

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

GENERAL ORDER NO.1  
Amended as of February 1, 2003  
PRETRIAL AND TRIAL PROCEDURES

This General Order replaces General Order No. 1, as adopted December 1, 2000.

On or after the effective date of this Amended General Order, all counsel of record are charged with knowledge of the procedures and requirements contained therein.

This Order is effective February 1, 2003, for all purposes for cases pending on that date on the docket of Judge Rice, Judge Rose, Judge Merz, or Judge Ovington to the extent practicable.

January , 2003.

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Walter Herbert Rice, Chief Judge  
UNITED STATES DISTRICT COURT

January , 2003.

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Thomas M. Rose  
UNITED STATES DISTRICT JUDGE

January , 2003.

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Michael R. Merz  
UNITED STATES MAGISTRATE JUDGE

January , 2003.

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Sharon L. Ovington  
UNITED STATES MAGISTRATE JUDGE

## PREPARATION FOR TRIAL

These instructions are intended to familiarize you with the procedures in the United States District Court in Dayton before The Honorable Walter Herbert Rice, The Honorable Thomas M. Rose, The Honorable Michael R. Merz, and The Honorable Sharon L. Ovington and to simplify your own procedures.

These procedures are designed to expedite the administration of justice without impeding in any way your ability, as an advocate, to present your client's case fully and fairly.

For your assistance, the following information is included herein:

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**I. PRETRIAL MATTERS**

**A. Rule 26(f) Conference and Report and Mandatory Disclosure<sup>1</sup>**

1. Rule 26(f) Conference

As soon as all counsel are identified, but in any event no later than receipt of notice of the preliminary pretrial conference, all counsel shall agree on a date for the conference required by Fed. R. Civ. P. 26(f), which must be held not later than twenty-one days before the preliminary pretrial conference.

2. Rule 26(f) Report

The parties shall file the written report required by Fed. R. Civ. P. 26(f) not later than fourteen days after the conference, but in any event no later than 7 days

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<sup>1</sup>Under Fed. R. Civ. P. 26(a)(1)(E), the following categories of cases are exempt from the requirements for a discovery conference, a discovery plan, and mandatory disclosure: (i) an action for review on an administrative record (e.g., Social Security benefits and certain ERISA cases), (ii) a petition for habeas corpus, (iii) a *pro se* prisoner action, (iv) an action to enforce or quash an administrative subpoena, (v) an action by the United States to recover benefit payments, (vi) a government student loan case, (vii) a proceeding ancillary to actions in other courts, and (viii) an action to enforce an arbitration award.

before the preliminary pretrial conference. The report must be substantially in the form annexed hereto and include the parties' views and proposals concerning:

- (1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
- (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
- (3) what changes should be made in the limitations on discovery imposed the Federal Rules of Civil Procedure and what other limitations should be imposed; and
- (4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

3. Mandatory Disclosure

Unless otherwise agreed in the Rule 26(f) report the parties shall make the disclosures required by Fed. R. Civ. P. 26(a)(1) not later fourteen days after the discovery conference.

**B. Preliminary Pretrial or Scheduling Conference**

The Court will schedule a preliminary pretrial or scheduling conference to occur within sixty days of the date when all counsel are identified. This conference will be conducted in person or by telephone as noted in the pretrial notice. The conference will deal with the following matters, wherever applicable:

**1) The Status of Settlement Negotiations**

If no negotiations have taken place, the Court will set a date for plaintiff's counsel to serve a settlement demand upon opposing counsel. Various means of alternative dispute resolution will be discussed with regard to their applicability to the case. Counsel will be

encouraged to contact the Court at any time if either counsel feels the Court can assist in facilitating settlement.

**2) Discovery Plan and Discovery Cut-off Date**

A review will be had of the Rule 26(f) report prepared by the parties.

The parties may wish to conduct limited discovery directed to a potentially dispositive motion to dismiss addressed to the pleadings (alleged lack of subject matter jurisdiction, lack of *in personam* jurisdiction, failure to state a claim upon which relief can be granted, qualified immunity in a civil rights case, etc.), pursuant to Fed. R. Civ. P. 12(b), 12(c), or one filed under Rule 56, and, consequently, to defer further discovery until this Court makes a ruling upon said motion. Such an agreed-upon approach must be included in the Rule 26(f) report.

A discovery cut-off date will be established, generally 90 to 120 days prior to trial. Parties who undertake to extend discovery beyond the cut-off date do so at the risk the Court may not permit its completion prior to trial. There will be no supervision or intervention by the Court, such as a ruling on a Fed. R. Civ. P. 37 request for sanctions, after the discovery cut-off date, without a showing of extreme circumstances. No trial setting will be vacated due to the failure to complete essential pretrial discovery, except under the most unusual of circumstances.

**3) Witness Lists, Lay and Expert**

A date will be set for filing a list of lay witnesses with the Court, together with a brief synopsis of their expected testimony. Lay witnesses who have not been timely identified will not be permitted to testify.

A date will likewise be set for filing a list of expert witnesses, and the service of expert reports complying with Fed. R. Civ. P. 26(a)(2). The purpose of these reports is to permit the opposing party to determine if deposing the expert is necessary and to prepare for that deposition. Expert witnesses who are not timely identified or who do not furnish timely and complete reports will not be permitted to testify. Neither will experts be permitted to testify to opinions or other matter not disclosed in their reports.

The purpose of this filing of witness lists is to permit timely completion of discovery. Supplementation of the lists after timely filing shall be only upon motion and for good cause shown, i.e., that the identity of the witness and/or the need for the witness's testimony could not have been previously determined upon the exercise of due diligence by counsel. These lists are not meant to be preliminary witness lists. Rather, they are to be final lists, insofar as discovery has revealed the necessity of testimony by these witnesses. Such a supplementation may well result in a brief extension of the discovery cut-off date for the other side to conduct discovery of any newly added witness. Counsel are advised to conduct their discovery early and in timely fashion in order to make the witness lists served upon opposing counsel as exact and as final as possible, because this Court will grant leave to supplement the witness list only upon a showing of good cause.

Rebuttal witnesses, the need for whose testimony can reasonably be anticipated prior to trial, shall also be identified in the original list.

#### **4) Motions**

A review of then-pending and any expected motions will be had, a briefing schedule will be fixed, and a hearing date set, if necessary. Leave of Court will be granted to file whatever

additional motions are deemed necessary, whether or not directed to the pleadings, including motions for summary judgment, provided same are filed by a date certain to be set at the conference.

The District Judges reserve the authority, at any time, to refer any or all pretrial motions, whether dispositive or non-dispositive, to a Magistrate Judge.

**5) Additional Conferences**

If, in the opinion of Court and counsel, additional conferences are necessary for monitoring settlement negotiations, for discovery, or for the Court to receive an adequate status report on the pretrial stages of the case, a date will be fixed at this conference. Either counsel may at any time request an additional preliminary pretrial or settlement conference. In all cases which will be tried to the Bench, every effort will be made to have settlement conferences conducted by a different judicial officer from the trier of fact.

**6) Final Pretrial Order**

A date will be set for the filing of a Joint Proposed Final Pretrial Order (generally five to seven days prior to the final pretrial conference), in the form adopted hereby and provided with the preliminary pretrial or scheduling conference order.

Unless otherwise agreed by counsel or by Order of the Court, the following procedures shall be used for the preparation of the Joint Proposed Final Pretrial Order:

a) Counsel for plaintiff(s) shall submit to counsel for defendant(s) a first draft of the Joint Proposed Final Pretrial Order (without, of course, the material which is within the knowledge of defendants, such as lists of witnesses, exhibits, etc.) Such draft shall be mailed or

otherwise delivered at least fifteen working days before the filing date for the Joint Proposed Final Pretrial Order.

b) Counsel for defendant(s) shall add all of the materials necessary to complete the Joint Proposed Final Pretrial Order, thus making a second draft of the Joint Proposed Final Pretrial Order, clearly delineating those matters which have been changed and added. Such second draft shall be mailed or otherwise delivered to counsel for plaintiff(s) at least ten working days before the Joint Proposed Final Pretrial Order is to be filed.

c) Upon receipt of the second draft from counsel for defendant(s), counsel for plaintiff(s) shall telephone counsel for defendant(s) and they shall agree upon a date, time, and place for a meeting for the resolution of differences and the final drafting of the Joint Proposed Final Pretrial Order. Such meeting shall be at least five working days before the Joint Proposed Final Pretrial Order is to be filed.

d) The Joint Proposed Final Pretrial Order shall then be completed and timely filed by counsel for plaintiff(s) unless the parties otherwise agree.

The Court wishes to emphasize that the Joint Proposed Final Pretrial Order must be jointly prepared; in the absence of such a Joint Proposed Final Pretrial Order, no final pretrial conference will be conducted, the trial will be continued, and counsel will be subject to sanctions, including possible dismissal for failure to prosecute, unless good cause is shown. The instructions in the attached form of Final Pretrial Order have the force of Court Order.

7) **The Setting of a Definite Date for the Final Pretrial Conference and for the Trial Itself.**



A final pretrial conference will be held within seven to thirty days of the trial date. At that conference the Court will review the Joint Proposed Final Pretrial Order, which will have been filed with the Clerk's Office. At the conclusion of the pretrial conference, the Court will approve the Joint Proposed Final Pretrial Order, with any additions or deletions, and will cause same to be journalized with appropriate notation, as an Order of the Court.

Trial counsel are expected to be present or available by phone for the final pretrial conference, unless previously excused by the Court, in which event, co-counsel may attend in their stead. Clients need not be present or otherwise available by phone, provided counsel has ultimate negotiating authority for his client. No attorney who has not participated in the final pretrial conference may act as trial counsel without Court permission.

At the conclusion of the Preliminary Pretrial Conference, the Court will prepare and file a Preliminary Pretrial Conference Order (Scheduling Order) covering the areas suggested in the form attached hereto.

**C. Contingent Consent to Magistrate Judge for Trial**

In order to guarantee the availability of a judicial officer to try your case on the date set in the Preliminary Pretrial Conference Order, the Court requests each trial attorney, in cases not otherwise referred to a Magistrate Judge, to discuss with his or her client the possibility of consenting to referral of this case to a Magistrate Judge on a contingent basis for trial only. If such contingent consent is given, the case will remain on Judge Rice's or Judge Rose's docket for all purposes including discovery, motion practice, and trial, unless the assigned District Judge becomes

unexpectedly unavailable for trial (e.g. because of other trial settings, criminal or civil), in which event the assigned Magistrate Judge will try the case. Counsel are requested to advise Judge Rice or Judge Rose's Courtroom Deputy Clerk in writing of their client's decision on this matter within twenty days of the Preliminary Pretrial Conference.

In cases otherwise referred to a Magistrate Judge for pretrial management, parties are separately advised of their right to consent to Magistrate Judge trial jurisdiction. The Court's General Order of Assignment and Reference permits them to exercise consent jurisdiction in any case referred to them upon unanimous consent of the parties.

Any party has the right to decline consent; failure to consent will have no adverse substantive or procedural consequences.

**D. Foreign Counsel**

All parties not appearing *in propria persona* are required to be represented by a designated "trial attorney" who must be an attorney at law who is a permanent member of the bar of this Court in good standing or admitted *pro hac vice*.

Counsel not otherwise eligible to serve as the trial attorney, who are admitted to practice before any United States District Court, may upon motion be admitted *pro hac vice* in the Southern District of Ohio to serve as trial attorney in a specific case. Such admission will be conditional only and may be withdrawn at any time for failure to observe the rules of this District and the General Orders of this Court or for failure to comply with Fed. R. Civ. P. 11, 16, 26 or 37. See S.D. Ohio L. R. 83.5 and *Flynt v. Leis*, 439 U.S. 438 (1978).

Attorneys admitted *pro hac vice* to serve as the designated trial attorney must obtain local counsel admitted to the Bar of this Court to participate as co-counsel. Such local co-counsel shall participate in a meaningful fashion in the preparation and trial of the cause, unless excused by this Court. Admission *pro hac vice* may be withdrawn for failure to obtain local co-counsel.

Unless excused by this Court, local counsel are expected to be intimately familiar with the litigation on which they are retained and fully prepared to take responsibility for any pleadings and other court filings signed and submitted by them. Further, unless excused by this Court, such local co-counsel shall participate in a meaningful fashion in the preparation and trial of the cause.

**E. Discovery**

The term "discovery" includes any depositions for presentation at trial in lieu of appearance.

While this Court does not wish to formalize or to institutionalize a procedure that would in any way detract from the obligation of counsel to "walk the last mile" to informally resolve discovery disputes between and among themselves, as required by Fed. R. Civ. P. 37(a)(2)(B) and S.D. Ohio L.R. 37.1 and 37.2, this Court is always open to a phone call from any counsel to this Court's secretary or law clerk requesting a telephone conference call, between all counsel of record, to address either an urgent discovery dispute arising during a deposition or a more systemic discovery impasse arising during the course of general pretrial discovery. Such an approach might quickly allow the Court and the parties to get to the central issues involved in the impasse, without

the costly and time consuming procedures inherent in the filing of motions, contra memoranda, and the like.

In any case in which Judge Rice or Judge Rose has retained responsibility for the management of pretrial discovery, he should be the judicial officer first contacted by counsel; should the District Judge determine that he is not or will not, within a reasonable time, be available for such a telephone conference, he may ask the assigned Magistrate Judge to conduct same.

Judge Rice and Judge Rose reserve the authority, at any time, to refer any action to a Magistrate Judge for management of discovery. If such a referral is made, all matters pertaining to pretrial discovery must be directed to that judicial officer. For example, the Magistrate Judge would determine, in the first instance, appropriate sanctions either for any violation of the agreed-upon discovery plan or for any other incident or situation in which the imposition of sanctions is appropriate under Fed. R. Civ. P. 37. In addition, the Magistrate Judge would be charged to resolve, upon a schedule to be determined between him and counsel of record, any impasse occasioned by the good faith inability to agree upon a joint discovery plan.

**F. Motions**

Other than motions required by law to be set for a hearing, with notice given to all counsel, and motions upon which a specific request for a hearing has been made and granted by the Court, all motions shall be submitted without oral argument on the memoranda filed with the Clerk, on the schedule set forth in S.D. Ohio L.R. 7.2, unless otherwise ordered.

Leave of Court is required for the filing of any motion beyond the time set forth in this Court's Preliminary Pretrial Conference Order. Should the Court grant such leave and if the

motion is sustained (thus canceling the trial if the motion is a dispositive one) or, in the alternative, overruled, but the filing of said motion and the time necessary to brief and/or to argue the same causes a continuance (postponement) of the trial date, the Court, in the exercise of its discretion, may award the party against whom the motion is directed the expenses incurred, caused by the untimely filing of the motion, in preparing for the canceled or continued trial. Said expenses may include attorney fees. Such expenses will be limited to the cost of preparation for the trial itself and will not include any expenses incurred in opposing the motion.

If a trial is merely continued (postponed), as opposed to canceled upon a ruling on such a motion (dispositive or not), the Court will not award expenses for any trial preparation that may be used at the subsequent trial.

**G. Limitations Upon Briefs and Memoranda**

Briefs and/or memoranda in support of or in opposition to any motion in this Court shall not exceed twenty pages without first obtaining leave of Court, which leave must be requested at least three working days in advance of said deadline. The request should include a proposed page length and the reasons for exceeding the usual page limit. If leave of Court is granted, counsel must also comply with the table of contents and summary requirements of S. D. Ohio Civ. R. 7.2. All briefs and memoranda shall comply with the formal requirements of S.D. Ohio L.R. 7.2.

**II. TRIAL PRACTICE**

**A. Preparation of Exhibits**

Counsel for each of the parties will assemble all documents, photographs, or other materials expected to be used at trial. Copies of such documents must be physically furnished to opposing counsel not later than seventy-two hours prior to the Final Pretrial Conference unless a different time is prescribed in the Preliminary Pretrial Conference Order. Any deviation from this procedure, in a situation wherein exhibits are unusually voluminous, in which event counsel may wish merely to make his exhibits available for inspection and/or copying by opposing counsel, will be permitted only upon leave of Court being first obtained.

It is not necessary to bring exhibits to the Final Pretrial Conference or to file them with the Court. Counsel are required to list all exhibits in the Joint Proposed Final Pretrial Order.

However, each counsel will deposit two complete sets of his exhibits with the Courtroom Deputy Clerk, not later than the close of business three (3) working days prior to trial. In a non-jury case, a third set of exhibits, for the use of the Court's law clerk, must be so deposited.<sup>2</sup>

The following procedure will be followed: All exhibits will be assembled in 3-ring binders, marked as listed in the Joint Proposed Final Pretrial Order, with each exhibit bearing a numbered exhibit sticker and with the same number on a tab extended beyond the binder on the right side thereof. Each page of a multi-page exhibit shall be numbered with a distinctive number (e.g. as applied by a BATES-numbering machine). All exhibits will be sequentially numbered with Arabic numerals as follows: Joint exhibits will be designated JX \_\_\_ on white exhibit labels; plaintiff exhibits will be designated PX \_\_\_\_\_ on yellow exhibit labels; and defendant exhibits will

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<sup>2</sup> The second (and third in non-jury cases) set of exhibits may contain Xeroxed or equivalent sets of photographs.

be designated DX \_\_\_\_\_ on blue exhibit labels. Third-party exhibits may be numbered with a distinctive identifying letter prefix.

If any sketches, models, diagrams, etc., of any kind will be used during trial or in argument, they must be exhibited to opposing counsel not later than the Final Pretrial Conference.

Exhibits deposited with the Courtroom Deputy Clerk and appropriately marked may be used by any party at trial.

Each party should offer its exhibits into evidence at one time, immediately prior to resting its case, except that an exhibit to be examined by the jury must be offered and admitted prior to examination. The admissibility of all exhibits referred to during trial and offered by the parties, other than those examined by the jury, will be ruled upon by the Court, at the latest, prior to that party's resting. Either side may offer any marked exhibit, regardless of which party marked it.

There is no requirement that counsel object to any exhibit at the Final Pretrial Conference.

**B. Depositions**

Counsel will specify in the Joint Proposed Final Pretrial Order those portions of any deposition which will be read at trial in lieu of live testimony. The deposition itself must be filed with the Clerk not later than the date of the Final Pretrial Conference. Opposing counsel will note objections to any portion of the deposition in advance of the trial, and the Court will rule on the objections either prior to the commencement of the trial or, at the latest, prior to the reading of the deposition in open Court.

Videotape presentations must include a method for cutting off either sound or the entire picture from the jury, in situations where the Court must rule on objections to testimony. In addition to the videotape itself, a typewritten transcript must be provided to the Court and opposing counsel as an aid in following the videotape presentation and in ruling upon any objections contained in the deposition. Objections contained in the videotape deposition will be dealt with by the Court in the manner as set forth in the preceding paragraph.

Any deposition that might conceivably be used solely for impeachment must be filed with the Clerk prior to the Final Pretrial Conference.

**C. Trial Briefs**

Trial briefs must be filed and served not later than one week prior to the commencement of trial. All briefs shall comply with S.D. Ohio L. R. 5.1, with citations and references conforming to S.D. Ohio L. R. 7.2(b). Counsel should use their trial briefs to instruct the Court in advance of trial in any area of law upon which counsel will rely at trial. Therefore, the briefs should contain arguments, with citations to legal authority, in support of any evidentiary or other legal questions which may reasonably be anticipated to arise at trial.

**D. Motions Directed to Trial**

All motions in limine, directed to the presentation of evidence at trial, must be filed not later than ten days prior to the Final Pretrial Conference.

All written motions presented during trial, which later form the subject of oral argument to the Court, must be filed with the Clerk of Court's Office, either immediately before presentation to the Court or immediately after the oral argument.



**E. Proposed Findings of Fact and Conclusions of Law**

In trials to the Court, counsel must, not later than the Final Pretrial Conference, file those proposed findings of fact and conclusions of law which such counsel believes the Court should render.<sup>3</sup> Post-trial briefs, accompanied by any desired supplemental findings of fact and/or conclusions of law, may be limited to specific questions assigned by the Court during or after trial and shall be filed in accordance with a briefing schedule set by the Court with counsel.

**F. Proposed Jury Instructions**

Proposed jury instructions and verdict forms must be submitted to the Court and opposing counsel not later than one week prior to the commencement of trial. This requirement may be waived by the Court only upon a showing of good cause. Each instruction should be on a separate 8.5" x 11" sheet of paper identified as "Plaintiff(s) (Defendant(s)) Requested Instruction No. \_\_\_\_." All instructions must contain a citation of authority upon which counsel relies. The original of the request for special instructions must be filed with the Clerk of Court's Office, prior to presentation to the Court.<sup>4</sup>

The Court uses as sources for its instructions O'Malley, Grenig, and Lee's FEDERAL JURY PRACTICE AND INSTRUCTIONS, 5<sup>th</sup> Edition; OHIO JURY INSTRUCTIONS; the Sixth Circuit Pattern Jury Instructions; and instructions given in prior cases of a similar nature which are kept on file.

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<sup>3</sup> In addition to filing a paper original with the Clerk, please provide the Court with an electronic copy on 3.5 inch diskette or CD-ROM in any standard word-processing format, preferably WordPerfect®.

<sup>4</sup> In addition to filing a paper original with the Clerk, please provide the Court with an electronic copy on 3.5 inch diskette or CD-ROM in any standard word-processing format, preferably WordPerfect®.

Samples of jury instructions previously given by the Court in similar cases are available upon request.

Judge Rose requires the parties to submit an agreed statement of the case not later than one week before trial.

**G. Courtroom Practice**

Conduct of counsel during the trial of cases will be governed by the following instructions:

**1) Counsel Tables**

The plaintiff in all civil cases and the United States Government in criminal cases will occupy the counsel table nearest the jury. Defendants in both civil and criminal cases will occupy the counsel table furthest from the jury.

**2) Court Sessions**

Trials will usually start at 9 a.m. The morning session will continue until approximately noon. There will be a morning recess of approximately fifteen minutes at approximately 10:30 a.m. The afternoon session will start one hour after the end of the morning session unless otherwise announced. The afternoon session will usually end at approximately 4:30 p.m. There will be a fifteen minute recess at approximately 3 p.m.

It is expected that the parties and all counsel will be available at least 15-20 minutes prior to the beginning of the morning and afternoon sessions.

The District Judges will ordinarily conduct trials Monday through Thursday, reserving Fridays for criminal and civil matters not related to the trial in progress. The Magistrate

Judges hold criminal dockets on Wednesdays and may need to interrupt a trial in progress for that reason.

**3) Qualification of Jury**

The general voir dire examination will be conducted by the Court, with the entirety of the prospective panel being questioned, following which counsel for the respective parties may question the prospective jurors on matters peculiarly applicable to the nature of and the issues presented in the case at trial. In addition, counsel may, in non-repetitious fashion, further explore any matters on which the Court has questioned which they feel have not been adequately discussed, or may explore any information in the individual jury questionnaires. The Court retains discretion to limit counsels' inquiry. Counsel must address questions to the entire panel of prospective jurors. An individual juror may be questioned only if such juror responds affirmatively to questions put to the entire panel, if counsel is following up on or further exploring a question asked or an area discussed by the Court, or if necessary to inquire into a matter disclosed by a prospective juror in that individual's jury questionnaire. Challenges for cause shall be directed to the entire panel.

**4) Peremptory Challenges**

a) Peremptory challenges will be exercised outside of the presence of the jury, alternately, with the plaintiff or the Government exercising the first challenge. Any prospective juror on the panel may be so challenged. In a civil case, each side is entitled to three peremptory challenges.

b) If either party "passes," that party will have thereby "used" one challenge.

c) At the conclusion of the peremptory challenges, the Courtroom Deputy Clerk will announce the composition of the jury.

d) The judges differ slightly in the handling of peremptory challenges. However, with any judicial officer, challenges to the manner in which an opposing party has exercised peremptory challenges (e.g. a *Batson* argument that said challenges are racially discriminatory) shall be made before the jury is sworn and before the extra venire persons are excused; otherwise, they are waived. Counsel should consult with the individual presiding judicial officer as to that Judge's preference in the manner of exercising peremptory challenges.

**5) Size of the Jury**

Judge Rice will seat a jury of eight in civil cases with a requirement of unanimity. Judges Rose, Merz, and Ovington will do the same unless otherwise ordered in the Final Pretrial Order.

**6) Interrogation by Counsel**

Counsel need not interrogate from the lectern nor request specific permission from the Court to approach a witness.<sup>5</sup> Since all evidence will have been previously deposited with the Courtroom Deputy Clerk, counsel will request the Clerk to hand specific documents to the witness. Documents intended for impeachment purposes, which are not admitted into evidence, will be handed to the Courtroom Deputy Clerk for suitable marking and then handed by the clerk to the witness.

**7) Qualifying Expert Witnesses**

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<sup>5</sup>Judges Rose and Merz require counsel specifically to request permission to approach a witness.

The Court will allow each counsel to qualify his or her own expert witnesses.

**H. Pre-summation (Final Argument) Conference:**

The Court will hold a conference with counsel, in Chambers and on the record, prior to the final argument in jury cases for the following purposes:

1) Counsel may be heard on proposed jury charges presented by either side and/or on the tentative charges submitted by the Court. Counsels' attention is directed to Fed. R. Civ. P. 51.

2) Counsel and the Court will determine the length of the summations to the jury.

**III. CIVILITY AND PROFESSIONALISM**

The Court expects counsel to behave civilly and in a professional manner both toward the Court and toward each other in all aspects of this litigation. Any violation of this expectation, whether occurring in open Court, in the Judge's Chambers, in the taking of depositions or otherwise and elsewhere, may be cause for sanctions. This Court adopts and expects counsel to adhere to the attached Code of Professionalism enacted by the Dayton Bar Association. Counsel are referred to the Introductory Statement on Civility in the Local Rules.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

Plaintiff(s)

vs.

:

Case Number:

:

Defendant(s)

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**PRELIMINARY PRETRIAL CONFERENCE ORDER**

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The captioned cause came on to be heard upon preliminary pretrial conference on \_\_\_\_\_.

**PERTINENT SETTINGS**

1. Settlement demand by Plaintiff upon Defendant to be made by: \_\_\_\_\_

2. "Cut-off date for filing of motions directed to pleadings (including motions to dismiss filed pursuant to Fed. R. Civ. P. 12): \_\_\_\_\_

Following this date, amendment to pleadings and motions directed to pleadings may be made only upon leave of Court, with notice to opposing counsel.

3. Not later than the date specified, the Plaintiff will be furnishing to the Defendant a medical package, consisting of reports, medical bills, lists of special damages, certification of wage loss, hospital bills, hospital records, other bills and expenses, etc. Plaintiff's counsel is under a continuing duty to update or supplement the "medical package" as further information becomes available. \_\_\_\_\_

4. Rule 16 discovery conference, by telephone: \_\_\_\_\_

5. Identification of lay witnesses with synopsis of their testimony to be filed by: \_\_\_\_\_

6. The dates to reveal the identify of expert witnesses, together with a copy of the expert's report are:  
Plaintiff(s) primary experts to Defendant(s): \_\_\_\_\_  
Plaintiff(s) rebuttal experts to Defendant(s): \_\_\_\_\_  
Defendant(s) primary experts to Plaintiff(s): \_\_\_\_\_  
Defendant(s) rebuttal experts to Plaintiff(s): \_\_\_\_\_

7. Requests for admissions: \_\_\_\_\_

8. "Cut-off" deadline for discovery\*\*:

9. "Cut-off" date for filing of motions not directed to pleadings (including motions for summary judgment): \_\_\_\_\_  
  
This deadline is inflexible and will not be extended except under the most extraordinary of circumstances (on Judge Rice's docket only).

10. Joint Final Pretrial Order by parties to be filed no later than: \_\_\_\_\_

11. Trial exhibits to be exchanged by: \_\_\_\_\_

12. Final Pretrial Conference to be held:

In Chambers on: \_\_\_\_\_

By Telephone Conference Call on: \_\_\_\_\_

The attorneys listed below need not appear in chambers for such pretrial conference but need only wait by their telephones at the appointed time. If any other attorneys will be substituted for those listed for such calls, it is the responsibility of counsel to NOTIFY CHAMBERS BEFORE SUCH CALL IS MADE.

13. Trial on the merits,  
before the Court, beginning: \_\_\_\_\_

to a Jury, beginning: \_\_\_\_\_

14. Further status conference set for: \_\_\_\_\_

15. The Law Clerk assigned to this case is: \_\_\_\_\_

\*\*The date of the discovery cut-off will generally be 90 to 120 days prior to the trial date.

There will be no continuation of discovery beyond the discovery cut-off date, absent express approval of the Court obtained upon a showing of good cause. While counsel may agree between themselves to a limited continuation of discovery beyond the discovery cut-off date, upon an amendment to the discovery plan approved and filed with this Court, there will be no supervision or intervention by the Court, such as a Fed. R. Civ. P. 37 request for sanctions, after the discovery cut-off date, without a showing of extreme circumstances. Counsel, therefore, face the possibility that the Court may not permit the completion of discovery, or the filing of a motion based thereon, prior to trial.

No trial setting will be vacated due to the failure to complete essential pretrial discovery, except under the most unusual of circumstances.



The term “discovery” includes any depositions for presentation at trial in lieu of appearance.

The discovery "cut-off" deadline means that all discovery must be concluded, as opposed to simply requested, by the discovery "cut-off" date. Purely as a hypothetical example, a request for the production of documents, with a 28-day response time, must be served upon the opposing party in sufficient time to allow said party to respond prior to the discovery "cut-off" date.

Except for good cause shown, no extension of the discovery "cut-off" deadline will be allowed if such extension would impact adversely on the trial date set herein.

In order to make certain that progress towards disposition of the captioned cause does not become "gridlocked" by discovery disputes, this Court would offer an invitation to counsel of record, should such a discovery dispute arise and, further, should the parties have exhausted all extra-judicial means of resolving same, to call the assigned Judge's office, in order to advise the Courtroom Deputy of the need for a brief discovery conference. That Judge (or the Magistrate, should the Court not be available) will then convene a brief discovery conference in the hope of resolving the impasse without the necessity of filing motions to compel, motions for protective order, etc.

Exhibits consisting of multiple page documents not internally numbered MUST contain consecutive Bates-stamped numbering.

Local counsel are expected to be intimately familiar with the litigation on which they are retained, fully prepared to take responsibility for any pleadings and other court filings signed and submitted by them. Further, unless excused by this Court, such local co-counsel shall participate in a meaningful fashion in the preparation and trial of the cause.

This Court expects counsel to behave civilly and in a professional manner both toward the Court and toward each other in all aspects of this litigation. Any violation of this expectation, whether occurring in open Court, in the Judge's Chambers, in the taking of depositions or otherwise

and elsewhere may be cause for sanctions. This Court adopts and expects counsel to adhere to the attached Code of Professionalism enacted by the Dayton Bar Association.

In order to guarantee the availability of a judicial officer to try your case on the date set in this entry, it is the request of the Court that each counsel speak with his/her client as to the possibility of consenting to a referral to the assigned Magistrate Judge for purposes of trial only. In this fashion, the undersigned will handle all aspects of this litigation including the trial (if he or she is available). If the undersigned is otherwise committed in trial on the date set for trial herein, Judge Merz or Judge Ovington will be able to try this case. Absent a referral to the Magistrate Judge (and it is always the right of the party to so refuse), the undersigned will try this case on the date set, or upon a very short-term trailing docket thereafter, even if it means trying more than one case at a given time. Please notify the Court in writing as to your client's wishes in this regard not later than twenty days from the date of the preliminary pretrial conference.

IT IS SO ORDERED.

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WALTER HERBERT RICE, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
OR

---

THOMAS M. ROSE  
UNITED STATES DISTRICT JUDGE

OR

---

MICHAEL R. MERZ  
UNITED STATES MAGISTRATE JUDGE  
OR

---

SHARON L. OVINGTON  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

JOHN DOE,

Plaintiff(s),

:

Case No. C-3-00-000

- vs -

District Judge Walter Herbert Rice

or

District Judge Thomas M. Rose

or

RICHARD ROE,

Magistrate Judge Michael R. Merz

or

Defendant(s).

:

Magistrate Judge Sharon L. Ovington

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FINAL PRETRIAL ORDER

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(A Final Pretrial Order following this form must be jointly prepared and submitted by counsel to the Clerk of this Court not later than the date set forth in the Preliminary Pretrial Conference Order.)

This action came before the Court at a final pretrial conference held on \_\_\_\_\_  
at \_\_\_ a.m./p.m., pursuant to Rule 16, Federal Rules of Civil Procedure.

I. APPEARANCES:

For Plaintiff(s):

For Defendant(s):

II. NATURE OF ACTION AND JURISDICTION:

- A. This is an action for
- B. The jurisdiction of the Court is invoked under Title \_\_\_\_\_ United States Code, Section \_\_\_\_\_.
- C. The subject matter jurisdiction of the Court (is) (is not) disputed. [If disputed, state by which party and on what basis.]

III. TRIAL INFORMATION:

- A. The estimated length of trial is \_\_\_\_\_ days.
- B. Trial to \_\_\_\_\_ has been set for \_\_\_\_\_.

IV. AGREED STATEMENTS AND LISTS:

A. General Nature of the Claims of the Parties:

(1) PLAINTIFF CLAIMS: (suggested type of simple language)

"Plaintiff asserts in Count 1 a right of recovery for defendants' negligence as follows;

"Plaintiff asserts in Count 2 a right of recovery for defendants' wanton and willful misconduct as follows;

"Plaintiff asserts in Count 3 a right to punitive damages and attorney fees for the following reasons:

(2) DEFENDANT CLAIMS: (suggested type of simple language)

Defendant denies liability as asserted in Counts \_\_\_\_ for the following reasons:

Defendant as an affirmative defense asserts:

(3) ALL OTHER PARTIES' CLAIMS

B. Uncontroverted Facts

Suggested Language:

"The following facts are established by admissions in the pleadings or by stipulations of counsel (set forth and number uncontroverted or uncontested facts.)

C. Issues of Fact and Law

Suggested Language:

(1) "CONTESTED ISSUES OF FACT: The contested issues of fact remaining for decision are: (list)"

(2) "CONTESTED ISSUES OF LAW: The contested issues of law in addition to those implicit in the foregoing issues of fact, are: (set forth)

OR: There are no special issues of law reserved other than those implicit in the foregoing issues of fact."

If the parties are unable to agree on what the contested issues of fact or law are, their respective contentions as to what the issues are shall be set forth separately and clearly labeled.

D. Witnesses

Suggested Language:

(1) "Plaintiff will call or will have available for testimony at trial those witnesses listed in Appendix A hereof."

(2) "Defendant will call or will have available for testimony at trial those Witnesses listed on Appendix B hereof."

(3) \_\_\_\_\_ will call or will have available for testimony at trial those witnessed listed on Appendix C hereof."

- (4) "The parties reserve the right to call rebuttal witnesses whose testimony could not reasonably be anticipated without prior notice to opposing counsel."

INSTRUCTIONS:

- (1) A brief one or two sentence synopsis of the witnesses' testimony must be given -- i.e., "Will testify to pain and suffering," "Will testify to lost profits, etc."
- (2) Leave to call additional witnesses may be granted by the Court in unusual situations. Counsel seeking such leave must file a Motion to Add Witnesses and serve a copy upon opposing counsel with names, addresses, and an offer of proof of such witness' testimony within twenty-four hours after the need to call such witness becomes known.
- (3) The witnesses need not be called in the order listed.

E. Expert Witnesses

Suggested Language:

"Parties are limited to the following number of expert witnesses, including treating physicians, whose names have been disclosed and reports furnished to the other side:

Plaintiff (a)    Defendant(s)

F. Exhibits

The parties will offer as exhibits those items listed herein and numbered with Arabic numerals as follows:

- (1) Joint Exhibits -- Appendix D (marked "JX \_\_\_\_")
- (2) Plaintiff Exhibits Appendix E (marked "PX \_\_\_\_")
- (3) Defendant Exhibits Appendix F (marked "DX \_\_\_\_")
- (4) Third-Party Exhibits -- appendix G (use Arabic numerals prefixed by initial of party).

INSTRUCTIONS:

The above exhibits will be deposited with the Court's Deputy Clerk not later than three working days prior to trial.

See Section II(A) of instructions, entitled "Trial Practice --- Preparation of Exhibits."

G. Depositions

Suggested Language:

"Testimony of the following witnesses will be offered by deposition/videotape"; OR

"No testimony will be offered by deposition/videotape."

INSTRUCTIONS:

See Section II(B) of Instructions entitled "Trial Practices --- Depositions."

H. Discovery

Suggested Language:

"Discovery has been completed" OR

"The following provisions have been made for discovery."

See Section I(C) of Instructions entitled "Discovery."

I. Pending Motions

Suggested Language:

"The following motions are pending at this time" OR

"There are no pending motions at this time."

J. Miscellaneous orders

INSTRUCTIONS: Set forth any orders not properly includable elsewhere.



V. MODIFICATION

Suggested Language:

"This final pretrial order may be modified at the trial of this action, or prior thereto, to prevent manifest injustice. Such modification may be made by application of counsel, or on motion of the Court."

VI. SETTLEMENT EFFORTS

Suggested Language:

"The parties have made a good faith effort to negotiate a settlement," or otherwise described the status of settlement negotiations.

VII. TRIAL TO A JURY

PROPOSED INSTRUCTIONS ---

Suggested Language:

"The parties will submit proposed Jury Instructions not later than one week prior to the commencement of trial."

See Section II(F) of these Instructions, entitled "Trial Practice - Proposed Jury Instructions."

Counsel for Plaintiff(s)

Counsel for Defendant(s)

Counsel for \_\_\_\_\_

Approved following Final Pretrial  
Conference:

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Walter Herbert Rice, Chief Judge

UNITED STATES DISTRICT COURT

OR

---

Thomas M. Rose  
UNITED STATES DISTRICT JUDGE

OR

---

Michael R. Merz  
UNITED STATES MAGISTRATE JUDGE

OR

---

Sharon L. Ovington  
UNITED STATES MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

	:	
Plaintiff(s),		Case No.
-vs-	:	District Judge
		Magistrate Judge
	:	
Defendant(s).		

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**RULE 26(f) REPORT OF THE PARTIES<sup>6</sup>**

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Pursuant to Fed. R. Civ. P. 26(f), the parties met on \_\_\_\_\_. The meeting was attended by:

\_\_\_\_\_ counsel for plaintiff(s) \_\_\_\_\_

\_\_\_\_\_ counsel for plaintiff(s) \_\_\_\_\_

\_\_\_\_\_ counsel for plaintiff(s) \_\_\_\_\_

\_\_\_\_\_ counsel for defendant(s) \_\_\_\_\_

\_\_\_\_\_ counsel for defendant(s) \_\_\_\_\_

\_\_\_\_\_ counsel for defendant(s) \_\_\_\_\_

\_\_\_\_\_ counsel for defendant(s) \_\_\_\_\_

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<sup>6</sup>This Report must be filed not later than seven (7) days before the preliminary pretrial conference.

2. The parties:

\_\_\_ have provided the pre-discovery disclosures required by Rule 26(a)(1), including a medical package (if applicable).

\_\_\_ will exchange such disclosures by \_\_\_\_\_

\_\_\_ are exempt from disclosure under Rule 26(a)(1)(E).

3. The parties:

\_\_\_ unanimously consent to the jurisdiction of the assigned United States Magistrate Judge pursuant to 28 U.S.C. 5 636(c).

\_\_\_ do not unanimously consent to the jurisdiction of the assigned United States Magistrate Judge pursuant to 28 U.S.C. 5 636(c).

\_\_\_ unanimously give contingent consent to the jurisdiction of the assigned United States Magistrate Judge pursuant to 28 U.S.C. 5 636(c), for trial purposes only in the event that the assigned District Judge is unavailable on the date set for trial (e.g., because of other trial settings, civil or criminal).

4. Recommended cut-off date for filing of motions directed to the

pleadings: \_\_\_\_\_

5. Recommended cut-off date for filing any motion to amend the pleadings or to add additional

parties: \_\_\_\_\_

6. Recommended discovery plan:

a. Describe the subjects on which discovery is to be sought and

the nature, extent and scope of discovery that each party needs to:  
(1) make a settlement evaluation, (2) prepare for case dispositive motions and (3) prepare for trial:

b. What changes should be made, if any, in the limitations on discovery imposed under the Federal Rules of Civil Procedure or the local rules of this Court, including the limitations to 25 interrogatories/requests for admissions and the limitation of 10 depositions, each lasting no more than one day consisting of seven (7) hours?

c. Additional recommended limitations on discovery

d. Recommended date for disclosure of lay witnesses: \_\_\_\_\_

e. Describe the areas in which expert testimony is expected and indicate whether each expert has been or will be specifically retained within the meaning of Fed. R. Civ. P. 26(a)(2).

f. Recommended date for making primary expert designations:

1. Plaintiff(s): \_\_\_\_\_

2. Defendant(s) \_\_\_\_\_

g. Recommended date for making rebuttal expert designations:

1. Plaintiff(s): \_\_\_\_\_

2. Defendant(s) \_\_\_\_\_

h. Recommended discovery cut-off date: \_\_\_\_\_

7. Recommended dispositive motion date: \_\_\_\_\_

8. Recommended date for a status conference (if any):

9. Suggestions as to type and timing of efforts at Alternative Dispute Resolution.

10. Recommended date for a final pretrial conference. \_\_\_\_\_

11. Has a settlement demand been made? \_\_\_\_\_ A response?

Date by which a settlement demand can be made: \_\_\_\_\_

Date by which a response can be made: \_\_\_\_\_

11. Other matters pertinent to scheduling or management of this litigation:

To be signed by the counsel for all parties and individually by any parties proceeding *pro se*.