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## Chief Judge David R. Herndon

### Case Management Procedures

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## General Matters

The Standards for Professional Conduct Within the Seventh Federal Judicial Circuit are hereby adopted as the governing standards for matters pending before Chief Judge Herndon. *Pro se* litigants are likewise expected to abide by these instructions. The standards are published in the *Practitioner's Handbook* published by the Seventh Circuit Court of Appeals. Internet access to the standards may be obtained at the following URL:

[www.ca7.uscourts.gov/conduct.pdf](http://www.ca7.uscourts.gov/conduct.pdf)

When presenting a TRO and the need for an immediate hearing, upon being advised by the Clerk's office that Chief Judge Herndon is assigned the case or is to cover the TRO for another judge, contact the Courtroom Deputy, Sara Jennings, to make arrangements for such hearing. If the Courtroom Deputy is engaged in the courtroom, please contact Senior Chambers Counsel, Katie Hoffman.

Chief Judge Herndon will hear oral argument on motions in exceptional circumstances only upon his determination of such need. Parties who wish oral argument should make the request in writing and state the reason the exception exists in the motion at issue. If Chief Judge Herndon directs that oral argument should proceed, parties will be advised by written or telephone notice and further advised if a time limit on argument has been set. Time limits will be strictly enforced.

When parties or attorneys feel compelled to cite other federal trial courts as authority for a particular proposition of law, despite the complete lack of precedential authority thereof, the name of the trial judge whose order is cited should be included with the citation. Furthermore, the exact purpose in citing the case should be included since it is presumed that it is not cited as binding precedent on this Court. If a subsequent Seventh Circuit opinion, for example, relies upon the case for a reason pertinent to the action at bar, this Court should be so advised.

Unfortunately, counsel too often cites a particular case simply because specific language contained therein seems to be an apt quote for the intended argument regardless of its relationship to the actual holding in the case. Briefs of counsel are closely scrutinized by this chamber for integrity of reliance upon authority.

It is Chief Judge Herndon's practice to adhere to the Local Rules, with rare exceptions. Those occasions will generally be related to complex litigation. There is not an opt out procedure available to litigants.

Parties are invited to write Chief Judge Herndon, with a copy to opposing counsel, to ask the status of any motion or other issue under consideration in excess of sixty days (i.e. from the date of the last pleading relative thereto). Acceptance of this offer will help this chambers determine if a matter has gone unnoticed.

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## Communications with Chambers

Chief Judge Herndon employs three chambers counsel (a/k/a law clerks) rather than the traditional staff of a judicial secretary and two counsel. Therefore, when the need arises to communicate with chambers, contact the chambers counsel assigned to the case or, if it is a scheduling matter, Courtroom Deputy Sara Jennings. If you do not know the counsel assigned to your case, call the chambers main line, 618-482-9077, and ask to be connected with the chambers counsel assigned to the case.

Direct communication with chambers should only be for urgent matters wherein the usual filing process will cause undue delay. Likewise, such contact shall only be with the knowledge and consent of, or in concert with, opposing counsel or *pro se* litigants. Every litigant and all attorneys are expected to respect the rules against inappropriate *ex parte* communications with all members of chambers. The typical effort to violate this rule occurs when persons attempt to influence chambers counsel in some action, usually by inquiring about the chambers counsel's opinion regarding how she or he expects the Court to rule on a pending matter while simultaneously advocating a position. Appropriate communications with chambers counsel include scheduling matters (in the absence of the Courtroom Deputy and with consent of opposing counsel or parties) and the need for information regarding chambers-specific procedures and policies not clearly established herein. Chief Judge Herndon requires adherence to the Local Rules except in rare cases, for which the Judge will directly advise the parties. Therefore, questions about Local Rules and procedures covered by such rules should be addressed by reading the Rules and not directed to chambers counsel.

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## **Court Hours and Promptness**

Promptness is expected of everyone involved in the proceedings before the Court. The Courtroom Deputy Sara Jennings should be advised of any delay to be occasioned by one's tardiness.

During trial days, Court will be in session from 9:00 a.m. until 4:30 p.m., with morning and afternoon breaks and an hour and a quarter for lunch. Judge Herndon tries to break between noon and 1:15 p.m. for lunch. Counsel's diligence in keeping track of the time will greatly assist the Court in avoiding an interruption in the testimony at illogical points. However, counsel should not unilaterally stop at a point not reasonably close to the above times and announce he or she is "ready to break now." The Court will determine when to take a break after learning from counsel the anticipated time of examination remaining. Fridays are reserved for miscellaneous criminal matters and, unless otherwise advised, trials will not be scheduled on that day.

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## Facilities

Chief Judge Herndon's Courtroom 7 is equipped with state of the art evidence presentation equipment. Each counsel table is equipped with monitors and cables for accessing the evidence presentation system with counsel's own laptop computer. The media cart includes the facility to utilize a personal computer, document camera, video playback and audio cassette playback. A touch screen monitor on the media cart allows attorneys to highlight what is being displayed by the document camera with a touch of a finger and in multiple colors. The witness stand includes a touch screen monitor so that the record can be supplemented with a permanent representation of that which was highlighted. Monitors distributed throughout the jury box insure that each juror has the ability to view the evidence being presented. A large plasma screen is available to allow spectators in the gallery to view the evidence or as a supplement to any of the other monitors.

Utilization of this equipment, which is strongly encouraged by the Chief Judge, requires coordination on the part of counsel. Any evidence or presentations, such as PowerPoint, generated through counsel's pc will require advance viewing by opposing counsel, with the Court's ruling on admissibility before something is displayed to the jury. The Court has use of a master control panel to prevent something from being shown to the jury which should not be viewed by them, but failure to work out such problems in advance will only defeat one of the primary purposes of such equipment. Anyone wishing to be tutored in the use of this equipment should contact chambers staff to arrange a convenient time to go over the equipment. The vendor for the equipment is DOAR and familiarity with other DOAR-installed equipment will be helpful in the operation of the Court's system.

With the advent of this equipment, the timeworn custom of passing an exhibit to the jury will be disallowed except in the rarest of circumstances. Jury instructions will be displayed on all courtroom monitors as the Judge reads the instructions in order to aid in the jury's understanding of the instructions.

Counsel shall insure that parties and witnesses do not mingle with potential jurors or trial jurors. Prior to trial, the venire panel will be located in the jury assembly room and instructed to report directly to the jury deliberation room adjacent to the courtroom once they have been selected for trial. However, mingling is always a potential when the jurors arrive at and leave the courthouse or go to the smoking area.

Unless otherwise invited, counsel and parties shall not enter the chambers area for the purpose of utilizing the Court's telephone, copier or computer. Chief Judge Herndon does not employ a secretary and chambers staff will not perform secretarial functions for counsel or parties. There is a counsel conference room, equipped with a color copier, on the first floor of the courthouse.

Counsel should advise clients and witnesses to avoid contact with the jury and to avoid lingering in the area outside of the courtroom since the entrance to the jury room is just outside the courtroom entrance.

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## Media Relations

Chief Judge Herndon recognizes the right of the media to report the various proceedings in his court. Likewise, he acknowledges that everyone, regardless of position, has certain job duties to perform and the desire to pursue them along a path of least resistance. Consequently, his chambers will cooperate in every possible respect. If interested in the schedule for a particular case, media should call the Courtroom Deputy Sara Jennings or the chambers counsel assigned to the case. Other inquiries should be directed to the chambers counsel or Chief Judge Herndon.

If there is a procedure that this chambers can follow which will assist the media in the execution of its duties generally, please discuss your needs with chambers counsel or Chief Judge Herndon. However, with respect to requests for copies from files, media should make that request directly to the Clerk's office, where billing arrangements can be made. If the file is physically in chambers, preventing the Clerk's office from making the needed copies, let us know, and we will convey the file or order requested to their office.

The media should expect this chambers and every member of it to comply with Canon 3(A)(6):

A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.

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## Pleadings and Motions

This judicial district utilizes a CM/ECF system, which is mandatory for counsel and encouraged for pro se persons who endeavor to receive appropriate training.

The Local Rules require that certain motions shall be accompanied by a proposed order. Proposed orders relating to dispositive or appealable matters must contain proposed findings of fact or conclusions of law to comply with Seventh Circuit Rule 50. Proposed orders should be emailed directly to chambers ([DRHpd@ilsd.uscourts.gov](mailto:DRHpd@ilsd.uscourts.gov)) (or if it is a motion submitted to the magistrate, then to the appropriate magistrate's chamber's designated address for proposed orders). Please **DO NOT** directly electronically file proposed orders. When emailing proposed orders to chambers, please include the case name and number in the subject line.

In civil cases, requests for physical and mental examination of persons should be pursued with close attention to the requirements of Rule 35. Consequently, the motion shall set out the nature of the "good cause" precipitating the need for the examination, as well as the contemplation of the movant as to the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Responses thereto shall likewise address the same Rule 35 criteria. Proposed orders embodying those criteria shall be submitted as well.

FRPC 702 (formerly known as Daubert motions) motions should be filed soon after the objections to the expert are known as practicable. Motions in limine, in the opinion of this judge, are not the appropriate vehicle for pressing such objections to an expert because they are not timely. Many 702 motions result in a hearing and, if granted too close to a trial date, may result in a continuance of the trial.

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## Pretrial Procedures

Pursuant to local rules and custom, discovery matters, including discovery scheduling, are handled by the magistrate judges. Chief Judge Herndon gives great latitude to the magistrate judges to exercise their discretion in these matters. He will enforce any rulings made by them unless specifically overruling them pursuant to an appeal of the magistrate's ruling. Appeals of a magistrate judge's discovery orders do not automatically stay the enforcement of such orders nor do they defer the obligation of the party to make every effort to comply with the order unless an order by the magistrate or Chief Judge Herndon so states.

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## Final Pretrial Conference

Chief Judge Herndon utilizes his own Final Pretrial Order and Exhibit List form. These forms can be downloaded by linking over to [Final Pretrial Order](#) and [Exhibit List](#).

The Court expects faithful adherence to the rule requiring cooperation between the parties for completion of the Final Pretrial Order. This is especially important regarding the issue of the parties' concurrence on the facts not in dispute. Bad faith refusal to cooperate or failure to supply substantiation for refusal to agree will be dealt with firmly and with the sanctions available to the Court. Likewise, strict adherence to the various directions and instructions contained within the final pretrial order form is fully anticipated by the Court. Once the parties complete their proposed final pretrial order they should e-mail it directly to chambers in a Word compatible format with their /S signature at least three days prior to the date of the final pretrial conference. Please **DO NOT** electronically file the proposed order.

Parties are expected to have their exhibit lists attached to the proposed order at the time of the conference and already evaluated by opposing parties to determine issues as to admissibility. This is particularly important in the matter of foundational issues which may require additional witnesses and trial time. Parties are strongly encouraged not to raise frivolous foundational objections, particularly as an expediency to avoid examining and evaluating the exhibits in advance of the conference as required.

Unless prearranged, motions will not be argued at the final pretrial conference. Motions in limine should be filed in advance of the trial as directed by the final pretrial order form. Said motions should be fully briefed as Judge Herndon typically rules without oral argument. If oral argument is desired, the Judge should be so advised at the final pretrial conference. Further, the filing of motions in limine should be pursued with an eye toward receiving the Court's decision sufficiently in advance of trial to allow for logistic or strategic decisions impacted thereby.

Should counsel anticipate any novel or particularly difficult legal issues which will require extensive arguments outside the hearing of the jury, the Court shall be so advised at the final pretrial conference. The Court will then determine a time and forum for resolution of the issues involved and whether counsel will be required to brief the issues and when.

Final Pretrial Conferences are not typically scheduled in criminal cases. Counsel wishing such conferences should make a request through the Courtroom Deputy.

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## General Trial Procedures

Chief Judge Herndon views one of his more important roles to be the protector of the jurors' time and reducing the imposition on them to every extent possible. Every trial participant must be cognizant of the impact on the jurors of anything which could cause them to waste their time by not observing trial proceedings. Consequently, the Court demands that everyone accomplish anything which might cause a delay prior to the jurors arriving. Judge Herndon will make every effort to explain unavoidable delay to the jurors in terms that will not reflect on either party. A pattern of delay that is avoidable may result in the jurors be advised who caused the delay.

Counsel need not request the Court's permission to approach a witness. However, it is strongly encouraged that counsel question witnesses using one of the available microphones (primarily on the podium or evidence cart). Counsel who feel a need to step away from a microphone should face the witness and speak with enough volume so that everyone can hear. Remember it is your record that you are trying to preserve and it is your evidence you are eliciting, so let everyone have the benefit of it, here and in Chicago.

Sidebar conferences are strongly discouraged because juries routinely find them annoying. When sidebar conferences must be conducted, the courtroom technology will be utilized to allow the reporter to take down the arguments and ruling while the jury's hearing is screened by "white noise." When a dispute has arisen regarding whether a witness should be allowed to offer particular testimony, which the Court has disallowed, the witness should be instructed to stay pending further arguments out of the jury's hearing and at a standard break in the trial. To indicate one's desire to pursue further argument and to have the witness remain, counsel need only make the simple statement that further discussion at the break is requested and then during the break advise the Courtroom Deputy of the intention to persist in that regard.

This Court does not tolerate non-verbal communication from litigants. Unfortunately, a litigant who is disenchanted with testimony or the rulings of the Court may communicate his dissatisfaction by using facial expressions. Aside from showing disrespect for the proceeding at hand, such communication is a source of consternation for jurors. At the worst, it could be interpreted by the Court or jury as a means of influencing the jury outside the scope of the normal rules of courtroom engagement. Counsel should advise their clients to refrain from such activity. Should the Court discern a pattern of such activity, it will issue a warning to counsel. Further examples of this behavior may result in an admonishment directly to the litigant or, if sufficiently blatant and prejudicial, expulsion of the offending litigant from the courtroom. Unfortunately, even counsel have been observed utilizing nonverbal communications and worse audible communication to convey inappropriate matters to a witness or the jury. Naturally, such occurrences by members of the bar will be sanctioned in appropriate fashion.

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## Examination of Witnesses

Counsel are expected to plan trial time so as to prevent delays occasioned by a witness' absence. Witnesses should be present and ready to testify when called. The Rule on Witnesses is not automatic and must be invoked by either party or the Court. Counsel should not depend on their agreement to suspend testimony for a period of time as an accommodation to witnesses' schedules without consulting the Court. The Rule on Witnesses does not apply to expert witnesses.

It is inappropriate during the questioning of a witness to summarize or paraphrase another witness' testimony, except where appropriate during the examination of an expert witness. Likewise, it is inappropriate to ask one witness to assess the credibility of another witness' testimony. For example, do not ask, "So if John Doe said such and such, he would be lying?" Likewise, it is not appropriate to preface a question with what counsel represented in opening statement.

When attempting to impeach a witness with a prior inconsistent statement, the proper procedure is to establish whether the witness admits or denies making the prior statement. If the witness denies making the statement, counsel who wish to perfect the impeachment must call as a witness the reporter of the prior statement. It is not appropriate impeachment to hand a deposition to a witness and ask if it refreshes his recollection and then ask if he told the truth in the prior statement or the current testimony.

Aside from the Court's determination outside of the hearing of the jury under *Daubert* and its progeny, counsel should not (in the presence of the jury) tender a witness to the Court to "certify as an expert." The Court's only response can be that such a determination is within the province of the jury to decide.

Requests for the court reporter to read back testimony will be granted in rare circumstances and only when the integrity of the question in its original form is of the essence. Normally, when a witness asks that a question be repeated, it is because the question is too long to follow or the witness does not understand it for some other reason. The best course is to rephrase the question. In any event, all requests to read back shall be directed to the Court, the response for which will depend upon the above analysis.

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## Exhibits

In preparing exhibits, the parties should comply with the following instructions.

1. Exhibits should be pre-marked.
2. Use individual *arabic* numerals for each exhibit without relying on an alphabetic denomination. (For example use only #1, #2, #3, #4 **do not use** #1, #1a, #1b, #2, #2a, #2b).
3. Do not designate any exhibits as "group" exhibits.
4. Designate multiple page exhibits with one exhibit number, using page numbers for further identifications.
5. Do not group sets of multiple photographs.
6. Give each photograph a separate exhibit number.
7. Do not assume that the Court will allow any exhibits to be passed among the jurors.
8. Publication will be handled by evidence presentation technology or by use of juror notebooks.

Should it occur that an exhibit must be marked during trial, the exhibit shall be handed to the Courtroom Deputy clerk for marking. Leave need not be sought to approach the clerk. The court reporter does not mark exhibits.

In order to avoid confusion, counsel should move, while in his or her own case, for admission of an exhibit contemporaneously with the particular testimony establishing its admissibility. Counsel should maintain a list of admitted exhibits for comparison with the clerk's when a question arises regarding admissibility or whether an exhibit is to be sent to the jury.

Admitted exhibits shall be placed on the table immediately in front of the clerk. Counsel who remove any exhibits are responsible for returning the exhibits promptly after their use.

No marking on any exhibit of an opposing party shall be made without the agreement of that party. In the case of such marking, counsel should clearly state for the record the exact nature of the marking.

Counsel shall examine all exhibits which are to be sent to the jury room prior to said conveyance. Failure to do so may waive an objection to the jury's access to such an exhibit.

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## Jurors

Every effort must be made to avoid contact with jurors or potential jurors. Jurors must utilize public hallways and elevators. Counsel, in addition to being constantly aware of the potential for the presence of jurors, must advise clients and witnesses not to speak about the case in the common areas of the building. Any inadvertent contact must be reported to Judge Herndon or his Court Security Officer immediately.

Neither counsel nor parties shall be allowed to retain any of the computer printouts or questionnaires with juror demographic information. Following a jury verdict, Judge Herndon often speaks to the jury and will gladly discuss appropriate portions of that conversation with counsel. The Local Rules prohibit counsel and litigants from speaking with the jury.

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## Jury Instructions

The parties must submit jury instructions by 9:00 a.m. on the first day of trial. The parties shall tender to the Court an original and one copy of each proposed instruction. The originals shall be on 8½" x 11" plain white paper without any designation or number. The copies shall be numbered, shall indicate which party tenders them, shall contain a source (e.g., "IPI 2.01"), and shall include a legend indicating whether the instruction was:

\_\_\_\_ withdrawn \_\_\_\_ given \_\_\_\_ given as modified \_\_\_\_ refused.

Instructions also must be submitted to the Court on disk in Word format. Counsel shall provide copies of all proposed instructions to opposing counsel at or before the time they are tendered to the Court. Counsel should submit to the Court copies of any cases relied on as authority for jury instructions.

The verdict forms shall have enough lines for all jurors originally selected for the trial to affix their signature with the top line designated for the foreperson.

Near the conclusion of the evidence the Court will hold an instruction conference. However, prior thereto and at a time that will not delay the Court's conference or the trial, counsel shall meet and confer for the purpose of determining which instructions shall be given by agreement. During the initial portion of the instruction conference, while off the record, the Court will inquire as to the areas of agreement and dispute. For those instructions in dispute, the Court will listen to argument and then decide which instruction will be given. In trials where counsel have demonstrated a propensity for disagreement, the Judge likely will consider the instructions tendered and any others necessary in order to determine which are to be given without prior consultation with counsel. After determining the complete set of instructions to be read to the jury, the Court will, on the record, announce formally which instructions it intends to give. Each party will be given an opportunity to make his argument relative thereto, and the Court will announce whether its prior decision stands or whether it has been persuaded to change its ruling.

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## Objections to Questions

In objecting, counsel should simply advise the Court of the grounds for the objection, without argument or speaking beyond the bare grounds. Should the Court desire argument relative thereto, it will so indicate.

Sidebar conferences are strongly discouraged. When a dispute has arisen regarding whether a witness should be allowed to offer particular testimony, which the Court has disallowed, the witness should be instructed to stay pending further arguments out of the jury's hearing and at a standard break in the trial. To indicate one's desire to pursue further argument and to have the witness remain, counsel need only make the simple statement that further discussion at the break is requested and then during the break advise the Courtroom Deputy of the intention to persist in that regard.

Where more than one attorney appears for a given party, the attorney who handles the direct examination of a witness shall also interpose objections when the witness is being cross-examined. The attorney who will cross-examine shall be the one to interpose objections during direct.

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## **Opening Statement and Closing Argument**

Any exhibits which counsel wish to use during the opening must first be shown to opposing parties and a determination of whether there is agreement for its use. In the event of disagreement, the Court will only allow the use of the exhibits for which admissibility can be determined promptly and without causing a delay in the start of the trial. Electronic demonstrative aids that do not involve exhibits to be introduced during trial, such as PowerPoint, must be shown to opposing parties and the Court for evaluation of its reasonableness.

Counsel should maintain a reasonable distance from the jury, but are not required to confine themselves to the podium. However, if the jury or the court reporter has difficulty hearing counsel, the podium and direct use of the microphone will be required.

The Court does not restrict the time spent in closing arguments. However, each counsel shall agree on the time to be allowed each, and each will then be confined to that time period. The Courtroom Deputy will give warnings as requested.

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## **Venire and Voir Dire**

Prior to seating the venire panel, each potential juror is required to fill out a questionnaire which will be given to each party. You can obtain a blank copy of the questionnaire upon request of chambers or the jury administrator. Likewise, a copy can be downloaded by linking to the [juror questionnaire](#).

The Court will conduct the initial voir dire. Following the Court's voir dire, each party shall be given the opportunity to inquire of the panel. However, if either side would like the Court to ask particular questions of the panel, such questions should be submitted to the Court prior to the seating of the panel, with a copy provided to the other parties. In the case of pro se parties, the Court will conduct all voir dire itself.

At the conclusion of all questions, the panel shall be excused from the room. Thereafter, the Court will entertain any cause challenges, followed by peremptory challenges. In criminal cases, the peremptory challenges shall be exercised with the government going first with one strike, the defendant next with two and so on until all strikes are exhausted or until the jury of twelve is selected. Additional challenges will be granted for alternate jurors as provided in Rule 24(c)(2), using the alternating method as previously described. In death penalty cases, strikes shall be exercised individually in alternating fashion. In civil cases, challenges shall be exercised individually in alternate fashion. All jurors in civil cases remaining at the beginning of deliberation shall remain on the jury throughout deliberation unless excused for cause.

The Court may use the "struck" method where efficiencies determine that method will be helpful.

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## Depositions

Counsel should confer prior to trial to work out which objections in depositions can be resolved without the Court's intervention. To the extent some agreement can be achieved, all copies of the deposition should be marked to strike testimony that will not be read to the jury. This includes the Court's original. If objections remain that need ruling upon by the Court, counsel shall so advise the Court well in advance of the time the deposition is to be shown or read to the jury. Delays in the trial or forcing the jury to wait beyond the normal break period for this purpose should be stridently avoided. If the Court determines that too much time will be taken up by this vetting process, it may determine that objections will be ruled upon as the deposition is shown or read. Video depositions are strongly encouraged in light of the courtroom technology available. Likewise, agreeing prior to trial regarding objections so that an edited version of the videotape can be played through without interruption should be the rule. If the Court's ruling is required prior to trial to accommodate this objection, call the Courtroom Deputy to make this arrangement.

All too often, unnecessarily long depositions are presented to the jury. The most consistent complaint the Court hears from jurors are those relating to the showing or reading of depositions. Counsel should give close consideration to eliminating as much of the deposition as possible or of presenting a summary of the testimony to the jury rather than the entire deposition. The Court should be advised at the final pretrial conference of any depositions which are in excess of one hour. It is the Court's intention to explore in each such case the possibility of reducing the quantity of such depositions, either by agreement or upon the Court's order.

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## Transcripts

At least two weeks prior to trial, all parties shall provide to the court reporter a list of all words, terms, technical terminology, proper names (including all witness names), acronyms, and case citations that would not be found in a generic spell check computer dictionary. The court reporter will maintain the confidence of parties submitting this information so as not to unnecessarily reveal any trial strategies.

Parties who wish to receive daily transcript of testimony must make their own arrangements, at least two weeks prior to the start of trial, directly with the court reporter, Laura Blatz, 618-482-9481. The court reporter will provide daily copy, whenever possible, given the press of other duties and the length of the trial. Parties should understand that the rate charged under Judicial Council policy is at an increased rate per page.

Likewise, requests for transcripts following trial must be made directly with the court reporter. It should not be assumed that she will automatically produce a transcript. Requests for transcripts should be timely and well in advance of appellate deadlines. Do not utilize the time it takes to produce a transcript as a means to manipulate your briefing deadline to suit your particular schedule.