

# Criminal Practice and Trial Procedure

## A. ATTORNEY CONFERENCE AND DISCLOSURE

Within ten (10) days of the date of arraignment, government and defense counsel shall meet and confer for the purpose of resolving or minimizing the issues in controversy.

Upon the request of defense counsel, government counsel shall:

(A) provide defense counsel with the information described in Federal Rule of Criminal Procedure 16(a)(1); and

(B) permit defense counsel to inspect and copy or photograph any exculpatory/impeachment evidence within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), United States v. Agurs, 427 U.S. 97 (1976), and Giglio v. United States, 405 U.S. 150 (1972).

A list of such evidence shall be prepared and signed by all counsel. Copies of the items disclosed shall be initialed or otherwise marked.

## B. DISCLOSURE DECLINED

If, in the judgment of government counsel, it would be detrimental to the government's interests to make any of the disclosures set forth in the paragraph above, the government shall file a motion within the ten-day period outlined in the Court's Scheduling Order seeking relief from this requirement and setting forth the specific reasons therefore.

## C. CONTINUING DUTY

The duty to disclose is continuing, even throughout trial.

## D. DISCOVERY BY THE GOVERNMENT

Nothing in these procedures is designed to preclude discovery by the government under the Federal Rules of Criminal Procedure, or to alter the Defendant's obligation, if any, under Rule 16(b).

## E. PRE-TRIAL MOTIONS

Before any pre-trial motion is filed, compliance with [Local Criminal Rule 12.1](#) must be observed.

## F. EXHIBITS

- 1. Agreement as to Admissibility:** Counsel for the government is urged to make reasonable efforts to reach agreement with defense counsel concerning the admissibility of each intended physical exhibit prior to trial. When such agreement is reached, a list of the exhibits in question will be prepared by government counsel and entered at the opening of trial. The exhibits will be considered admitted at the outset.
- 2. Marking of Exhibits:** Counsel are required to mark all proposed exhibits in advance of trial. The Government's exhibits shall use consecutive numbers and Defendant's exhibits shall use consecutive letters.
- 3. List of Exhibits:** A list of proposed exhibits shall be submitted directly to Judge Berg's chambers by each of the parties by the deadline established at the final pretrial conference. No later than one (1) week before the final pretrial conference, each party shall make available for inspection all exhibits which that party will introduce at trial. This provision shall not extend the time for disclosure and inspection of material previously ordered herein.
- 4. Foundation issues and Motions in Limine:** Motions in limine and any notices of intent to

contest foundation, chain-of-custody, or scientific analysis shall be filed at or before the final pretrial conference. Unless the items or exhibits are unusually voluminous, any notice of intent to contest foundation, chain-of-custody, or scientific analysis shall provide a brief item-by-item or exhibit-by-exhibit description of the good faith basis for any objection.

5. **Objections to Exhibits:** These guidelines shall not affect the right of a party to object at the time of trial to the introduction of an exhibit other than on the basis of authentication and foundation.
6. **Custody and Record of Admitted Exhibits:** Counsel should refer to and comply with the Standing Order of Discovery for this District.
7. **Presentation of Exhibits during Trial:** The Court encourages parties to use electronic projection to present exhibits during trial in a manner that allows the jury, court, attorneys, and parties to view the exhibit simultaneously. If photographs and documentary exhibits are not presented electronically, then the party must prepare exhibit books for the Court and each juror. Whether or not exhibits are presented electronically, a separate exhibit book should be prepared and made available to any witness who is to be questioned about an exhibit.
8. **Preparing Exhibits for Jury Deliberation:** Originals of all exhibits admitted at trial should be ready to be turned over to the jury foreperson prior to closing jury instructions so that jury deliberations are not delayed. Prior to submitting exhibits to the jury for deliberations, counsel must confer and purge from one set of binders or files all exhibits not admitted during trial.
9. **Filing Exhibits:** It is the responsibility of the parties to ensure that the record is complete. All proposed exhibits are to be filed in the record within five business days of the verdict.
10. **Full Disclosure:** Computer generated visual or animated evidence, together with underlying data, must be disclosed to opposing counsel at least one week before the start of trial.
11. **Penalty:** A party who does not abide by these provisions may be subject to sanctions, including preclusion of the introduction of exhibits at trial by the offending party.

## G. WITNESS LIST

By the deadline established in the Scheduling Order, and to enable the Court to better estimate the length of trial, each party shall submit directly to Judge Berg's chambers a list of witnesses by name and agency (if appropriate) whom it reasonably anticipates it will call to testify at trial, noting the approximate amount of time the party anticipates will be needed for examination of each witness. The list must be served on opposing counsel; proof of service must be attached. This list and proof of service are NOT to be electronically filed or otherwise submitted to the Clerk's Office. Parties should submit their lists to chambers via the Proposed Orders function in CM/ECF.

## H. EARLY DISCLOSURE OF JENCKS MATERIAL

The Court urges the government to disclose *Jencks* materials well in advance of the trial, and in the event that some of the information is not disclosed pursuant to the Act until the witness testifies, the Court will allow a reasonable amount of additional time during trial for the defense to prepare before proceeding.

## I. JURY INSTRUCTIONS

The parties must meet and confer prior to trial to discuss jury instructions. By the deadline established in the Scheduling Order, the parties must submit to chambers a single set of proposed, stipulated jury instructions via the Proposed Orders function. Counsels are responsible for submitting all instructions related to their specific claims or defenses, and special instructions related to evidence.

All such instructions are to be submitted in Word format via the Proposed Order function. Each instruction shall be presented on a separate page and contain references to authority (e.g., "Devitt

and Blackmar, Section 11.08"). In addition, each party must submit separately to chambers all additional proposed instruction (in the same form) to which any other party objects. The parties must make a concerted, good faith effort to narrow the areas of dispute and to discuss each instruction with a view to reaching an agreement as to an acceptable form. Disputes between the government and defense counsel regarding proposed jury instructions will be settled at a hearing on the record.

The Court has its own standard introductory and concluding instructions, and therefore counsel are directed to concentrate on elements of the offense, the defense(s), etc. In criminal cases, the Court will usually instruct the jury using the Sixth Circuit's pattern jury instructions when available. The jury is charged before final argument.

#### **J. JURY SELECTION**

The Court uses a "struck jury" system for jury selection. In most cases, the government is allowed six peremptory challenges and the defendant is allowed ten peremptory challenges. The Court will select twelve regular and two alternate jurors. Alternate jurors are not told they are alternates; they are dismissed by random draw at the conclusion of the proofs.

Voir dire will be conducted by the Court using its standard questions. Counsel should submit proposed additional voir dire questions in writing at least three days in advance of the final pretrial conference via the Proposed Order function, and the Court will add those questions it deems appropriate. The Court will provide parties with the final list of questions before jury selection begins. During jury selection, parties will be permitted to submit additional questions to be asked by the court, or may be permitted to ask questions directly, as provided by Fed. R. Crim. P. 24(a).

#### **K. NOTE TAKING & JUROR INVOLVEMENT**

Jurors will be permitted to take notes during trial. The Court specifically instructs the jury in advance on this issue. Jurors who choose to take notes will be instructed that such notes are not themselves evidence, but are merely aids to the juror's memory of the evidence presented at trial. Jurors will also be permitted to question witnesses by submitting questions to be asked by the Court. Before a witness is excused, the Court will ask whether any jurors have any questions. If so, the questions will be submitted to the Court on paper and the Court, after conferring with counsel at sidebar, will ask those questions it deems appropriate.

#### **L. MULTI-DEFENDANT OR MEGA TRIALS**

The Court does not have a general procedure for handling multi-defendant criminal "mega trials." Instead, the Court encourages attorneys to work out procedure for peremptory challenges among themselves. In such trials, if counsel cannot agree among themselves, the Court will allocate peremptory challenges depending on the circumstances of the case.

#### **M. CONTINUANCES**

Continuances of trial dates or continuances during trial will not be granted because of unavailability of witnesses. Please notify the Court if its intervention is necessary to secure witness attendance. Otherwise, witnesses will be expected to be available when called.

#### **N. TRIAL BRIEFS ENCOURAGED**

The Court encourages, but does not require, the submission of a criminal trial brief. If a trial brief is submitted, it should, among other things, inform the court about the party's proposed resolution of anticipated evidence problems.