Hon. Gregory W. Alarcon
L.A.S.C.
Department 96

FINAL TRIAL PREPARATION

All lawyers are expected to act with the highest standards of civility and respect the time of the court and the jurors. See Los Angeles County Court Rule 3.26, Appendix 3.A: *Guidelines for Civility in Litigation*. The Court and staff are committed to ensuring that there is a fair and just trial in each case. They expect that you will also handle yourself in a manner that represents outstanding advocacy of which we all can be proud. Our judicial system only works because we are available to continually find jurors who indicate through voir dire that they can listen to both sides and remaining impartial.

You are required to comply with L.A.S.C. Rule 3.25(f)-(h) concerning preparation for the final status conference and trial.

You are required to file your pre-trial documents five (5) court days before the final status conference. "**Final Trial Preparation**. Counsel must attend a final status conference, which the court will set not more than ten days prior to the trial date. . . . (1) At least five days prior to this conference, counsel must serve and file **lists of pre-marked exhibits** to be used at trial [see Local Rules 3.151, 3.53 and 3.149], **jury instruction requests, trial witness lists,** and a **proposed short statement of the case** to be read to the jury panel explaining the case. L.A.S.C. Rule 3.25 (f) (1).

L.A.S.C. Rule 3.25(g)(2)-(8) allows the court, in its discretion, to require: "an **'in person' meeting of counsel** before the final status conference concerning the submission to the court of joint trial documents: the submission of trial documents to the court more than five days before the final status conference; a **joint statement to be read to the jury; a joint witness list; a joint exhibit list;** a set of **agreed jury instructions** (and, if necessary, a separate set of instructions to which there is disagreement), in the proper format with all changes and modifications applicable to the case in accordance with California Rules of Court, rule 2.1055, (i.e., correct references to the parties, no blanks, brackets, empty spaces, or inapplicable options); and an **agreed special verdict form** with interrogatories."

I. GENERAL DECORUM

1. **Ceremony**. It is common practice for counsel to be present when the jury enters or leaves the courtroom, and to rise while the jury is standing. Please rise when addressing the court, whether for the purpose of making objections or for any other reason.

2. **Formal Address**. "When addressing the trial judge in court, "Your Honor" is proper. "Judge," "Judge (Name)," "ma'am," or "sir" is improper." L.A.S.C. Rule 3.95. "During trial, counsel must not exhibit familiarity with witnesses, parties or other counsel, nor address them by use of first names (except children)." L.A.S.C. Rule 3.96.

3. **General Deportment**. "Persons in the courtroom, including the parties and counsel, must not indicate, by facial expression, shaking of the head, gesturing, shouts, or other conduct their disagreement with or approval of testimony or other evidence. Counsel must so instruct parties they represent, witnesses they call, and any persons accompanying them." L.A.S.C. Rule 3.120.

4. **Position at Lectern**. Opening statements, examination of witnesses, and closing arguments shall be from the lectern. Pacing, roving, etc., is not condoned by trial judges. Do not approach the bench, the clerk, or the witness box without specific permission. Statements by counsel, other than at the lectern, will be limited to the specific purpose for which permission was granted. Approach to the bench or witness box should not be made through the "well." Questions of witnesses will be asked only from the lectern.

5. **Testimony from Witness Stand Only**. Witnesses shall testify only from the witness stand, except with permission of the Court where necessary to answer specific questions by reference to free-standing exhibits.

6. **Facial and General Demeanor**. Counsel, parties, and witnesses should not exhibit, by nodding, facial expression or other conduct, any opinion about testimony or argument given by others. Counsel should strongly admonish clients and witnesses in this regard. L.A.S.C. Rule 3.120.

II. STATEMENT OF THE CASE

Mini-Opening Statement: In lieu of a statement of the case, the Court may allow counsel, if all counsel agree, to give mini-opening statements. These oral statements will be made prior to the examination of the jurors for hardship, cause or peremptory challenges and will be no more than five (5) minutes in length. They will each be a short version of an opening statement: it will state what the party believes the evidence will show, will not be argument, and will not take the place of opening statements. Cal. C.C.P. § 2.225.

III. JURY SELECTION

The "30-pack" method of jury selection is used. All prospective jurors are questioned before counsel makes any challenges. That is, 12 jurors are seated in the jury box and 8 are seated in front of the court. After attorney voir dire, challenges for cause are made on all 30 prospective jurors at side bar. Peremptory challenges are only made on the 12 jurors in the jury box. In voir dire examinations, counsel should not engage in the following: repeat questions already asked; instruct on the law or the facts; ask suggestive or argumentative questions; request a juror to impart his or her knowledge of legal principles or secure a promise in advance regarding the weight of any particular testimony of facts; use a juror as a "witness" to bring out facts or circumstances you expect to arise in the case.

Time Limits: The court generally allows a minimum of 45 minutes to voir dire the panel of jurors for each side. It will consider additional amounts of time for voir dire if the complexity of the case necessitates a longer amount of time for questioning. See Cal. C.C.P. § 222.5(b).

a. Hardship and Comfort Questions Prohibited

Counsel are not to ask "comfort" questions of the jury like inquiring whether they would rather be doing something other than jury service or whether they are likely to be bored if the case is complicated. Another typical "comfort" question is the question, "is there anybody who just doesn't want to be here for any reason?" California Judicial Administration Standards, Section 3.25(f). Further, with respect to hardship issues, be they vacations, meetings, doctors' appointments, or anything else, the Court will ask each juror to write out their hardship, give it to the courtroom assistant, and the Court and counsel will read and discuss each and every hardship. Counsel are not to inquire about hardships with the jurors unless it is an individual inquiry after reading and considering the note written by the juror.

- Counsel's questions on voir dire that attempt to precondition the prospective juror to a particular result are prohibited. Cal. JUD. Admin. 3.25(f).
- Counsel's questions on voir dire that ask questions to jurors about the applicable law are prohibited. Cal. JUD. Admin. 3.25(f).
- Counsel's questions on voir dire that ask questions to jurors about the meaning of particular words or phrases are prohibited. Cal. JUD. Admin. 3.25(f).
- Counsel's questions on voir dire that ask questions to jurors about the applicable pleadings are prohibited. Cal. JUD. Admin. 3.25(f).

b. Selection of Fourteen Jurors if There is a Stipulation

With the agreement of counsel, the court will select 14 jurors initially and, just prior to jury deliberation, two alternate jurors will be selected randomly. The Court has found that 14 jurors pay far more attention to a case and are more content with jury service as opposed to the traditional seating of 12 jurors and 2 alternate jurors prior to opening statement. Because it does not follow the traditional rule of selecting alternates immediately after selecting jurors, it requires the agreement of counsel. If there is no agreement, the court will employ the traditional method.

c. Jury Questionnaires

The court generally does not use written questionnaires, which are time consuming and rarely conserve valuable court time, but the trial judge could require a prospective juror to complete a questionnaire to assist the voir dire process. Cal. C.P.P. § 205(d). If questionnaires are submitted, they should not ask for personal information of the jurors. The information is to be used only for counsel to select jurors and not as a starting point to conducting internet searches intruding into jurors' privacy.

IV. EXHIBIT LIST

A **joint exhibit list** is required to be filed five (5) court days before the final status conference. Counsel must meet and confer to prepare a joint list of exhibits, which will be marked for identification and introduced at trial. All exhibits are to be exchanged early, long before jury selection. At the outset, counsel should seek agreement on stipulations for authentication of evidentiary foundations for exhibits in order to limit unnecessary testimony or witnesses (e.g., custodians of record where there are no real disputes.) Be sure to place your evidentiary stipulations on the record before trial begins. Conferring can also eliminate needless motions in limine.

Your joint exhibit list must conform to L.A.S.C. Rule 3.53, which provides: "The most efficient method of marking exhibits is the use of Arabic numerals in which each party is allocated a block of numbers to be used sequentially. For instance, plaintiff may be allocated numbers 1 to 200, the first defendant numbers 201 to 400, and the second defendant numbers 401 to 600.Documentary exhibits consisting of more than one page must be internally paginated in sequential numerical order to facilitate reference to the document during interrogation of witnesses." Documents with original page numbers, or numbers which were attached to deposition transcripts, should be re-numbered (e.g., 31-1, 31-2, etc.). **Avoid using letters for exhibits.** Each photograph should have its own exhibit number and be presented separately (e.g., Ex. 1-1, Ex. 1-2, etc.).

Three-ring binders with numbered divider tabs containing all exhibits marked for identification **must** be prepared prior to trial, including copies for the Court, Clerk, testifying witnesses and all counsel.

Please do not:

- Fail to premark your exhibits.
- Expect the clerk to keep track of your exhibits.
- Produce exhibits at trial which opposing counsel has never seen, unless they are used for impeachment.
- Fail to produce the requisite numbers of exhibit books.

Demonstrative evidence and blow-ups must be marked for identification and shown to or played for opposing counsel before trial. See, L.A.S.C. Rule 3.97 (Use of Graphic Devices in Opening Statements).

Depositions: All original depositions must be lodged with the court prior to the beginning of trial.

V. MOTIONS IN LIMINE

Motions in limine are due five (5) court days before the final status conference. Unless specially set as noticed motions, they will be heard on the day of trial. Thoughtful and well-conceived motions in limine can be useful in narrowing and defining issues at trial, particularly evidentiary and witness matters anticipated by counsel.

The trial attorneys should meet and confer before generating unnecessary motions in limine. See, L.A. Sup. Ct. Rule 3.57. Pre-trial stipulations on typical trial matters frequently settle differences before commencement of the trial. Stipulations can be reached on issues such as exclusion of witnesses, use of demonstrative evidence, document authenticity, insurance coverage, admission of agreed reports and records, bifurcation, mention of punitive damages, net worth, attorneys' fees, and other matters which may be the subject of unnecessary motions in limine. Counsel should commit to memorization the lessons on the uses (and abuses) of motions in limine, Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659, 669-671.

Some examples of impermissible motions in limine:

- Compelling a witness to conform their testimony to a preconceived factual scenario taken from pretrial discovery.
- Requesting the court to rule on day-to-day logistics and common professional courtesy.
- Requesting bifurcation of an issue or issues.

Although motions in limine must be **filed** five court days before the final status conference in this department, they will be heard on the day of trial unless specially set. **Oppositions** are due no less than five court days before trial. This includes requests for hearing under Evidence Code section 402. Each motion should be filed separately with its own points and authorities, supporting declarations and other evidence. Please do not staple or bundle the individual pleadings together with other motions in limine or file them as an "omnibus" series of motions in a single pleading.

The memorandum of points and authorities in support of the motion in limine should avoid boilerplate verbiage and citations. Vague motions to "exclude testimony" without specifics do not assist the Court. Use appropriate and brief citations to support legal authorities and evidence. An opposition to a motion in limine should be equally direct. The opposing party should not only state the grounds for opposition in the caption, but also provide the reasons for the opposition with pertinent legal authorities and factual reasons.

VI. JURY INSTRUCTIONS

A **joint** set of proposed, accepted and unaccepted jury instructions are due five (5) court days before the final status conference. Review the requirements specified in L.A.S.C. Rule 3.25. Knowing and understanding the law that applies and considering how the jury will utilize the jury instructions to decide your case is essential. For these reasons, determine which "standard" CACI instructions are applicable and what areas of law may require formulating special jury instructions.

L.A.S.C. Rules 3.170 -3.172 details your obligations for the preparation of CACI jury

instructions and the procedures that the Court will follow in reviewing proposed instructions with counsel. Carefully read these rules along with L.A.S.C. Rules 3.173 and 3.174 regarding use of the instructions by the jury.

Focus on "filling in the blanks" of the jury instructions particular to your case. Work with opposing counsel in fine-tuning the instructions for final submission by combing through each instruction and selecting the singular or plural, crossing out brackets, removing inapplicable options and perfecting applicable language. Be certain to note objections filed in a separate document for the court.

Regarding any case-specific special instructions not covered by the standard CACI instructions, be sure that these are clear and accurate statements of law with complete citations. Discuss all jury instructions with opposing counsel before your personal meeting under L.A.S.C. Rule 7.9(i), rather than just faxing a set.

Five court days before the final status conference, please file a "hard copy" of **jointly agreed instructions**, and each counsel's separate statement set of "not-agreed-upon" instructions with your objections. At the final status conference, the Court will review finalizing jury instructions. This will be completed on the first day of trial. **A computer disk in Word format of the agreed upon instructions should be brought to court on the first day of trial.**

VII. WITNESS LIST

A joint witness list with time estimates for direct and cross-examination is due five (5) court days before the final status conference. Make additional copies of the witness list for each juror. Confer with opposing counsel regarding drafting a single list of witnesses for trial. See L**.A.S.C. es 3.240, 3.241, 3.25 (g) (5)**. By listing the witnesses whom you really expect to call at trial, you can better plan which witnesses actually will be called and have them ready to testify.

VIII. DIRECT AND CROSS EXAMINATION

The court expects lawyers to examine witnesses in a professional manner and follow the Rules of Court and Los Angeles Superior Rules regarding civility and what constitutes an appropriate examination. Counsel shall not:

- Repeat the witness's answer to a prior question before asking another question.
- Talk over a witness.
- Interrupt a witness who hasn't completed the answer to the previous question.
- Exhibit familiarity with a witness by using their first name unless they are a child.
- Ask a witness their opinion as to whether another trial witness told the truth on the witness stand. *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1219-1220. (Determinations of witness credibility are for the jury, not a witness.)
- Indicate approval of, disapproval of, or disagreement with testimony by facial expressions or other conduct.
- Examine a witness from the witness stand.

IX. Attorney Created Demonstrative Evidence Tracking the Answers of Witnesses During Examination of Witnesses is Prohibited

Counsel are prohibited from using the direct or cross examination of witnesses as an opportunity to create demonstrative evidence by writing on butcher paper key answers of the witnesses asked in an attempt to preview to the jury what counsel believes are the highlight points from the testimony for his or her case.

The court has presided over dozens of jury trials where counsel uses valuable court time during their examination of the witness to argue their case by creating demonstrative evidence calculated to convey counsel's view as to what is important of the testimony of the witness for their case. Often each answer to a question is needlessly interrupted by counsel taking the time of the jurors to write down key words already heard by the jurors for the tactical purposes of counsel. The court sustains its own objection to this practice on the grounds that it is argumentative, time consuming, and unnecessarily confusing to the jury because the jury could erroneously believe the attorney created notes on butcher paper have any evidentiary value. See *Evidence Code Section* 352, *Los Angeles County Court Rules* 3.97, Wegner, Fairbank, and Epstein, *California Practice Guide Civil Trial and Evidence*, Section 8:472 (The Rutter Group 2006), *Los Angeles County Court Rule 3.112* (Counsel must not repeat the witness's answer to the prior question before asking another question.), *Evidence Code Section* 765 (The court exercises reasonable control over the mode of interrogation of witness as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment.) *Evidence Code Section* 320 (Power of court to regulate order of proof). *People v. Jackson* (1971) 18 Cal. App. 3d 504, 509 ("[t]he administration of justice would greatly benefit if more trial judges made use of their inherent powers as codified in Evid Code § 352, to control and, if necessary, terminate repetitious, time consuming and irrelevant testimony"). Code of Civil Procedure §128(a)(3).

X. CLOSING ARGUMENT

The court will ask for and enforce limits on closing arguments. Attorneys have a broad right to argue the evidence and their view of it. See *People v. Hamilton* (2009) 45 Cal.4th 863, 953. There are certain restrictions of argument that frequently occur, therefore the court will list certain improper arguments. This list is not complete:

Counsel shall not:

- Assert a personal belief in the truthfulness of a party or a witness. *People v. Martinez* (2010) 47 Cal. 4th 911, 958 (attorney may not vouch for the credibility of a witness based on personal belief).
- Asking the jury to "send a message" in a case in which the Plaintiff is not seeking punitive damages. *Nishihama v. City & County of San Francisco* (2001) 93 Cal. App.4th 298, 305.
- Making a "Golden Rule" argument, where an attorney asks the jurors to place themselves in plaintiff's shoes and award such damages as they would "charge" to undergo equivalent disability, pain and suffering. *Beagle v. Vasold (*1966) 65 Cal. 2d 166, 182, n.11.
- Not limiting Plaintiff's closing argument to matters raised in Defendant's

argument (sandbagging). *Cain v. State Farm Mut. Auto. Ins Co.* (1975) 47 Cal.App. 3d 783, 800-801.

XI. VERDICT FORM

An agreed proposed joint special verdict form with interrogatories or a general verdict form must be filed five (5) court days before the final status conference. In drafting a form of special verdict, counsel should rely upon the suggested formats set forth in the CACI instructions.

When discussing jury instructions before trial, counsel should decide whether a general or special verdict form will be requested. If there is agreement between counsel on one form or the other, a cooperative effort in formulating the verdict form is professional, efficient and economical. A proposed joint verdict must be filed with the pre-trial conference documents. If counsel cannot agree in advance on a verdict form, alternative verdict forms should be submitted. As with jury instructions, prepare a computer disk of the proposed verdict form and have it ready at trial.

Since the verdict form is what the jury ultimately will complete in deciding the case, give it adequate thought and consideration. It is never too early to start preparing this critical pleading. See, L.A.S.C. Rule 3.25(g). **A CD in Word format should be brought to court on the first day of trial.**

XII. POST VERDICT ISSUES

At the end of trial, the court will excuse the jury with the admonition that they may or may not speak to counsel. The Court will inform the jurors that if any issues come up later, they are free to contact the Court. The Rules of Professional Conduct of the State Bar forbid counsel from making comments to a member of the jury that are intended to 1) harass or embarrass the juror or 2) to influence the juror's actions in future jury service. Rules of Professional Conduct 5-320(D). An example of influencing a juror negatively for future jury service would include revealing matters excluded by the Court's ruling or doing anything else that would make that juror never want to sit on a jury again. CACI 5090 (June 2013) is a new jury instruction which counsel should be aware of because it emphasizes to the jury that any contact with jurors must be done only with the jurors' consent and conducted at a reasonable time and place.

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