer in
19 person over all exhibit numbers and objections and to weed out duplicate exhibits and
20 confusion over the precise exhibit. Use numbers only, not letters, for exhibits, preferably the
21 same numbers as were used in depositions. Blocks of numbers should be assigned to fit the
22 need of the case (e.g., Plaintiff has 1 to 100, Defendant A has 101 to 200, Defendant B has 201
23 to 300, etc.). A single exhibit should be marked only once, just as it should have been marked
24 only once in discovery (if this Court’s guidelines were followed). If the plaintiff has marked
25 an exhibit, then the defendant should not re-mark the exact document with another number.
26 Different *versions* of the same document, e.g., a copy with additional handwriting, must be
27 treated as different exhibits with different numbers. To avoid any party claiming “ownership”
28 of an exhibit, all exhibits shall be marked and referred to as “Trial Exhibit No. _____,” not as

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“Plaintiff’s Exhibit” or “Defendant’s Exhibit.” If an exhibit number differs from that used in a deposition transcript, then the latter transcript must be conformed to the new trial number if and when the deposition testimony is read to the jury (so as to avoid confusion over exhibit numbers).

22. The exhibit tag shall be in the following form:

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA TRIAL EXHIBIT 100 CASE NO. _____

Place the tag on or near the lower right-hand corner or, if a photograph, on the back. The official record of admitted trial exhibits are the trial log sheets attached to the trial minutes for each day. The parties must jointly prepare a *single* set of all trial exhibits that will be the official record set to be used with the witnesses. Deposit the exhibits with the deputy clerk (Angie Meuleman) on the first day of trial.

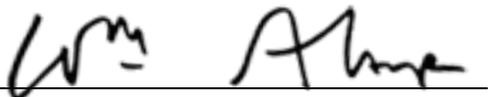
23. Please move exhibits into evidence as soon as the foundation is laid and it is fresh in the judge’s mind. Do not postpone motions and expect the judge to remember the foundation. Counsel must consult with each other and with the deputy clerk at the end of each trial day and reconcile exhibits admitted in evidence and any limitations thereon. If there are any differences, counsel should bring them promptly to the Court’s attention. *See* L.R. 5-1(g).

1 calendar (but it turns out later that there was only a settlement “in principle” and disputes
2 remain). Cases, however, cannot be taken off calendar in this manner. Unless and until a
3 stipulated dismissal or judgment is filed or placed on the record, all parties must be prepared to
4 proceed with the final pretrial conference as scheduled and to proceed to trial on the trial date,
5 on pain of dismissal of the case for lack of prosecution or entry of default judgment. Only an
6 advance continuance expressly approved by the Court will release counsel and the parties from
7 their obligation to proceed. If counsel expect that a settlement will be final by the time of trial
8 or the final pretrial conference, they should notify the Court immediately in writing or, if it
9 occurs over the weekend before the trial or conference, by voice mail to the deputy courtroom
10 clerk. The Court will attempt to confer with counsel as promptly as circumstances permit to
11 determine if a continuance will be in order. Pending such a conference, however, counsel must
12 prepare and make all filings and be prepared to proceed with the trial.

13 29. The Court strongly encourages lead counsel to permit junior lawyers to examine
14 witnesses at trial and to have an important role. It is the way one generation will teach the next
15 to try cases and to maintain our district’s reputation for excellence in trial practice.

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17 **IT IS SO ORDERED.**

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19 Dated: May 15, 2024.

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21 
22 WILLIAM ALSUP
23 UNITED STATES DISTRICT JUDGE
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