Towards Trial By Agreement

Selections from Pretrial and Trial Agreements found at
www.trialbyagreement.com

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How "Trial By Agreement" Came About

by Steve Susman

In the mid-90s, as a member of the Texas Supreme Court Advisory Committee, I served as the chair of the Discovery Subcommittee that completely rewrote the Texas discovery rules. I learned then about the inefficiency of the rule-making process. First, it is very difficult to come up with a procedural rule that fits every civil case, both simple and complex. Second, rule-making requires the consensus of large numbers of judges and trial lawyers, most of whom are reluctant to change the way they have done business. This typically results in the adoption of a rule that is both the lowest common denominator and not very innovative. Frustrated with the rule-making process, I asked myself why opposing counsel couldn't make their own rules by agreement: rules that fit their particular case and were intended to make litigating less expensive and stressful for both sides. For over a decade now, the lawyers in my firm have been producing and refining agreements to suggest to the other side.

At first, we began with Pretrial Agreements directed at the discovery phase of litigation. We tried to come up with ideas that would not inherently benefit either the plaintiff or defendant, and so would likely be acceptable to both sides. We learned immediately that our chance of striking an agreement depended on having the other side consider these ideas in the abstract, before a dispute arose. Thus, our practice is to send these to opposing counsel as soon as all counsel on both sides make an appearance. Some of our agreements (*e.g.*, no letter writing, or numbering of deposition exhibits) are so obvious that we rarely had anyone disagree. Some (*e.g.*, making expert drafts and expert/counsel communications undiscoverable) have found their way into recently adopted federal or state rules.

Several years ago, we realized that this same approach towards agreement would work when it comes to the trial. So we began developing and proposing to opposing counsel, before the trial began, a series of Trial Agreements (or at least subjects for agreement) that would govern the trial. These Trial Agreements require the cooperation of the trial judge even more so than our Pretrial Agreements. Nonetheless, we have been amazed at how willing most judges are to trying something that counsel agrees upon.

Over the years, I have spoken and written about the benefits of Pretrial and Trial Agreements. My colleagues in the trial bar and most judges have been very receptive to the idea. Lawyers in my firm have obviously made a record in each case of what has been agreed to. I established my website—www.trialbyagreement.com—to create a forum where trial lawyers, in-house counsel, clients and judges can discuss improvements, agreements covering other subjects, and keep some record of what has and hasn't worked.

There is always a way to build a better mousetrap the years, and so the agreements undergo constant modification and fine-tuning. I hope you will join us in this ongoing project.

Better Litigating Through Pretrial Agreements

by Charles Eskridge

Clients and commentators often criticize the pace, burden, and expense of litigation, principally discovery. They are right. Many lawyers seem to engage in discovery for the sake of engaging in discovery. Opposing counsel fight bitter fights over discovery issues that have no bearing on the results of the case. All too often, the fruits of discovery turn out to be wasted – unused or unusable at trial.

Too often, at the beginning of a new case, lead counsel will turn over discovery and other pretrial work to junior attorneys who do not have the judgment to know what is important, or who are afraid of not turning over every rock. The junior attorneys will mechanically go about the task of asking for every document, noticing the deposition of every witness, and asking every conceivable question at the depositions. They will get cross-wise with their opposing counsel, and silly discovery disputes will abound.

This is a problem for everyone involved in litigation.

For the client which is paying its attorneys by the hour, the cost of inefficient discovery comes right out of its pocket. For corporate defendants, the burden and cost of discovery can contribute to the desire to settle, even when settlement is not warranted.

The cost of inefficient discovery can be an enormous burden for contingent-fee attorneys. Time-consuming discovery disputes are – or at least should be – anathema to the contingent-fee lawyer who profits from handling cases efficiently.

For the hourly lawyer, protracted and costly pre-trial proceedings may seem like a boon. But it's not. Hourly clients first and foremost look for attorneys who can efficiently handle their cases. They are not likely to rehire the lawyer who bills hundreds of hours towards taking dozens of depositions which are left on the cutting room floor when trial arrives.

Some commentators have suggested that discovery is inherently burdensome under the rules as they exist in American courts. They assert that the court system can be "fixed" only by radical alteration of the rules which permit "runaway discovery." That's wrong. The Rules of Civil Procedure do not require attorneys to take dozens of depositions or to file motions to compel over every document. And lawyers can make their own rules – pre-trial agreements – which enhance the efficiency of each case.

And of course, in negotiating pre-trial agreements at the beginning of the case, counsel should be thinking about pre-trial motion practice and trial, not just discovery. Lead counsel (not junior associates) should discuss pre-trial agreements at the very beginning of the case, before discovery picks up steam. At Susman Godfrey, our experience has shown that early agreements work to reduce the cost and burden of litigation while keeping the focus on the eventual trial of the case. The key has always been to attempt to reach agreement on as many of these items before discovery begins. Once you are in the heat of battle, what appears to be good for one side is often deemed to be bad for the other – making it hard to reach an agreement.

❖ COMMUNICATION

1. Discovery disputes will be resolved with a phone call between lead counsel.

One of the most counter-productive litigation activities is the discovery dispute letter. Lawyers write these multi-page, single-spaced tomes not for the purpose of working out discovery disputes, but to create a record for an eventual motion to compel. Such a letter typically generates a response in kind from opposing counsel, and then a reply, then a sur-reply. In short, the parties draw battle lines instead of working toward an agreement.

Counsel should not engage in discovery disputes for the purpose of engaging in discovery disputes. Instead, counsel should raise a discovery issue with the other side only when it involves documents or testimony which are really needed for trial of the case. It is always more efficient to obtain such evidence by agreement than by motion. An agreement is also a quicker and more certain method of obtaining evidence.

If your goal is to get evidence quickly and efficiently, then you should eschew letter-writing and the posturing that goes with it. A phone call typically will bring much better communication, more civility, and better results than an exchange of letters.

The phone call should be between lead counsel. More experienced lawyers are simply more capable of quickly sorting out what's important from what is not.

2. Papers will be served by e-mail on all counsel.

Some lawyers still do not serve papers by e-mail unless required by the rules. Their reluctance may in some circumstances be motivated by misguided tactical considerations; they want their opposing counsel to go a few days without realizing that an important motion has been filed. This is particularly a problem in state-court jurisdictions where there is no e-filing.

Such tactical maneuvering does not yield a better outcome at trial. It is unnecessary and counter-productive. The parties should agree at the beginning of every case that all papers will be served by e-mail as soon as they are filed.

It also is a good idea to agree at the beginning of the case that all filings will be served by e-mail on all counsel and legal assistants. It is more efficient for everyone on the trial team to learn immediately of any filings. Moreover, if the parties agree at the beginning to send all emails to all members of the other side's team, lead counsel can spot a fight brewing and intervene to resolve it before it gets out of hand.

❖ **DOCUMENTS**

3. The parties will ask the court to choose a protective order.

Sometimes discovery is bogged down from the very beginning when the parties cannot agree on the form of a protective order. This is particularly a problem in patent infringement cases and other big-stakes matters involving sensitive business information.

Sometimes the parties will negotiate a month or two trying to reach agreement on the language of a protective order, to no avail. When that occurs, the parties have wasted several weeks and their clients', or their own, time and money.

Most judges have a good sense of what they think should and should not be in a protective order. Rather than negotiate for weeks then submitting the dispute to the judge, the parties should put a 48-hour limit on protective order negotiations.

The parties should exchange protective order proposals. Then, they should negotiate. If agreement cannot be reached on the form of a protective order within 48 hours of the time when the proposals are exchanged, both sides will write a letter to the Court including each side's preferred version and, without argument, ask the Court to select one or the other as soon as possible.

Agreed protective orders, like most agreements, tend to get done if there is some pressure to get them done. The 48-hour deadline puts maximum pressure on the parties to reach an agreement and begin the real work of putting together their case. If the parties fail to reach such an agreement, the Court can quickly decide which form of order is best without enduring tedious argument from counsel.

Each court can reduce the time spent on protective orders if it will have a standard protective order which it presumptively enters in each case. The Court can make it clear that there is a very high burden on anyone who wants something different.

4. Documents will be produced on a rolling basis.

There is no real advantage to be gained for either side in posturing over when documents will be produced. And delays in document production can only lead to inefficiencies and fights about collateral issues.

The parties should agree to produce documents on a rolling basis as soon as they have been located and copied. If copies are produced, the originals should be made available for inspection upon request.

One commendable procedure is used in the United States District Court for the Eastern District of Texas. In that district, judges expect the parties to produce all relevant documents at the beginning of the case as part of initial disclosures. The parties can of course exchange additional requests and produce additional documents as the case moves along, but this early production of

the key documents in the case helps the parties to focus on the important issues and conduct more efficient discovery.

5. Each side will pick five custodians for production of electronically-stored records, and produce electronically stored information in native, searchable form.

Electronic discovery has become the most expensive and time-consuming part of the pre-trial practice in most cases. But pre-trial agreements can help to reduce the burden.

Electronic discovery is so burdensome because requesting parties seek overbroad production of electronic documents, and because producing parties try to conduct a relevance and privilege review of every single electronic document. In some large cases, each side will end up having several young lawyers spend weeks on end conducting relevance reviews of dozens of custodians' electronic files. This is extremely expensive, and not terribly useful.

Parties can greatly reduce the burden and hassle of producing electronically stored information by focusing only on those custodians who really matter. Moreover, the parties can agree not to conduct a time-consuming relevance review prior to production.

In our cases, we like to propose that each side must initially produce electronically stored information from the files of five custodians selected by the other side during an agreed period of time. Only documents which have a lawyer's name on them can be withheld from production, and only then if they are actually privileged. Production does not waive any privilege, and documents can be snapped back whenever the producing party recognizes that they are privileged. After analyzing the initial production, each side can request electronic files from five other custodians. Beyond that, good cause must be demonstrated.

This procedure gives both sides the assurance that, in all likelihood, they will not have to gather electronic documents from more than ten custodians. It also gives both sides the assurance that the other side cannot withhold documents because of obscure or unfounded relevance objections. The parties will simply screen out electronic documents that list lawyer names, determine whether the screened-out documents are actually privileged, then produce what is not privileged.

One objection we sometimes hear is that some cases have more than ten relevant custodians per side. The parties can always ask the Court for electronically stored documents from more custodians. But from our experience, that rarely is necessary. When is the last time that the key email in your case was neither sent to nor received by one of the top ten most important witnesses on either side of the case? In our experience, ten custodians will usually be more than enough to capture the relevant documents.

The parties should work in good faith to make sure that their electronically stored information (ESI) is useable by the other side. To that end, the parties should agree at the beginning of the case that, whether in federal court or not, they will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook / PST, Concordance, or Summation, so that it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made

available to the other side. The parties will produce a Bates-numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire e-mail (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail – so it's stand-alone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from which it came, (2) the director or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension.

6. Production does not waive the privilege.

One of the major hindrances to quick and efficient production of documents is most attorneys' fear of producing privileged documents. This fear can lead to overly long and detailed privilege reviews and production of massive privilege logs.

The case law on waiver of privilege can be an obstacle to efficient document production. Counsel fear that if they let one potentially privileged document slip into their document production, they will then be faced with an argument for a very broad waiver.

Some jurisdictions permit snap back of privileged documents, but snap back rules sometimes are structured in a way that limits protection against waiver arguments. For example, in some jurisdictions, privileged documents can be snapped back only if their production is "inadvertent." Sometimes counsel are over-inclusive when claiming privilege, because they do not want to later bear the burden of showing that production was inadvertent.

To deal with these concerns, the parties can agree at the beginning of a lawsuit that the production of a privileged document does not waive the privilege as to other privileged documents, and that documents can be snapped back as soon as it is discovered they were produced without any need to show that the production was inadvertent.

For additional protection, if the case is in federal court, the parties can request an order at the beginning of the case under Fed. R. Evid. 502(d), which provides that "a Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other Federal or State proceeding."

7. Each side may select up to 20 documents from the other side's privilege log for in camera inspection.

As document productions have gotten larger in complex cases, so have privilege logs. It is not all that unusual anymore to see privilege logs in excess of 100 pages. When faced with such a log, we have found that the best practice is to select 20 documents which, based on the log descriptions, appear to be the most relevant documents to which there potentially is not an applicable privilege, and request the Court to determine whether there is an applicable privilege. Therefore, we suggest agreeing at the beginning of the case that each side has the right to select 20 documents from the other side's privilege log for submission to the Court for in camera

inspection. This agreement tends to keep both sides honest regarding what each logs, and courts typically will agree to take up such a limited number of documents for review.

❖ **DEPOSITIONS**

8. Limiting the length of trial.

Lawyers who have participated in time-limited trials usually applaud being disciplined to plan who will really testify and for how long. Most actually give time back. Jurors and courts certainly appreciate this. Yet an agreement on length should ideally be made at the start of discovery, and certainly before depositions commence. Such an agreement allows the Court to provide a firm trial date, while also removing any incentive to seek unbridled document production, or to take too many depositions, or to otherwise engage in a fishing expedition (whether for plaintiff or defense purposes) that is costly and inefficient for both sides.

9. Depositions will be taken by agreement, and will be limited in number and length.

Lawyers tend to take too many depositions and spend too long with each witness. In a typical commercial case, 99% of deposition testimony ends up on the cutting room floor by the time of trial. There rarely are more than a handful of truly important witnesses in any case. And there is almost never a need to spend more than six hours questioning a witness. So, we typically propose at the beginning of the case that the parties agree to limit themselves to ten depositions each, with each deposition no more than three hours in length.

Some counsel try to gain an advantage by unilaterally noticing depositions or by overstrategizing the issue of whose witnesses will be deposed first. These issues tend to waste time while having no impact on the outcome of a case. As such, the parties should agree at the beginning of the case that depositions will be taken by agreement, with no unilateral deposition notices. Moreover, the parties should agree to alternate witnesses—plaintiffs' witness first, defendants' second, plaintiffs' third, defendants' fourth etc. Depending on the case, it can also make sense to do depositions in agreed blocks—two by plaintiffs, then two by defendants, or three-and-three, etc.

Many jurisdictions are moving towards limiting deposition length. In the late 1990's, Texas changed its rules to adopt a limit of six hours of questioning per side. The result has been more efficient and more focused litigation. But even six hours is unnecessarily long for most witnesses. For most witnesses, there simply is no reason to question them for more than half a day. An agreement that deposition of any witness will not last longer than three hours has tended to work. The parties could also agree at the outset that a small number—one or two—can proceed up to six hours. There are rarely more than two witnesses per side that are so central to the narrative that more deponents need to exceed three hours.

An agreement we haven't reached yet, but would like to try, is one that mirrors a frequent trial limitation—time limits. The parties could agree that only a certain number of hours of deposition time will be available, to be used with witnesses in lengths as each side sees fit.

10. No objections at depositions.

Many jurisdictions are moving towards rules that prohibit counsel from asserting deposition objections other than privilege objections and "objection, form." These rules have had the very positive effect of cutting down on speaking objections. Speaking objections waste time, frustrate the questioner, make litigation more contentious, and make the witness and his counsel look bad.

We like to go one step beyond the limitations in the rules. At the beginning of the case, the parties should agree that at depositions, all objections to relevance, lack of foundation, non-responsiveness, speculation, or to the form of the question will be reserved until trial. There will be no reason for the defending lawyer to say anything other than to advise the client to assert a privilege or to adjourn the deposition because the questioner is improperly harassing the witness. If counsel violate this agreement, the other side can play counsel's comments or objections to the jury at trial.

This agreement is subject to occasional modification. For instance, some counsel taking depositions prefer to know if an objectionable exists to challenge a question. This permits the questioner to consider whether the question should be modified to avoid the risk of is being struck at a later time. Counsel can easily accommodate such practice.

11. Exhibits will be numbered sequentially.

It becomes apparent that many litigators are not thinking about trial when they start numbering deposition exhibits. It is a particularly annoying practice to number exhibits separately for each deposition. When this is done, the same document can end up being Smith-1, Jones-4, and Johnson-14 once the parties get to trial. Alternatively, the plaintiffs and defendants can continue the numbering from deposition to deposition but have a separate set of plaintiffs' exhibits and defendants' exhibits. Plaintiffs-14 and defendants-14 then will be different documents.

Exhibits should be numbered at deposition with the ultimate goal in mind – trial. Each exhibit should have one and only one number, which it will carry through trial. This practice greatly reduces confusion over exhibit numbering. It also allows the parties to more easily play at trial the deposition excerpts in which exhibit numbers are referenced.

12. The parties will share the same court reporter and videographer.

Counsel often fail to cooperate on the selection and negotiations with a court reporting firm. This is a mistake. The parties can easily cooperate to choose a court reporting firm at the beginning of the litigation. If counsel can promise the firm that it will handle court reporting and videography for every deposition in the case, the firm should be willing to provide a discount in return for the right to transcribe all depositions. Counsel can also cooperate to solicit competitive bids from multiple court reporting firms. This cooperation at the beginning of the lawsuit can save considerable money for clients.

13. The parties will share the expense of imaging deposition exhibits.

Just as the parties should cooperate in selecting a court reporting firm, they should cooperate and share the cost of imaging all deposition exhibits. There is no advantage to anyone – except perhaps companies which image documents – of the parties failing to share costs in this manner.

❖ EXPERTS

14. Neither side will be entitled to discovery of communications with counsel or draft expert reports.

The parties can greatly reduce the cost of expert work and discovery by agreeing that communications between experts and counsel, as well as draft expert reports, are not discoverable. The preparation of expert reports is not nearly as time-consuming when experts and attorneys can freely communicate in writing.

We have been proposing this agreement for years, and the federal rules are now catching up. Under new Fed. R. Civ. P. 26(b)(4)(B), effective December 1, 2010, draft reports are protected as work product unless they are otherwise discoverable under the catch-all discovery "scope" provision of Rule 26(b)(1) or, under Rule 26(b)(3)(A)(ii), the party seeking production shows that it has "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." And under new Rule 26(b)(4)(C), attorney-expert communications are protected except to the extent that they (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Many state court systems do not yet have equivalent rules, but in the few months since the new federal rule became effective, we have found that state-court litigants often are willing to agree by stipulation to apply the common-sense federal rule to their cases.

Even with the federal rule in place, it may make sense in some cases to get a broad stipulation that draft reports and attorney-expert communications are not discoverable. Such a stipulation can give the parties more assurance that the opposing side will not prevail with an argument of "substantial need" to see communications or drafts, and that the opposing side will not seek production based on a broad reading of the exception for communications that identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed.

15. No expert depositions.

If a case is in federal court, and parties provide expert reports in the manner that is required by FRCP 26(a)(2)(B), there should be no need to depose experts. It is more efficient to use the opinions and other information provided in the report to prepare to cross-examine the experts once – at trial. Moreover, it is often strategically advantageous to save the questioning for trial.

Depositions often serve only to alert experts and opposing counsel to problems which can then be fixed prior to trial.

Sometimes parties do not comply with FRCP 26(a)(2)(B). The rule requires detailed and complete reports, including (among other things) "a complete statement of all opinions the witness will express and the basis and reasons for them," "the facts or data considered by the witness in forming them," and "any exhibits that will be used to summarize or support them." If a report is incomprehensible or incomplete, the parties should reserve the right to depose the expert. However, the parties should agree that the party seeking clarification is required to establish its entitlement to a deposition through a motion filed with the Court.

Given today's practice, a frequent modification here is to permit depositions of a delimited nature. Three hours should be more than sufficient to test the boundaries of an expert's reports, and to confirm the materials upon which he or she relied.

❖ MOTION PRACTICE

16. The parties should agree upon a briefing schedule and page limits for all pre-trial motions.

When it is not otherwise set by rule or court order, the parties should agree in advance for a pre-trial motion schedule and page limits. Most consequential pre-trial issues can be resolved with short briefs filed in a timely way that set out the key arguments. It is typically a waste of time to bury the Court in paper, especially with motions filed shortly before trial.

Better Trials Through Trial Agreements

Litigants, judges, juries, and lawyers all win when counsel can work together and agree on some simple rules at the beginning of a case to streamline discovery and trial. These agreements can reduce expense, stress, and many of the uncertainties that are associated with pretrial rulings and jury trials. We hope that these agreements can prove to be as beneficial in your cases as they have been in ours.

❖ TRIAL BUILD-UP

1. Limiting the length of trial, and of opening argument.

If the Pretrial Agreements above are used, the length of trial will already have been established during discovery. The necessary length may be modified in light of the close of discovery, but regardless, the parties should agree to limit the length of trial. Jurors and courts certainly appreciate such boundaries, as do lawyers who have participated in time-limited trials and appreciate the discipline to play for who will really testify and for how long. Openings should not normally last more than an hour per side and closing, not more than two hours per side.

2. Real witnesses may be deposed once disclosed.

Though this governs what may happen in the month before trial, it is an agreement that should be made at the start of discovery. Depositions are typically taken to discover facts and to pin down witnesses who will testify at trial so that there is no surprise. In taking depositions for the latter reason, counsel feel compelled to depose any possible fact witness. If, instead, counsel knows that he can wait until he sees the other side's real witness list to depose a witness, many unnecessary depositions can be avoided.

3. The use of an agreed form motion in limine.

Exhibit A covers things that most lawyers would agree should not be mentioned in the presence of the jury.

4. Limit exhibit lists to documents counsel intend to show to the jury.

Exhibit lists appended to pretrial orders frequently include the kitchen sink. Delegated to young attorneys, they include hundreds of documents that will never be shown to the jury, but that are included just "for the record." Experienced trial lawyers recognize that this is a waste and unnecessary. That's why is important that lead counsel commit to personally meet to try to resolve exhibit objections.

5. Stipulation that what you produce is authentic.

Almost all authenticity objections can be cured by deposition testimony if given fair warning. This agreement prevents either side from sandbagging its opponent with scores of such objections on the eve of trial when it is too late to cure the problems.

6. Agreed jury questionnaires.

In order to streamline jury selection, the parties should agree up front on a jury questionnaire to be filled out by potential jurors. Even judges that would not normally permit it are hard-pressed to deny an agreed motion to submit a jury questionnaire. Given the restrictions on lawyer voir dire in many courts, this is about the only effective way to identify jurors that should be subject to a preemptory strike.

❖ TRIAL MANAGEMENT

7. Court reporting needs.

Almost anything can be arranged if requested in advance. With many court reporters competent at real-time reporting, the parties should request this as an inexpensive substitute for daily copy.

8. "Just in time" deposition designations.

One of the most wasteful exercises required by most pretrial orders is the designation in advance of deposition testimony. In most cases, counsel over-designate and end up playing only a tiny portion of what they have designated. Unnecessary designations require unnecessary objections and counter-designations. Because of the speed with which video clips can be edited on the fly, it saves the parties and the court lots of work if deposition testimony need only be designated 48 hours before it is intended to be used.

9. How to count deposition time.

Disagreements over how to count deposition time and incentives to over counter-designate can be avoided by agreeing that only optional completeness counters count against the party who plays video clips during its case.

10. Admission upon mention of unobjected-to exhibits.

In spite of everyone's best intentions, there are always exhibits on the Trial Exhibit List that counsel decides are not important enough to display to the jury. Pre-admission of all unobjected to exhibits has the effect of cluttering up the record with these unused exhibits. The better practice is to agree that once either side mentions an unobjected to exhibit, whether in questioning a witness or making the opening statement, the exhibit is admitted. The court reporter can easily provide the clerk and parties of a daily list of mentioned and hence admitted exhibits. This agreement allows unobjected to exhibits to be used during openings and dispenses with formal offers that require "no objection" statements by opposing counsel and "admitted" rulings by the Court.

11. Fair notice of order of witnesses.

Both sides are able to assign and prepare their crosses by knowing, the weekend before the witnesses are called, of the order in which they will be called. The second, 36-hour notice, is useful if there are any unexpected changes in the order.

12. Demonstratives need not be listed on exhibit lists and need only be disclosed at the last minute.

If a chart is to be admitted into evidence and can be consulted by the jury during deliberations, it is to be listed on the Trial Exhibit list just like all other documents. But charts or power point slides prepared by counsel and intended to be teaching aids but not intended to be taken into the jury room need not be so listed. Both sides are likely to use them during openings and on direct and since they are not admitted into evidence, the only real objection would be that they violate a limine order. Because counsel prepare these up to the last minute and because the ground for objection is so limited, counsel should agree to disclose them to the other side immediately before they are displayed. There should be no need to disclose in advance those used during cross.

13. Sharing equipment and PowerPoint slides.

Most courts will require the joint use of equipment because of space limitations. Effective cross or redirect requires that you have available any demonstratives that opposing counsel just used with the witness.

❖ JUROR COMPREHENSION

14. The use and content of juror notebooks.

In our experience judges and jurors appreciate these aids to comprehension. As long as they do not become argumentative, opposing counsel can readily agree on a glossary of terms, a cast of characters, and a short chronology. There will be disagreements about what exhibits, if any, should go into the Juror Notebook, but these can be handled by an agreement that each side gets to pick 5 or 6.

15. Note-taking by jurors.

Note-taking is well accepted, although there are some courts that refuse to allow jurors to take their notes into deliberations. This defeats one purpose of allowing note taking—allowing jurors to rely upon their own notes in addition to their memories. Providing the jurors with a photo of each witness helps them remember testimony.

16. Questions by jurors.

Allowing the jurors to ask questions is an innovation that courts are increasingly allowing in order to make jurors more attentive and engaged. Because it improves juror comprehension, both sides should welcome it.

17. The use of preliminary substantive instructions and pattern instructions.

Waiting until the end of the case to tell jurors about the substantive law and what to look for is akin to asking a person to assemble a complicated piece of equipment before reading the

instructions. Increasingly courts are willing to consider some preliminary substantive instructions, particularly if the parties agree that they should be given. At some point in time, the parties should ask the Court when it wants them to submit final jury instructions—filing them with the pretrial order is usually much earlier than the Court needs them. The parties can save themselves a lot of aggravation if they will agree to use pattern instructions where they exist. If one side insists on preparing a tailor-made instruction by lifting helpful language from decisions, the other side will obviously do the same and the end result is an instruction that is too long, incomprehensible and a likely candidate for reversal.

18. Interim arguments.

Interim arguments improve jury comprehension and therefore should be encouraged. But there should be an overall time limit (e.g., each side gets an hour) and an agreement that the arguments will be made in units of a certain amount of time (e.g., 5 minutes) and be made only before or after a witness takes the stand.

19. Final instructions should be given before final arguments.

This is the case in many state courts, but the Federal Rules, for some reason, provide for the court to instruct the jury after the lawyers argue. This makes for a very awkward argument, with the lawyers having to argue the charge without having the court first give it.

(Style of Case)

PRETRIAL AGREEMENTS WITH OPPOSING COUNSEL

Here is a list of pretrial agreements we try to reach with the other side before discovery begins. These agreements will make life easier for both sides and should not advantage one side over the other at the outset. If we wait until we are in the heat of battle to try to reach these agreements, one side or the other will feel disadvantaged.

Place a check mark in the "Agreed" column for all the agreements that are reached. Any modifications or additions should be noted.

Item No.	Description	Agreed	Source of Agreement
	COMMUNICATION		
1.	As to any discovery dispute, the lead lawyers will try to resolve by phone and no one will write letters to the other, including letters attached as pdf's to emails: just e-mails and phone calls. Each side will copy all of its emails to the email group distribution list provided by the other side.		
2.	All papers will be served on the opposing party by e-mail. For purposes of calculating the deadline to respond, email service will be treated the same as hand–delivery.		
	DOCUMENTS		
3.	If agreement cannot be reached on the form of a protective order within 48 hours of the time they are exchanged, both sides will write a letter to the Court including each other's preferred version and, without argument, ask Court to select one or the other ASAP.		
4.	Documents will be produced on a rolling basis as soon as they have been located and numbered; if copies are produced, the originals will be made available for inspection upon request.		
5.	If the case is in federal court, the parties will seek an order from the court, under FRE 502(d), providing: Each side must initially produce		

Item No.	Description	Agreed	Source of Agreement
	electronically stored information from the files of 5 custodians selected by the other side during an agreed period of time. Only documents which have a lawyer's name on them can be withheld from production and only if they are in fact privileged. Production does not waive any privilege and documents can be snapped back whenever the producing party recognizes they are privileged. After analyzing the initial production, each side can request electronic files from 5 other custodians. Beyond that, good cause must be demonstrated. Whether in federal court or not, the parties will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook/PST, Concordance or Summation, so it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made available to the other side. The parties will produce a Bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire e-mail (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail–so it's stand-alone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from whence it came, (2) the directory or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension.		
6.	The production of a privileged document does not waive the privilege as to other privileged documents. Documents that the other side claims are privileged can be snapped back as soon as it is discovered they were produced without any need to show the production was inadvertent.		

Item No.	Description	Agreed	Source of Agreement
7.	Each side has the right to select 20 documents off the other's privilege list for submission to the court for in camera inspection.		
	DEPOSITIONS		
8.	Before depositions begin, we will try to agree on how long the trial will last and ask the Court to give us a firm trial setting and to establish the length of the trial. Whatever time is allotted will be divided equally.		
9.	Depositions will be taken by agreement, with both sides alternating and trying in advance to agree upon the dates for depositions, even before the deponents are identified. Each side gets 10 depositions lasting for 3 hours each.		
10.	At depositions, all objections to relevance, lack of foundation, non-responsiveness, speculation or to the form of the question will be reserved until trial, so there will be no reason for the defending lawyer to say anything other than to advise the client to assert a privilege or to adjourn the deposition because the questioner is improperly harassing the witness. If counsel violate this agreement, the other side can play counsel's comments/objections to the jury.		
11.	All deposition exhibits will be numbered sequentially X-1, X-2, etc., regardless of the identity of the deponent or the side introducing the exhibit and the same numbers will be used in pretrial motions and at trial.		
12.	The parties will use the same court reporter/videographer, who agrees to provide specified services at discounted prices for the right to transcribe all depositions.		
13.	The parties will share the expense of imaging all deposition exhibits.		

	EXPERTS		
14.	We will exchange expert witness reports that provide the disclosures required by the Federal Rules. Neither side will be entitled to discovery of communications between counsel and expert witnesses or to drafts of experts' reports.		
15.	There will be no depositions of experts unless an expert's report is incomprehensible or incomplete, in which case the party seeking clarification is required to establish the same by motion filed with the Court.		
	MOTION PRACTICE		
16.	We will agree to a briefing schedule and page limitations for all pretrial motions.		

(Style of Case)

TRIAL AGREEMENTS WITH OPPOSING COUNSEL

Here is a list of trial agreements we try to reach with the other side before the final pretrial conference. These agreements will make life easier for both sides at trial, will aid juror comprehension, and should not advantage one side over the other.

Place a check mark in the "Agreed" column for all the agreements that are reached. Any modifications or additions should be noted.

Item No.	Description	Agreed	Source of Agreement
	TRIAL BUILD-UP		
1.	The length of the trial (excluding openings and closings) will be ___ days and that time will be split equally. Each party will get ___hours to open and ___ hours to close.		
2.	Real live witness lists will be exchanged on _____. Any witness who appears on a party's live witness list whom the other side has not deposed, can be deposed before the final pretrial.		
3.	An agreed Motion in Limine (see Exh. A) plus a briefing schedule for contested limine motions.		
4.	We will exchange lists of exhibits (with each exhibit entitled simply Trial Exhibit and numbered sequentially as in the deposition transcripts) on ___ that will be limited to exhibits we in good faith intend to show to the jury during trial. Deadlines for exchanging exhibit objections and a time for lead counsel to meet and confer on them.		
5.	All exhibits produced by a party are deemed authentic. All exhibits produced by certain third-parties are authentic.		
6.	The parties will exchange proposed jury questionnaires on _____ and try to reach agreement before the final pretrial conference.		

Item No.	Description	Agreed	Source of Agreement
	TRIAL MANAGEMENT		
7.	The parties will jointly request real-time reporting.		
8.	Deposition designations will be deferred until 48 hours before a party intends to read or play a deposition. The opposition then has 24 hours to object and counter-designate, and the originally designating party has 4 hours to object to any counter-designations. The deposition may be used as soon as the Court rules on the objections.		
9.	Deposition counter-designations will be counted against the designator's time. Counter-designations for optional completeness will be played during the "direct examination" portion of the video playback. All counter-designations will be played in full after the "direct examination" portion of the video playback is completed.		
10.	All unobjected-to trial exhibits listed on the exhibit lists at the time the trial begins are deemed admitted when mentioned by any party during trial.		
11.	The parties shall notify opposing parties of the order in which they plan to call live witnesses each Friday by 5pm for the following week. The parties shall further notify opposing parties 36 hours before any particular witness is called live.		
12.	Demonstratives (i.e., charts, power point slides, models and the like, that do not go back into the jury room) need not be listed on the parties Trial Exhibit lists. Those to be used on direct examination, opening or closing will be provided to opposing counsel before the session (morning or afternoon) in which they will be used.		
13.	The parties will share any courtroom audio-visual equipment, and will provide each other electronic versions of whatever they display immediately after the display.		

	JUROR COMPREHENSION		
14.	An agreed juror notebook containing a glossary, cast of characters, chronology and any key documents.		
15.	The jurors can take notes, can use their own notes during deliberations. When each witness takes the stand, the party calling that witness will provide each juror with a lined sheet of looseleaf paper with a photo and the name and title of the witness, suitable for taking notes on and placing in the juror notebook.		
16.	Jurors can direct, through the judge, questions to each witness before he leaves the stand. Attached as Exhibit B is a protocol of doing this.		
17.	The parties will exchange proposed preliminary and final jury instructions on _____ and ____, respectively; will ask the Court to give preliminary instructions; and will try to reach agreement on preliminary instructions before the trial begins and on final instructions before the court sets a charge conference. If a pattern instruction is available, it will be used.		
18.	Each side will be allowed ____ minutes of interim argument that can be used in increments no greater than ___ minutes when no witness is on the stand.		
19.	The parties will ask the court to instruct the jury before final arguments.		

EXHIBIT A

AGREED MOTION IN LIMINE

1. Privileged communications.

The intent or understanding of any parties' counsel, and the content of any attorney-client privileged or confidential communications, or lack thereof. FED. R. EVID. 501; TEX. R. EVID. 503. (Oral or written communications between any third party and counsel for one of the parties, which are non-privileged and non-confidential, may be inquired into, subject to objection on relevancy or other ground.)

Counsel shall refrain from asking questions that may tend to require an attorney or witness to divulge a client confidential or privileged communication, or which may tend to require an attorney or witness to have to object to answering on such grounds. FED. R. EVID. 403.

2. Questions about trial preparation.

Questions about how counsel prepared witnesses who they represent for their trial testimony.

3. References to the filing of a motion in limine.

Reference to the filing of any Motion in Limine by any party because such references are inherently prejudicial in that they suggest or infer that a party sought to prohibit proof or that the Court has excluded proof of matters damaging to a party's case. FED. R. EVID. 401-403.

4. Exclusion of evidence.

Any reference in any manner by counsel or any witness that suggests, by argument or otherwise, that a party sought to exclude from evidence or proof any matters bearing on the issues in this cause or the rights of the parties to this suit. FED. R. EVID. 401-403.

5. Statement of any venire person.

After the close of voir dire, reference to the statement of any venire person. FED. R. EVID. 401-403.

6. Questioning attorneys.

Any question by a witness, in front of the jury, directed to the adverse party's counsel. FED. R. EVID. 401-403.

7. Probable testimony of unavailable witnesses who will not be called by deposition.

That the probable testimony of a witness, who is absent, unavailable or not called to testify in the cause would be of a certain nature. FED. R. EVID. 401-403.

8. Any reference to any exhibit not being offered by any party.

Any reference to any exhibit not being offered by any party. FED. R. EVID. 401-403.

9. Pre-trial motions or matters.

Any pre-trial motions or matters, specifically including but not limited to summary judgment motions and the Court's rulings on such motions. FED. R. EVID. 401-403.

10. Attorney's objections.

In reading or playing videotaped depositions, any attorney's objections, comments, side bars, or responses to objections. FED. R. EVID. 401-403.

11. Settlements and settlement discussions.

Settlements entered into or discussed with any party, including a party to this lawsuit or to any other action and proceeding, as well as any and all statements made by any party in the settlement discussions during the course of those discussions. FED. R. EVID. 408.

12. Stipulating to any matter.

Any reference to the fact that counsel for any party may have declined or refused to stipulate to any matter. FED. R. EVID. 401-403.

13. References to any anyone sitting in the courtroom.

Any reference to any anyone sitting in this courtroom other than witnesses, counsel, the party's corporate representatives, or Court personnel. FED. R. EVID. 401-403.

14. Reference to other suits.

Any reference, comment, or statement by counsel, or by any witness called to testify, regarding any other suit, litigation, arbitration, or other legal or administrative proceeding. This would be irrelevant, confusing, misleading and unfairly prejudicial. FED. R. EVID. 402 & 403.

15. Alternative pleadings, theories, and requests for relief.

Any reference, comment, or statement by counsel, or any witness called to testify, regarding the fact that one party or the other may have had alternative pleadings, other theories of liability, or other requests for relief in this lawsuit than those contained in the latest pleading. Those matters are irrelevant and would be confusing, misleading and unfairly prejudicial.

16. Opinions not disclosed in expert report.

Eliciting any opinion from an expert that is not contained in that expert's written report. *See* FIRST AMENDED SCHEDULING ORDER ¶ 4 ("Any opinion or testimony not contained in the summary will not be permitted at trial.") [D.E. #43].

17. Location or size of any law firm.

Any suggestion as to where a particular lawyer or firm is from or how big it is.

18. The Wealth, Religious or Political Beliefs or Sexual Preferences of any party

Any reference to the wealth, religious or political beliefs or sexual preferences of any party.