

ROBINS  KAPLAN<sub>LLP</sub>

*Trial Essentials  
& Logistics:  
A Strategic Guide*

## ***Foreword***

This Guidebook compiles the trial experience and knowledge of numerous Robins Kaplan LLP partners, principals, associates, and paralegals. It is not intended to necessarily provide the “correct” answer in any given situation, but rather to prepare attorneys and paralegals for the issues they are likely to encounter or could consider when preparing for and during trial. If a conflict exists, always defer to the Court’s local rules, the Judge's orders, standing orders, pretrial orders, and practice tips for your Judge and jurisdiction.

## Table of Contents

PRETRIAL CONFERENCE .....	3
WITNESS LISTS.....	6
EXHIBIT LIST .....	7
EXHIBITS .....	10
USE OF EXHIBITS AT TRIAL .....	11
ADMITTED EXHIBITS.....	11
DEMONSTRATIVES .....	11
JURY ISSUES.....	12
VOIR DIRE .....	12
JUROR NOTEBOOKS .....	13
JURY INSTRUCTIONS .....	13
SEALING OF THE COURTROOM.....	14
THIRD-PARTY DOCUMENTS .....	14
TRIAL SUBPOENAS.....	15
DISCLOSURES/EXCHANGES .....	15
DEPOSITION DESIGNATIONS.....	17
WHAT TO BRING TO COURT .....	17
ENSURE PARALEGAL/LAA ALWAYS BRING.....	18
AFTER ARGUMENT AND INSTRUCTIONS .....	18
COURTROOM ARRANGEMENTS .....	19
JMOLS.....	19
CLOSING ARGUMENTS.....	19
POST-TRIAL BRIEFING.....	22
MISCELLANEOUS.....	20
TRIAL CALENDAR.....	21
HOT SEAT/TRIAL GRAPHICS CONSULTANT .....	21
TRIAL DECORUM & ETIQUETTE.....	20

### Appendix

A. TRIAL TRANSCRIPT INDEX .....	23
B. ADMITTED DOCUMENT TRACKING LIST .....	24

## Pretrial Conference

Before the Pretrial Conference takes place, consult the pretrial scheduling orders, speak to local counsel, or contact court staff about the Court's typical agenda for the pretrial conference:

- *Motions in Limine*
  - Will briefing and/or argument be allowed, or will the Judge simply wish to have the parties identify a list of issues?
  - *Daubert*/Expert objections: will the Court hold evidentiary hearings for each expert who has been challenged before testifying? How does the Court handle voir dire of experts?
- Outstanding dispositive motions
- Exhibit objections
- Objections during depositions

During the Pretrial Conference, consider covering the following topics:

### 1. Trial logistics

- Order of witnesses
  - Discuss how to produce witnesses from parties who may have settled out of the case
  - Discuss taking some witnesses out of order, such as if an expert has travel obligations
- Order/presentation of issues at trial
  - If a bench trial, will there be a rebuttal case? Or will you need to get all of your evidence into the record during affirmative examination?
- Confirm scope of disclosures/exchanges agreed to by the parties and/or required by the Court
- Are there trial breakout rooms available for the parties? If so, make efforts to reserve a room
- Logistical and procedural preferences:
  - Does the Judge want his or her own copies of exhibits? In what format?
  - How does the Court and courtroom clerk want to receive admitted evidence?
  - How will audio-visual evidence be played? Does the Court want to review the exhibits in advance to know what the jury will see?
  - What time does the courtroom open each day?

### 2. The Court's time and resources

- Find out if and when the Court has any hearings on other matters to attend to during your trial and will there be any breaks as a result
- Will the Court enforce time constraints?
  - Limited number of days for the whole trial?
  - Limited number of hours to present evidence/testimony per side?
- Will the trial be broken up?
  - How many days a week? Does the Court sit on Fridays? Day before holidays?
- Will the trial be in the same courtroom every day of the trial or will there be any changes?
- Time limits on opening and/or closing statements?
  - Is the Plaintiff allowed to reserve time?
  - If a bench trial, does the Court want closing statements or just a post-trial briefing?
- When does a trial day start and end? If a bench trial, is there court on weekends and evenings?
- Will there be morning and afternoon breaks? At what times? How long?
- How long does the Court usually take for lunch?
- How strict is the Court about enforcing this schedule? Will witnesses be interrupted?

3. Are there break out rooms for the parties during trial? (Refer to deputy clerk)

4. Will witnesses be sequestered? If yes, make sure any persons that could end up testifying do not sit in the courtroom. Be mindful of all conversations outside the courtroom

- Are fact witnesses treated differently than expert witnesses?
- Can you discuss testimony with the witness once tendered for cross?
- Is a live feed of the transcript to war room allowed?

5. The Court's preferences regarding presentation of evidence

- Does the Court want you to ask permission any time an exhibit is published to the jury?
- Are there limitations on what may be published? (Example, some Courts preclude publishing of deposition transcripts, medical literature, timelines – even when proper foundation is laid)
- Can the publication of exhibits to the jury occur prior to admission?
- Do documents used for impeachment need to be disclosed ahead of time or identified on the exhibit list?

6. Where does the Judge want attorneys to stand:

- When making objections?
  - How are objections made? Limited to Rule Number only (“Rule 404”) or short substantive statement (“Asked and answered.”)?
  - What is the Court's view of sidebar conference requests?
- When examining a witness?
  - Can witnesses get off the stand if they are to demonstrate or teach something?
- When giving opening/closing argument?
- Is permission required before approaching the witness?

7. Handling voluminous exhibits and bulk exhibit objections

- Will the Judge allow you to address exhibit objections for multiple documents that fit within the same category all at once?
- How does the Judge want to address exhibit objections during examination?
  - Lodge objections during examination?
  - Handle major objections prior to examination?
- Preview to the Judge any special exhibit issues you may have
  - e.g., voluminous exhibits: may propose they be introduced in its entirety on disc as Exhibit 39. Subparts used during testimony can be printed as Exhibits 39A, 39B, etc.
  - Other side may object that additional parts are necessary for context or completeness— you need to find balance. Do it in a way so the jury does not believe you're hiding something from them

8. Judicial notice issues

FRE 201 – allows facts to be introduced into evidence if they are not subject to reasonable dispute and subject to other requirements

- How does the Judge want to handle issues of judicial notice?

If the Judge takes judicial notice of certain facts, be sure they are included in the jury instructions (See FRE 201(g))

## 9. Technology issues and set up:

- Make sure you know what you would like from a technology standpoint before going to the pretrial. Bring your tech support person along if you are uncomfortable discussing specifics
- Does the Judge require you to seek permission to use/set up technology not already present?
- Is there existing courtroom technology the Court would prefer you use? What technology is available? Consider projectors, screens, document cameras, switches, anything you may need to run PowerPoints or Trial Director (PPT clickers, scan guns, laser pointers, etc.)
  - Does the Court have preferences regarding potential rewiring to set up the technology?
  - Does the Court have preferences where the wiring is placed (e.g., outside of jury's path)?
- Ask the clerk or deputy when you can access the courtroom to set up and test technology
  - Can you leave the technology set up throughout trial or take it down at the end of the day?
- Monitors
  - Are they available?
  - What size? How many?
  - Who has them?
    - Judge? Counsels' tables? Jury?
  - Are you allowed to bring larger monitors for the jury?
- Real-time monitors
  - Are they provided by the court reporter? Do you need to bring laptops/monitors?
- Where will your tech person sit?
  - Who is in charge of the display controls (the clerk or Judge)?
- Is a Court Order required to bring in equipment by the parties or vendors?
  - What information is needed (serial numbers)?
- Is a Court Order required to break down the equipment at the end of trial?

## 10. Judicial preference for receiving Offers of Proof (PRESERVE YOUR RECORD):

- Written?
- Read into the record outside the presence of the jury?
- Live testimony with the witnesses?
- Be firm and clear about needing to make your record, while maintaining credibility and professionalism

## 11. Will the Judge order the courtroom closed/sealed for certain confidential issues?

- Are there less restrictive options for dealing with confidential information, including source code and/or licenses, short of closing the courtroom (e.g., strategic positioning of display screens)?
- Limitations on information that should be elicited in open court?
- Redacting the transcript?
- Not publishing demonstratives on monitors that can be seen from the gallery?

See *Sealing the Courtroom* section for more detailed approaches

12. Potential scheduling conflicts for witnesses:

- What will be the order of witnesses?
- Will a witness be called out of order?
- Does the other side object to calling a witness out of order?
- Will a witness appear twice? (Unlikely: inefficient)
- Are you calling an adverse witness the other side is also calling?

If you call in your case-in-chief, will you agree the other side may conduct their direct in your case-in-chief?

**TIP:** If you take a witness in the opposing party's case-in-chief get agreement that you are not limited to the scope of the direct. If Plaintiff, be sure you do not, and Court knows you will not, rest your case until you get the witness

**TIP:** Confirm any agreements with counsel in the presence of the Judge as to which witnesses will be produced without a subpoena

13. Other issues:

- Pretrial Conference is a good opportunity to notify and preview to the Court an opposing party's intent to take strange positions or positions contrary to Court's orders

### Witness Lists

Ensure all potential witnesses were disclosed in Rule 26(a) Initial Disclosures

- Supplement Rule 26(a) disclosures, if necessary, before the close of fact discovery

With regard to experts, confer with opposing counsel if qualification/experience summaries should be included and whether to stipulate to include those summaries into the trial record

Prepare witness chart for **INTERNAL** purposes only, include:

- List topics (including which witnesses will testify to each element of your claims to ensure all elements are met)
- Identify evidentiary issues that may affect the content of witness testimony
- Timelines for testimonies
  - When is each witness expected to testify?
  - How long they are expected to testify?
- Exhibits to be used, per testimony
- Calendar/chart the time and method of witness arrival, room number, mobile number, prep date, location, and duration of stay
  - Circulate electronic file, or provide a whiteboard or flipcharts so the entire team has access to the information

## Exhibit List

If a document is not on your exhibit list you will likely not be able to have it admitted at trial. This certainly applies to documents to prove your case-in-chief/defenses; it may also, but not necessarily, apply for use on cross-examination for impeachment. Prepare exhibit list, include:

1. Key exhibits to prove your claims or defenses

- Outline reasons for admissibility for key exhibits (INTERNAL purposes only)
- Consider what you will use if those key exhibits are excluded from evidence
- Ensure all back-up documents are on the Exhibit List
- Ensure there is a witness that can testify to the issue or there is another mechanism in place for getting the facts into evidence (i.e., stipulation)

2. Determine what you will need to refute the opposition

- Documents you can use on cross
- If available, documents you might only use on redirect to rehabilitate your witness

3. Exhibit list is usually made up of:

- All documents cited in your expert(s)'s report. Expert reports are generally not admissible, but underlying documents supporting and/or cited in the expert's opinions might be
- All exhibits attached to your expert(s)'s report
- All documents marked as exhibits at fact and expert depositions you have taken
- All documents relied on in support of dispositive motions
- All exhibits in outlines for direct examinations
- All exhibits in outlines for cross examinations
- In a separate location, include those exhibits marked for identification only

4. Federal Rule of Evidence 1006 Summaries:

Unlike demonstratives, 1006 summaries are real evidence that will go back to the jury room

- Ensure you have both the 1006 summary and all the underlying materials supporting the 1006 on your exhibit list
- When using 1006 summaries, remember the rule requires that you make all originals or duplicates (i.e., the underlying documents supporting your 1006 summary) available for inspection or copying or both
- Because the exhibit summarizes voluminous evidence, the copies you are required to bring to the courtroom often results in stacks of boxes being brought into the courtroom
  - Preparing the underlying materials can be a massive undertaking of copying, sorting, categorizing, etc. Work with paralegals to start the process early
  - Consider where all the documents will be placed in the courtroom
    - Can the witness easily get off the stand?
    - Will it help the jury or be a distraction?
  - If the summary is undisputed try to obtain a stipulation from the other side to avoid the burden described above
- Consider that exhibits to expert reports may make good 1006 summaries

5. Placeholders for demonstratives, if needed

6. Some exhibit lists follow deposition exhibit numbers. This will save everyone time by not having to relearn new exhibit numbers
- Check with local counsel as to the Judge’s preferences or local rules, per section 7
  - The Court may ask the parties to collaborate on a unified set of exhibits, requiring that the exhibits used by all parties are numbered sequentially prior to trial
    - Be prepared for the Court to ask the parties to exchange objections to potential trial exhibits in a pretrial meet-and-confer setting to streamline the objection process at trial

7. Questions to ask local counsel or the court clerk:
- Does the Judge have exhibit numbering requirements (e.g., type and location of sticker)?
  - Can we use electronically assigned footers rather than an exhibit stamp?
  - How are demonstratives going to be numbered?
  - Does the Judge want all exhibits pre-marked?
  - Is there a Court limit to the number of exhibits on your exhibit list?
  - Does the Court require joint exhibits?
  - Does the Court preclude duplicates marked as exhibits?
  - Get their general view of objections

8. Questions to ask lead counsel:
- Do they have an exhibit order preference?
  - Do they have an order preference for key exhibits?

9. Deposition kit tips that will help you at trial:
- If you have a document for which there are multiple, identical versions produced, ensure the same Bates numbered document is used each time
  - Use the most legible version if there are multiple identical versions
  - Once one version is marked as an exhibit, continue to use that marked exhibit in subsequent depositions. (Don’t remark identical documents with different numbers). This will ensure testimony is consistently directed to the same document and avoids getting stipulations on the testimony later
  - While some duplicate exhibits may be marked, this should be the standard, as well as using a consecutive exhibit number sequence, rather than starting at “one” each time

10. Supplemental Exhibit Lists: use only when necessary. It gives the other side permission to do the same

11. Objecting to Exhibit Lists Suggestions: Don’t object to every exhibit; it looks bad. Better approach:
- Be selective and object only as needed
  - Make consistent objections to like exhibits, to the extent possible
  - Do not object to documents that appear on your own exhibit list
  - Make an agreement with opposing counsel to develop objection codes so they remain consistent and each side clearly understands the objections

12. Steps involved in resolving exhibit objections:

- Resolve as many objections as possible before the Judge’s ruling
- Make it as easy as possible for the Judge to consider ruling
- Limit as much as possible the number of exhibit-related disputes brought before the Judge
- Put exhibits into groups or buckets to consider and rule en masse
- Find out when will the Judge intend to rule on objections (Local counsel will know)
  - In advance of trial? During testimony?

13. Exhibit Stipulations to consider include:

- Authenticity
  - Certifications per FRE 902(13) and/or (14)?
  - Use Request for Admissions for authentication
- Business Records:
  - E-mails to/from an employee of a party
  - E-mail where the employee of a party is a recipient
  - Documents produced from a party’s files

14. Other objection considerations:

- To preserve an evidentiary issue for appeal, the attorney must object on the record
  - Objections to admission must be timely and specific
  - Objections to exclusion require an offer of proof
    - Description of the proposed testimony or presentation of actual evidence on the record outside the jury’s presence
  - Get clear and definitive rulings
  - Motions in limine are usually sufficient to preserve the objection for appeal when there is a definite ruling, BUT
    - Tentative or conditional rulings may not preserve the issue, requiring renewed objections when the evidence is offered
    - For unsuccessful movants in limine, some jurisdictions require objections to be renewed when the evidence is offered
    - Successful movants in limine must be prepared to make timely objections to the introduction of evidence that was excluded at pre-trial
    - If in doubt as to the status of the Court’s ruling in limine, seek timely clarification
    - Do not withdraw objections after the Court rules
    - If the context/landscape changes during trial, you may need to renew your objection or offer of proof based on the circumstances
- Know your jurisdiction’s rules for preserving objections, such as whether motions for mistrial or for a new trial are required
- 403 Objections: some courts only tolerate 403 objections in the most extreme situations
- Documents subject to pending *motions in limine*
- Multiple exhibits of the same objectionable document
- Documents similar in nature:
  - Licenses, medical records, tax returns, documents subject to 408 objections

## Exhibits

Electronic Exhibit Exchange: Typically agreed to by parties; often not provided for in the Court's orders

Consider electronic exhibit file format and pagination requirements

- Find out if the Judge has requirements for exhibit stamping and pagination
- Know any size restrictions and the format the Court prefers to receive the exhibits (PDF or TIFF; on disc or flash drive, etc.)

Make sure to review your electronic exhibits after they are stamped or endorsed with an exhibit number, look for:

- Illegible images, bad file formats, or load files
- Completeness
- Pagination issues, etc.

Electronic exhibit timing:

- Before agreeing to a date for exchange, allow for a realistic amount of time. Work with paralegals and E-discovery for timing. The exchange should be set as early as possible to avoid any of these issues. Remember to choose a date for exchange of lists and discuss format of the list (XLS preferred as it can be easily loaded into a database for searching)
- Allow time for finding, organizing, and numbering potential exhibits (most likely into Relativity)
- Electronic endorsements can be applied in lieu of a manual-applied stamp, but only if enough time is allotted for endorsing
- Allow for time to work out kinks in vendor's and your electronic exhibits before loading into Trial Director-- you may need to locate more legible document copies or the color version of a document
- Determine exhibits as far in advance as possible and use technology to streamline the exhibit list and exhibit endorsing. One known time-saving step is to transfer all deposition exhibits into a potential trial exhibit database as a first round of potential trial exhibits

Hard copy trial exhibits:

- How many copies will you need?
  - Does the Court want a full set of exhibits?
  - How many full sets of exhibits need to be submitted prior to trial? (one set typically required)
  - Does the Judge require an additional hard copy of all exhibits for chambers?
  - What format does the Judge prefer (binder, folder, etc.)?
- Consider whether or not they will fit in the courtroom
  - Can racks be brought in the courtroom?
  - Will they fit under benches or behind the barrier to the gallery?
- Does the courthouse have a break room for parties to store overflow?
- Can exhibit boxes be kept in the courtroom throughout trial or will they need to be removed each day?
- Find out how to deal with sensitive exhibits that may have special handing provisions
- The Main Set of Exhibits:
  - Designate one set of exhibits as the master copy. Keep it separate from other copies made. Treat this set carefully as the master copy. These should be accessible in the courtroom. Ask lead counsel where this set should be located
    - Determine who is in charge of this set (usually a paralegal). If attorneys need copies of something that cannot be printed from Livenote/Concordance/Local drive, ask the paralegal to make a copy. This ensures that an entire set is maintained at all times
    - Otherwise, at trial, all exhibits should be printed from Trial Director to ensure the most complete version of the exhibit is used
  - Discuss with trial team how many hard copies of original exhibits are needed in the war room
  - If you have sensitive exhibits (e.g., source code) does it require special storage like a lock box or a locked room?
  - Develop process for updating hard copy exhibits discussed above with changes when trial occurs, this ensures the set is up to date

## Use of Exhibits at Trial

Do not use documents that do not have an exhibit sticker on them

If using Trial Director, ask the attorneys taking witnesses if they need bar code versions of exhibits for their outlines. Barcodes may also be printed directly onto their outlines

## Admitted Exhibits

What will the process be for exhibit management in the courtroom?

Find out how the Judge/deputy wants to receive originals of admitted exhibits:

- Individually?
- Ongoing daily notebooks of admitted exhibits?
- Notebooks of admitted exhibits for each witness?
- Comprehensive notebook of all admitted exhibits?
- If a bench trial, only those exhibits that are explicitly recited in post-trial briefing?
- Box goes to the jury at the end?

What will the process be? Court may have its own preferred process. Some suggestions:

- Designate one person to track the identification and admission of all exhibits. (Just because an exhibit was identified, does not necessarily mean it was admitted into the record)
- Have one or more additional individuals tracking as back-up (e.g., one paralegal and one associate). If time allows, check admitted exhibit list against daily transcripts
- Track admitted exhibits and meet with clerk periodically (after a.m. session, at the end of day, or even next morning) to confirm everyone has the same list of admitted exhibits. Then at the end of trial, each party will submit a set of originals that will go back to the jury
- OR, on a daily basis provide the originals to the clerk the following morning

Maintain ongoing lists of admitted exhibits as they are admitted at trial

- Keep a running list of all objected-to exhibits and the Court's rulings on each, to the extent the Court decides to entertain objections on an ongoing basis. An opportunity may arise later to get a previously excluded exhibit into evidence
- Some courts (e.g., Eastern District of Texas) require a list of admitted exhibits be filed at the end of each court day. Check with local counsel on this or any similar procedural requirements

## Demonstratives

Ask lead counsel if they have a preference for board demonstratives or electronic slide decks. Remember, you are likely going to exchange demonstratives with opposing counsel before using them so they may be able to see what is coming to some extent

If you are exchanging your exhibits electronically, consider altering your exhibits in some non-substantive way to prevent opposing counsel from using them against you. A giant watermark usually works. Beware that removing colors on what you provide may draw an objection

To ensure quality and a great appearance, ensure boards are printed before leaving. Be aware:

- It can take a long time to get colors to display properly. Avoid problematic color schemes (e.g., sometimes gray shows up with pink or purple hues when blown up)
- Are you in a region that requires heavy duty boards ("gator boards" are often used in hotter, humid climates because foam core boards may warp)?
- Be aware of board surfaces that reflect light – it may be difficult for the jury, Judge, etc. to see
- Make sure the boards are not too big for the easels you have available
- Ensure you have considered placement for adequate juror and judge viewing

Confirm with paralegal/LAA that a local vendor is identified for printing boards that are added or not previously printed before trial

Demonstratives are normally not admitted into evidence. Refer to the Judge's preferences on reliance on demonstratives and whether you can cite to demonstratives in closings/post-trial briefings

### **Jury Issues**

Will all issues in your case be submitted to the jury?

- Ensure you know which issues will be reserved for the Judge (i.e., an equitable remedy, etc.)

Does the Judge permit jurors to:

- Take Notes?
- Are there times the jury will be precluded from taking notes? (E.g. opening statements in WI)
- Keep notes during deliberation?
- Ask the witnesses questions?

### **Voir Dire**

Ask local counsel how the Judge conducts voir dire and consider covering the topic at pretrial

- Does the Judge conduct voir dire and to what extent?
- Will the Judge allow counsel to participate or ask follow-up questions?
- Are counsel expected to come to agreement on voir dire?
- To what extent will the Judge allow parties to address the facts of the case?
- How long does the Judge allow each side for voir dire?
- Does the Judge require voir dire questions be filed in advance?
- Does the Judge require a joint statement of the facts be filed and read during voir dire?
- Does each plaintiff and each defendant participate?

Juror Questionnaires can shorten the voir dire process:

- Get samples of what the Judge has used before
- Ensure agreement with opposing counsel
- Get permission from Judge and submit for approval

Patent Cases:

- Will the Judge allow you to show a patent video?
- Are there claims and defenses not asserted in your case that could allow the parties to agree to shorten the patent video? (avoids inundating the jury with unnecessary and irrelevant information)

#### Voir Dire Procedure:

- Will the Judge provide juror/biographical information in advance? If so, when?
- How does the Judge seat the jury?
- How many jurors will be seated?
- How many potential jurors will be called?
- How many strikes does each side get after strikes for cause?
- How many strikes are allowed for each plaintiff and each defendant?
  - o Does the local rule preclude separate strikes for common interest parties?
- Are strikes limited to individuals "in the box" or across the board?
- How does the Judge handle strikes for cause?
- How does the Judge address further questioning outside the presence of other potential jurors?
- To preserve appellate review, objections to the jury selection process should generally be made before jurors are sworn

#### **Juror Notebooks - Typical in patent cases**

Notebooks are not always required by the Judge, but is often agreed to by the parties and distributed with the Court's permission. The contents may include:

- Cover: case caption and case number
- Copy of the patent(s)
- Glossary of terms and definitions (acronyms, technical terms, relevant terms from claims construction)
- Witness sheets (includes: witness name, picture and space for notes or questions)

Assuming no objections:

- Photos can be taken from website bios, still shots from depositions, or during witness prep
- Photos can be taken by the court clerk when the witness begins testimony
  - o Keep in mind not all witnesses will arrive for trial prior to it starting

Start the process early. Most arguments/objections will center around Glossary definitions

#### **Jury Instructions**

- How do the parties submit proposed jury instructions? Separate filings?
- Consider suggesting a charging conference early on for complicated issues
- Does the Judge require you meet and confer in advance of trial and then jointly submit proposed jury instructions on which the parties agree, and/or designate contested instructions in different colors (e.g., black for joint proposed instruction, blue for plaintiff's proposed instruction, and red for defendants' proposed instruction)?
- Does the Judge prefer form jury instructions (e.g., local patent jury instructions, state CIVJIGs) be used as a starting point?
- Whenever possible, include fulsome case citations for each of your instructions
  - o Check whether the Judge requires citations
- Does the Judge require the parties to submit preliminary instructions?
  - o Are there separate requirements for preliminary instructions?
- Does the Judge read the instructions to the jury before or after closing arguments?
- Always remember that the jury instructions are the only "law" that goes to the jury
  - o If a legal theory changes during trial, include a jury instruction on that new legal principle
- For appeal: to preserve an objection to jury instructions the objecting attorney must:
  - o Ask for requested instructions, AND
  - o Object to the instructions used
- Ensure that the charge conference is transcribed
- Object to a special verdict form if the Court does not use your form

## Sealing of the Courtroom

Do you have Confidential or Highly Confidential documents that you want to use in open Court ( e.g., source code, licenses, future business plans, financial information, competitive information, etc.)?

- Address this issue with opposing counsel to determine whether they will try to place obstacles to your ability to present evidence
  - Opposing party could preclude your ability to use certain evidence based on issues of confidentiality (or, in patent cases, issues related to patent prosecution bars)
- Are there documents/information that your client considers highly sensitive?
- Are there third-party documents subject to confidentiality obligations that you want to introduce?

1. Determine whether your Protective Order addresses the use of confidential information at trial

2. Find out the standard for sealing the courtroom or the record (Courts generally favor public records)

- But opinions may vary depending on the Court
- Within the same Court, opinions concerning sealing the courtroom may vary among different judges. Know your Judge’s preference by asking local counsel

3. Identify reasons to seal/close the courtroom, they may include:

- Highly confidential/sensitive business information
- Third-party documents to which the third party objects to their public disclosure, etc.

4. Be sure to highlight confidentiality and sealing issues in final pretrial conference

5. Find out local rules/customs on sealing the courtroom

6. Consider possible compromises:

- Agree to redacted versions of certain exhibits
- Agree to refrain from eliciting highly confidential information through testimony
- Strategically position display screens showing sensitive information like source code in a way that the gallery will not be able to see them
- Create summaries of evidence
- Enter into stipulations as to certain facts to avoid having to introduce highly confidential information
- Licenses or Settlement Agreements: Is it sufficient for the jury to just be made privy to certain key terms without revealing the identity of the licensee/parties?

## Third-Party Documents

If you had to seek permission to produce a document in discovery you will likely need permission to use the document at trial. Examples include:

- Licenses/agreements
- Confidential pleadings/documents from a previous litigation and covered by a dueling protective order
  - May limit use of exhibit to only the purposes of the other litigation

Check to see if there are permissions/notices required

- Send notice/permission letters **well** in advance of trial
  - What is “urgent” to parties in litigation is almost certainly not to a third party
- Document on one or both exhibit lists and anticipate that it will be introduced into evidence at trial
- Absent contractual obligations put onus on third party to move for a protective order, if it is a document you want to use
- Some instances may require cc’ing opposing counsel

Check if there is a Protective Order covering this situation

- Is the Protective Order silent as to trial use?
- Be aware that third parties may object and move for a protective order. Third parties may not view any Protective Order entered in the case as being sufficient

### Trial Subpoenas

Ask opposing counsel if they will agree to accept service of trial subpoenas for employees of parties or other witnesses they represent

- If not, work with local counsel to prepare and serve trial subpoenas
- If you're unable to serve a particular witness with a trial subpoena (e.g., witness who is more than 100 miles from the courthouse), arm attorneys attending pretrial hearings and conferences with the subpoenas they need just in case those individuals show up in court prior to trial

**Tip:** Usually there is no need to serve trial subpoenas upon witnesses that opposing counsel represents they will call at trial. But if opposing counsel has made such a representation make sure it is documented

**Tip:** Make your request to opposing counsel to accept service of trial subpoenas prior to the final pretrial conference or rulings on motions *in limine*/dispositive motions so you have an opportunity to address the issue with the Judge

In some cases opposing counsel will refuse to accept service for sensitive witnesses (e.g., executives, in-house counsel). Those individuals may stay away from trial to avoid service, but may still come to watch pretrial hearings/conferences

**Tip:** Have copies of the trial subpoena form saved to your desktop and blank hard copies printed so that they are always easily accessible

### Disclosures/Exchanges

Prior to trial propose schedule of exchanges for:

- Exhibits and/or demonstratives used in opening statement
- When witnesses and order of witnesses for direct are disclosed
- When exhibits for witnesses on direct are disclosed
- Deposition designations and exhibits and objections to the same
- Notice 24 hours prior to a party resting its case-in-chief
- Will the parties agree to disclose exhibits to be used on cross?

Does your proposed disclosure adhere to court expectations? The Judge may require a certain amount of time to consider objections. The exchange schedule should account for such time

### 1. Opening statements:

Seek agreement with opposing counsel to a time to exchange demonstratives and disclose exhibits, for which there are outstanding objections, to be used in opening statements. Some judges may require this exchange. If not required, determine whether you want an agreement to exchange opening statement power points in advance

**Tip:** Propose that exhibits for which there are no outstanding objections need not be disclosed for the purposes of opening statements. This is a good deal for cases where the opening statement will primarily rely on exhibits for which there are no objections. Despite the disclosure requirement, virtually nothing is disclosed to the other side

### 2. Witnesses and order of witnesses:

Remember that deposition designations are “witnesses” too for the purposes of disclosure

### 3. Exhibits for direct and cross:

- Include in your disclosure exhibits that you intend to introduce through deposition testimony the next day
- Once disclosed, group and create an outline of the opposing side’s exhibits for direct by category, if time allows
  - This creates a virtual outline of the other side’s direct for the attorney conducting cross

### 4. Objections:

- Start with the formal list of exhibit objections you previously exchanged
- Determine whether some or all objections can be dropped and/or maintained
  - If large/voluminous exhibits are disclosed to you, ask opposing counsel to identify what pages/sections they intend to use so you can better determine whether you have an objection and/or whether you can narrow your objections
    - This saves you time
    - It also tips you off to where they’re going with the exhibit
  - Ask attorney taking/crossing witness if they want (and how do they want) objections to their exhibits noted?
    - Marked in outline?
    - Separate list?
    - Color coding scheme in binder?

5. Witness Binders: binders containing copies of the exhibits disclosed and/or intended to be used on direct or cross, usually by agreement of the parties with permission from the Court. Copies of witness binders typically go to the witness, Judge, clerk, and opposing counsel

- Find out exactly who requires a copy?
- Quality check all binders page by page
- Ask lead counsel whether they want ALL documents disclosed as potential exhibits in the witness binder or just those exhibits they actually intend to use

Note: It is worth discussing the contents of the binders with opposing counsel because if they believe their binder will include ALL disclosed exhibits but only certain exhibits are included, they may blame you for the omission. Similarly, if you expect the other side to include all disclosed exhibits in their binders because you want to use some of them, you could be left without key materials

6. Don't forget to set up time to meet and confer on issues where there are objections. For example,

- 5 PM – the party directing the witness will provide notice of exhibits and demonstratives to be used during the examination
- 7 PM – the party crossing the witness will provide objections to exhibits and demonstratives to be used during the examination
- 9 PM – the parties meet and confer

7. Make sure opposing counsel is sticking to its disclosures

- Print copies of 1) your disclosure email and 2) Defendants' objections and bring to court with you daily (or vice versa)
- Track as testimony proceeds
- Alert responsible attorney if opposing counsel attempts to use exhibits they did not disclose or, if they are objecting to your exhibits when they failed to object the night before

Alternatively, if the opposing party makes an allegation that an exhibit or an objection was not disclosed, you will have evidence to the contrary

### **Deposition Designations**

- How does the Judge want deposition designations handled?
  - A book for the Judge and the attorneys with a clip report and attached exhibits?
- When does the Judge want to address objections to a designated deposition or accompanying exhibits?
- If not videotaped, who is allowed to read deposition testimony to the jurors?
  - Clerk? Actors? Attorneys?
- Allow time for clips to be cut following the Court's ruling on objections
- Determine process early and agree upon exactly what will be exchanged. Dealing with deposition designations is generally a time consuming pretrial activity
- Will the reading of designations be counted toward the Court's time allotment for you to put on your case?
- Ensure video tape testimony becomes part of the court record (especially for purposes of appeal)

### **What to Bring to Court**

1. Rules of Civil Procedure/Rules of Evidence

2. Witness script/outline and examination books

3. Copies of Pocket Briefs and/or legal research
4. Relevant correspondence related to witness/exhibit disclosures and objections
5. Copy of disclosed demonstratives <ul style="list-style-type: none"> <li>– Ensure opposing counsel is not cheating on their disclosures and using demonstratives that are different from what they disclosed</li> </ul>
6. Cheat sheet of elements - your causes of action <ul style="list-style-type: none"> <li>– Track as testimony proceeds to ensure nothing is missed</li> </ul>
7. Court orders relevant to witnesses or exhibits <ul style="list-style-type: none"> <li>– Did the Court partially exclude a witness' testimony?</li> <li>– Did the Court partially exclude particular exhibits?</li> </ul> <p>Be sure you can point precisely to the bounds of the exclusion or what was not excluded</p>
8. Chart of <i>Motions in Limine</i> rulings
9. Exhibit lists and objections in the courtroom
<b>Ensure Paralegal/LAA Always Bring</b>
1. Deposition transcripts (preferably min-u-scripts to minimize space requirements)
2. Hearing Transcripts
3. Notebook containing all orders
4. Expert Reports (with cross reference of report exhibits to trial exhibits)
5. Disclosure emails/lists
6. Multiple copies of the patent-in-suit or agreement (whatever key documents may be at issue)
7. Time tracking sheet (particularly for timed trial) <ul style="list-style-type: none"> <li>– A paralegal and/or associate should track the amount of time used at trial for timed trials</li> </ul>
8. Daily trial transcript(s)
9. Copies of all presentations or demonstratives that might be used that day
10. Box with various supplies, including: Post-It Notes (of various sizes), notepads, pens, highlighters (of various colors), flags (of various colors), etc.
11. Copies of all stipulations entered into by the parties
<b>After Argument and Instructions</b>
Does the Judge: <ul style="list-style-type: none"> <li>– Require counsel to be available by telephone?</li> <li>– Request that counsel remain at the courthouse during jury deliberations?</li> <li>– Take a verdict without counsel present? Then inform them of the result afterwards by telephone</li> </ul> <p>Be sure to:</p> <ul style="list-style-type: none"> <li>– Object to inconsistencies in the verdict before the jury is discharged</li> <li>– Poll jurors after the verdict</li> <li>– Be familiar with local rules concerning juror interviews and whether information can be obtained that may impeach the verdict</li> </ul>

## Courtroom Arrangements

Find out if you CAN bring to Court:

- Cell phones
  - Do you need to request the Court issue an order for attorneys allowing cell phones?
  - May they be checked into a locker at security?
- Laptops
  - Are there restrictions on laptops brought into court?
  - Does the courthouse have Wi-Fi?
    - Can you bring in your own connective device?
    - How many users at a time?
- Security issues
  - Does the loading dock need a prior signed order for materials coming in the day prior to trial and materials going out at the end of trial?

Technology:

- What technology will the Judge allow in the courtroom?

Other Logistics:

- When can you access the courtroom?
  - A day or two prior to trial to move in all the boxes of exhibits?
- Counsel's table
  - Are laptops (other than trial consultants and real-time laptops) allowed at counsel's table?  
In the gallery?
  - Is water provided? Are water bottles allowed in the courtroom and/or at counsel's table?
- Is there a side room/break-out room for breaks and witness prep/sequestration?
  - Can printers be used in the break-out room?
- What time does the courtroom open and how late will it remain open each night?

## JMOLs

- Determine who is responsible for drafting
  - Draft as the trial progresses
- Add evidence daily as trial progresses
- Find out if the Court is going to want to hear these argued
- Check the rules in your jurisdiction for requirements on the timing of pre-verdict and post-verdict JMOLs
  - Federal: two-step procedure, once before the submission to the jury and a renewed motion 28 days after entry of judgment
- Include all evidentiary ruling issues in a motion for new trial

## Closing Arguments

- Ensure there are no exhibits in the closing argument/outline that were not admitted during trial
- Objections to statements made during opening or closing arguments should be made immediately, and a request for a curative instruction or a mistrial may be needed

Tip: If there are concerns about objecting in front of the jury during opening or closing, consider seeking an order in advance preemptively foreclosing categories of statements or arguments

## Post-Trial Briefing

In bench trials, in complex cases, the Court will normally ask for a post-trial briefing. This is judge-specific:

- Does the Court want explicitly proposed findings of fact and conclusions of law? Or just briefing where you apply the law to the facts?
- Page limits?
- Does the Court want one or multiple rounds of briefing? A schedule of mutual exchanges?
- Agree on consistent citation format. “Trial Tr. at \_\_\_ (witness last name)” or, “Tr. Day 2 at \_\_\_”?
- Will the Court want to bring in the parties for closing arguments after the briefing is filed?

## Miscellaneous

- Keep a running list of erroneous rulings and other issues for appeal. You can choose later which issues to appeal and the list is helpful in drafting a Notice of Appeal. Remember to keep objecting whenever these issues arise over the course of trial
- If you intend to order daily transcripts, inform court reporter you will want daily transcripts in advance
  - They usually come in a.m. and p.m. editions
  - Determine how and to whom the transcript is delivered (evening e-mail, flash drive the following day, etc.)
  - Work with the Judge and court reporter to determine whether a live feed of the courtroom transcript to your war room is available during trial
  - Discuss the cost of daily transcripts with the client so he/she understands the value of daily transcripts
- If you do not intend to order daily transcripts, consider doing the following:
  - Get an agreement with opposing counsel that you will disclose any transcript requests during trial
  - Ask the court reporter to provide you with a copy of whatever portions of the transcript your opposing counsel orders
- Does your case have a high number of acronyms or unusual names? Consider making an acronym chart for the court reporter so he or she can finalize the transcript more quickly. Check in with the court reporter at the end of each day, after morning, or afternoon session to go over questions about names
- Have a paralegal/LAA set up folder in the team directory for daily transcripts so they are equally accessible to everyone
- Find out if one of your roles at trial is to review and code daily transcripts in LiveNote. This can be an easy way to later access particular categories of testimony and retrieve sections on request
- Have a paralegal index transcripts so you can quickly find the exact page for a witness’ direct, cross, redirect, etc.
- Determine how your witnesses and all of your boxes will get to court every day
  - Smaller towns usually warrant renting a car, large SUV, or van for the team
  - Even in large cities, consider a shuttle or van service, as taxi cabs to/from hotels or court may not be reliable and more costly

### **Trial Calendar**

Trial calendars allow you to track what disclosures must be made and when, and what topics will be addressed by the Court and when

- Update and circulate the calendar to the team daily so everyone is on the same page with respect to what needs to be done, who needs to do it, and by when it must be done

### **Hot Seat/Trial Graphics Consultant**

- Do you use an internal or external vendor? Consider the complexity of the case, the complexity of the demonstratives, and all appropriate factors when determining what you need
- Practice, practice, practice. Determine cues between the attorney and the hot seat operator to direct the witness/court exactly where you want to go with the evidence
- It is critical that the hot seat operator has a complete set of the latest witness script/outline from which to prepare

### **Meals**

A well-nourished trial team is critical to victory

- Designate a space in your war room or a separate conference room for meals
- Cater or order meals ahead of time—1 or 2 days before—at particular times
- Eat as a team but don't necessarily talk shop at every meal
- Before traveling to trial designate someone to circulate an email to determine food allergies and preferences and stock war room with food and drinks accordingly
  - o Consider client(s) and expert(s) in your hotel/war room plans

## Trial Decorum and Etiquette

- Be the first to introduce yourself to staff and the opposing counsel team. It shows a degree of control and confidence
- Keep a poker face at all times. No reacting, frowning, smiling, smirking, etc. Jurors see everything
  - The same goes for bench trials. Judges notice
- If you are observing trial that day, watch the jury and take notes (without staring at them constantly, of course). Lead counsel will appreciate your observations
- Absolutely no speaking to jurors or jury pool
  - If a juror or potential juror speaks to you, be courteous, smile, but immediately walk away and do not verbally respond
  - The same applies to your witnesses, clients, and corporate representatives. Ensure they are prepped the same
- Watch conversations in the halls, gallery, in security lines, and bathrooms
- Stand when the Judge enters and exits the courtroom. Generally, as a sign of respect, wait until the Judge is seated or the last juror is seated before you sit down
- Stand whenever you are speaking in open court, unless told not to do so by the Judge (some courtrooms will lose recording functionality if you stand) - even if all you have to say is “Objection.”
- Understand the expectations of the lead attorney with regard to your interactions with opposing counsel. Some will expect absolutely no chit-chat/small talk. Some will want you to “make nice” for a particular purpose
- When addressing the Court, maintain formalities. Witnesses and opposing counsel are always addressed and/or referred to as “Mr. \_\_\_\_\_,” “Ms. \_\_\_\_\_,” “Mrs. \_\_\_\_\_,” “Dr. \_\_\_\_\_,” etc., by attorneys and witnesses
- Some courts will not allow you to address your opposing counsel directly. Instead, all communication is directed to the Court—even if it means you say, “Your honor, I respectfully would ask Mr. [Opposing Counsel] whether he is prepared to address [X] at this time”
- Always be courteous with every person within and around the courtroom, especially the court officers/marshals
- Police your area of the courtroom: counsel’s table, your side of the gallery, the carts/stacks of your exhibits, etc.
  - Jurors will make judgments if these areas are messy. Pick up all the areas for which you are responsible at the end of the day and/or in the morning.
- Find out from local counsel whether the district has certain conventions with respect to attorney attire. Dress accordingly
- Always avoid dress that could be deemed provocative, revealing, or too flashy (e.g., unconventional ties, short skirts, expensive watches, etc.)

# Trial Transcript Index - Example

## Attachment A

Smith v. Jones  
Case No.: 256481.0001

Day	Trial Date	Witness	Transcript Pages
1	7/11/12 AM	Housekeeping Matters MIL Arguments	
1	7/11/12 PM	Plaintiff Opening Statement (Lueck) Defendant Opening Statement (Kim)	155 – 320 321 - 359
2	7/12/12 AM	Defendant Opening Statement (Kim) Logan – Direct (Lueck)	364 – 504 505 - 575
2	7/12/12 PM	Logen – Direct (Lueck)	586 - 713
3	7/13/12 AM	Elsworth – Direct (Beehler)	726 - 884
3	7/13/12 PM	Elsworth – Direct (Beehler) Elsworth – Cross (Kim) Elsworth – Redirect (Beehler) Elsworth – Recross (Kim) Elsner – Judge Bobrick Questions	890 – 955 956 – 1103 1103 – 1113 1113 – 1114 1114 - 1116
4	7/16/12 AM	Kilgore– Direct (Hamlin)	1131 - 1310
4	7/16/12 PM	Kilgore - Direct (Hamlin) Kilgore - Cross (Shen) Kilgore - Redirect (Hamlin) Kilgore – Judge Bobin Questions Mortensen - Direct (Lueck)	1316 – 1350 1350 - 1432 1433 – 1463 1463 - 1464 1465 - 1513
5	7/17/12 AM	Mortensen – Direct (Lueck)	1522 - 1714
5	7/17/12 PM	Mortensen – Direct (Lueck) Mortensen – Cross (Fisher) Mortensen - Redirect (Lueck) Mortensen–Recross (Fisher) Mortati – Judge Bobrick Questions	1720 – 1807 1807 - 1926 1926 – 1940 1940 – 1941 1941 - 1944
6	7/18/12 AM	Post – Direct (Beehler)	1953 - 2190
6	7/18/12 PM	Post – Cross (Kim) Post – Redirect (Beehler) Post – Judge Bobin Questions	2196 – 2356 2356 – 2394 2394 - 2419
7	7/19/12 AM	Levin – Cross (Panner)	2425 – 2570

