

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

A.C.L.U., et al.,	:	Case No. 1:08CV145
	:	
Plaintiff(s),	:	
	:	JUDGE O'MALLEY
v.	:	
	:	
	:	<u>TRIAL ORDER</u>
JENNIFER BRUNNER, et al.,	:	
	:	
Defendant(s).	:	

This case is **scheduled** for **BENCH TRIAL** on **JULY 10-11, 2008**, in the courtroom of the Honorable Kathleen McDonald O'Malley, Courtroom 16A, United States District Court, 801 West Superior Avenue, Cleveland, Ohio. If the trial date is delayed for any reason, unless otherwise notified by the Court, parties shall remain on standby subject to call for the start of trial for a period of two (2) weeks.

The **Final Pretrial** is **scheduled** for **JULY 3, 2008, at 1:00 p.m.** **Lead trial counsel for all parties shall be present and prepared with full authority to discuss all aspects of the case,** including pleadings, settlement and scheduling. **Parties shall attend in person** unless counsel has requested and received prior approval from the Court for a party to attend by telephone. Parties attending by telephone must be ***readily available at all times*** during the conference. Counsel are

to have conferred with their clients and with each other regarding their final settlement posture *within forty-eight hours* of the final pretrial.

The following instructions will govern the operation of the trial and the obligations of parties and their counsel (a time line of these obligations is attached at the end of this Order):

1. **TRIAL DAYS.**

Trial days will normally begin at 9:15 a.m. and continue until 5:00 p.m. Counsel must anticipate, to the extent practicable, and notify the Court's staff of issues to be addressed by the Court outside the presence of the jury so that trial may proceed with as few interruptions as possible. Accordingly, counsel should expect to be present in the courtroom from 8:45 a.m. until 5:30 p.m. and should be prepared to address matters before the Court, during breaks. All parties are to be present in the courtroom at all times when the jury is seated. Counsel may not leave the courtroom during the course of proceedings without permission.

The Court normally takes a 15-minute break once during the morning and once during the afternoon, and also takes a lunch break from 12:30-1:30 p.m. During the lunch break, the Court often conducts courtroom proceedings in other cases.

2. **VOIR DIRE.**

The Court will conduct initial voir dire of the entire panel and of individual panel members. The Court will thereafter allow *one* counsel for each party to question individual panel members *briefly* on issues not addressed by the Court. The Court will discontinue voir dire questioning by

counsel if questioning seeks to accomplish anything other than to elicit information regarding the panel member's background, biases, or suitability for service.

Proposed questions for the Court's questioning are to be submitted fourteen (14) days prior to the final pretrial.

Counsel will exercise their juror strikes at sidebar immediately following voir dire. First, the plaintiffs will present all of their motions to strike for cause; then, defendants will present all of their motions to strike for cause. After the Court rules on these motions, the parties will exercise their peremptory strikes. Counsel may use *any* peremptory strike to remove *any* potential juror from the panel — “back strikes” are allowed. Counsel will always know what jurors have been stricken — there are no blind strikes. The Court keeps a chart tracking which jurors would be seated at any given time. Jurors will *not* know why they were stricken, or by whom.

All challenges, including challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), are to be made during sidebar when counsel exercise their strikes, and the Court will rule upon these challenges outside the hearing of the jury. Challenges not made at this time are deemed waived.

3. **WITNESS LISTS.**

No later than twenty-one (21) days prior to the final pretrial, each party shall provide opposing counsel and the Court with a list of witnesses to be called at trial, including potential rebuttal witnesses to the extent known. A brief description of the testimony to be offered by each witness shall be included. No witness will be permitted to testify at trial if his or her name is not provided to opposing counsel at this time, unless the Court determines that the witness is needed to offer rebuttal testimony which could not have been reasonably anticipated prior to trial or that

exceptional circumstances warrant amendment of one or both of the witness lists. No witness may be included on a witness list if not identified in connection with initial disclosures required under Federal Rule of Civil Procedure 26 (or reasonably timely supplements thereto) or in response to a discovery request seeking the identity of persons with knowledge regarding the matters at issue (or reasonably timely supplements thereto), unless neither pretrial obligation applies to the action.

By 4:00 p.m. on the day before trial, and by the close of Court each day thereafter, the counsel conducting witness examinations on the following day shall provide opposing counsel with a list of those witnesses he or she anticipates calling the next day, in the order in which the witnesses are expected to testify. **It is counsel's responsibility to ensure that enough witnesses are present each day for presentation of proofs to fill the entire trial day.** Counsel should inform the Court early regarding any problems in obtaining the attendance of witnesses.

4. **DEPOSITION TESTIMONY.**

Whenever depositions (videotape or written) are to be used at trial, counsel proposing such testimony shall provide opposing counsel with pertinent transcript references twenty-one (21) days prior to the final pretrial. (These references should include possible rebuttal evidence, to the extent reasonably anticipated.) Objections to the proposed testimony will be provided to counsel within seven (7) days thereafter. Counsel shall consult in an effort to resolve any objections raised.

No later than twenty-four (24) hours prior to the final pretrial, counsel proposing to use the deposition testimony will provide the Court with a transcript of the deposition, containing highlighted references to the testimony to be offered. Where objections have been raised and not

resolved, those objections shall be noted in the margin. The Court will make every effort to rule on the objections before the jury is impaneled.

5. **EXHIBITS.**

The parties shall exchange and file proposed exhibit lists twenty-one (21) days prior to the final pretrial. Written objections to any proposed exhibit shall be filed with the Court and served on opposing counsel within seven (7) days thereafter. Written responses to the objections are to be filed no later than twenty-four (24) hours before the final pretrial.

Exhibits shall be marked with exhibit stickers prior to submission. Stickers are available from the clerk's office on request. Plaintiff's exhibits shall be numbered in sequence beginning with the number 1. Defendant's exhibits shall be numbered in sequence beginning with the number 1001. All exhibits must reflect the case number on the exhibit sticker. If there are multiple parties, the party's surname should precede the numbers or letters (*e.g.*, "Smith-1" or "Jones-1001"). The parties shall confer so that any given exhibit shall be designated and numbered only once (*e.g.* "Smith-1" and "Jones-1001" should not be the same document). Joint exhibits are encouraged; at defendant's option, any exhibit proposed by both parties shall be designated a joint exhibit. Joint exhibits shall be numbered in sequence beginning with the number 2001 (*e.g.*, "Joint Exhibit - 2001"). Demonstrative exhibits shall not be marked, and shall be exchanged two (2) days prior to trial.

Where the exhibits offered by a party number more than ten (10), exhibits are to be placed in three-ring loose-leaf binders, with divider tabs and a table of contents. In these instances, two (2) binders shall be provided to the Court and one (1) binder shall be provided to opposing counsel

two (2) days prior to trial. On the morning of trial, an additional binder(s) shall be provided for use on the witness stand. Exhibits need not be filed with the clerk.

The formal exercise of moving to admit exhibits shall take place at the close of *all* presentations of proofs, not at the time each exhibit is actually used at trial. Exhibits may *not* be published to the jury (via the electronic evidence projector or otherwise) until counsel has laid a foundation for its admission.

6. **TRIAL BRIEFS AND MOTIONS IN LIMINE.**

Trial briefs shall be filed fourteen (14) days prior to the final pretrial. They shall set forth a general description of pertinent facts and a complete discussion of controlling law, with particular emphasis on those legal issues that might justify a complete or partial motion under Rule 50 of the Federal Rules of Civil Procedure.

Motions in limine (other than those addressed to documentary evidence — see paragraph 6 on Exhibits — and expert witnesses — see below) — shall be filed with the trial brief. Responses to motions in limine shall be filed seven (7) days prior to the final pretrial.

Motions in limine addressed to the admissibility of expert testimony under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), shall be filed forty-two (42) days prior to the final pretrial. Responses to such motions shall be filed thirty-five (35) days prior to the final pretrial.

In non-jury trials, proposed findings of fact and conclusions of law shall be incorporated into the trial brief.

In all cases, trial briefs and motions in limine are to be exchanged with opposing counsel **by hand delivery or fax.**

7. **OBJECTIONS.**

Counsel *must stand when making an objection* and may state no more than the word “objection,” unless invited to do so by the Court. Sidebar conferences should be kept to a minimum and should always be brief. Counsel’s request for a sidebar will be considered, but will only be authorized if the Court concludes the request is appropriate and timely and will not unduly hinder the conduct of the proceedings. In the case of multiple counsel representing a party, only the individual attorney responsible for examining the witness may make an objection or speak at sidebar.

8. **CONDUCT OF EXAMINATION.**

Counsel should expect to proceed only with direct examination, cross-examination, and re-direct examination. Only in rare instances will the Court allow re-cross-examination, and only where, in the Court’s view, the scope of the re-direct exceeds the scope of cross-examination. All argument and questioning must be done from the podium.

9. **JURY INSTRUCTIONS AND STIPULATIONS.**

Counsel shall exchange proposed jury instructions no later than fourteen (14) days prior to the final pretrial date. Counsel shall then confer regarding their respective proposals in an effort to reach an agreement regarding as many jury instructions as possible. Twenty-four (24) hours prior

to the final pretrial, a joint submission shall be made indicating (1) agreed instructions; (2) instructions proposed by plaintiffs, but opposed by defendants; and (3) instructions proposed by defendants, but opposed by plaintiffs. All proposed instructions shall be supported by citations to authority at the time submitted to the Court. Grounds for objections need not be spelled-out at this time and will be addressed at the final pretrial and/or at a preliminary charge conference, to be held prior to opening statements.

In addition to filing proposed jury instructions in document form, **counsel should present the Court with their jury instructions on computer disk.** Boilerplate instructions need not be submitted.

During trial or at the close of all evidence, the parties may submit supplemental requests for instructions on matters not anticipated prior to trial.

Stipulations of Fact, if any, shall also be submitted no later than twenty-four (24) hours prior to the final pretrial.

Courtesy copies of all filings set forth in this order shall be hand-delivered to Chambers at the time of filing with the Clerk.

IT IS SO ORDERED.

s/ Kathleen M. O'Malley

KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

DATED: February 21, 2008

**TIME LINE OF OBLIGATIONS
UNDER THIS TRIAL ORDER**

Forty-two (42) Days Prior to the Final Pretrial.

- 1) File and serve motions in limine regarding expert testimony.

Thirty-five (35) Days Prior to the Final Pretrial.

- 1) File and serve responses to motions in limine regarding expert testimony.

Twenty-one (21) Days Prior to the Final Pretrial.

- 1) File and serve witness lists.
- 2) Exchange proposed deposition transcript references.
- 3) File and serve exhibit lists.

Fourteen (14) Days Prior to Final Pretrial.

- 1) File and serve proposed voir dire.
- 2) Exchange objections to proposed deposition testimony.
- 3) File and serve objections to proposed exhibits.
- 4) File and serve trial briefs and other motions in limine.
- 5) Exchange proposed jury instructions.

Seven (7) Days Prior to the Final Pretrial.

- 1) File and serve responses to other motions in limine.

Twenty-four (24) Hours prior to the Final Pretrial.

- 1) File stipulations of fact.
- 2) File deposition transcripts containing references to unresolved objections.
- 3) File and serve responses to objections to proposed exhibits.
- 4) File joint submission regarding jury instructions (both hard copy and on disk).

Forty-eight (48) Hours prior to Trial.

- 1) Exchange demonstrative exhibits.