

**PRETRIAL INSTRUCTIONS FOR CRIMINAL CASES
BEFORE THE HONORABLE KENNETH J. GONZALES
UNITED STATES DISTRICT JUDGE**

TRIAL PREPARATION IN CRIMINAL CASES – *The following procedures shall be followed unless otherwise determined by the Court.*

I. CALL OF THE CALENDAR

1. Trial counsel must plan to appear on behalf of client. If unable to appear, please advise the Court no less than 24 hours before Call of the Calendar and arrange for substitute counsel.
2. Call of the Calendar is scheduled by the Court.
3. Please be prepared to address the following:
 - a. Number of days needed for trial; and
 - b. Motions to Continue. All motions to continue trial shall be filed no later than 48 hours prior to the Call of the Calendar and state the grounds for the motion in accordance with 18 U.S.C. § 3161(h)(7) and *United States v. Toombs*, 574 F.3d 1262 (10th Cir. 2009).
4. Counsel also shall specify the number motions to continue that have been filed in the underlying case and shall specify the facts and circumstances giving rise to a continuance of trial setting. If the case is a multiple defendant case, counsel is to state in the motion each defendant's position in the motion and preferably file a joint motion to continue. Counsel shall provide chambers with a proposed Order. *See* sample Order attached to these instructions. A sample Order in Word format may also be found under Criminal Forms on the Judge's webpage.

II. PRETRIAL DEADLINES

1. Throughout these pretrial instructions, the term "trial" refers to the date set in the written notice for commencement of the trailing docket.
2. **Counsel must seek leave of the Court in the form of a written motion to extend any pretrial deadline.**
3. Where a submission deadline falls on a Saturday, Sunday or a holiday, the deadline becomes the next business day.

Event	Deadline	Comment
Exhibit List	Seven (7) days before trial	Counsel for each party shall file with the Clerk and provide to opposing counsel, a proposed exhibit list. Counsel will specify for each exhibit the Rule(s) of Evidence or other legal authority upon which the admissions of the exhibit is sought. A list of stipulated exhibits shall also be filed at this time. <i>Any offer of exhibits into evidence that results from discovery later than seven (7) days before trial will be denied, except on a showing of good cause.</i>
	Five (5) days before trial	Counsel for each party shall file with the Clerk a complete list of all objections to the exhibits offered, specifying the Rule(s) of Evidence or other legal authority upon which an objection is based.
Witness List	Seven (7) days before trial	Counsel shall furnish a complete list of witnesses in the order to be called to opposing counsel and file that list with the Clerk.
Deposition Testimony	Seven (7) days before trial	Objections to use of deposition testimony shall be filed with the Clerk five (5) days before trial.
	Five (5) days before trial	The parties must confer about any disputes and, if unable to resolve any differences, must notify the Court in writing.
Jury Instructions	Seven (7) days before trial	Please refer to detailed requirements for jury instructions set out herein.
Voir Dire Questions	Seven (7) days before trial	Any party wishing to participate in voir dire must file proposed voir dire questions with the Clerk.
Motions in Limine and any other admissibility issues	Twenty-one (21) days before trial	Responses are due ten (10) days before trial. Replies to motions in limine will not be entertained unless specifically requested and allowed.

Daubert Motions and other pretrial motions	Twenty-one (21) days before trial (unless otherwise set earlier by Court Order).	Parties shall provide advance notice of intent to introduce or challenge expert testimony so that the Court has sufficient time before the trial to schedule a <i>Daubert</i> hearing, if necessary.
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III. MOTIONS IN LIMINE

Counsel is reminded of the following:

“The purpose of a motion in limine is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.” *Mendelsohn v. Sprint/United Mgmt. Co.*, 587 F. Supp. 2d 1201, 1208 (D. Kan. 2008) *aff’d*, 402 Fed.Appx. 337 (10th Cir. 2010) (internal quotations omitted). Accordingly, motions in limine “give the trial judge notice of the movant’s position so as to avoid the introduction of damaging evidence which may irretrievably effect the fairness of the trial.” *Stewart v. Hooters of Am., Inc.*, 2007 WL 1752843, at *1 (M.D. Fla.).

While pretrial in limine rulings can save time and avoid interruptions at trial, “a court is almost always better situated during actual trial to assess the value and utility of evidence.” *Mendelsohn*, 587 F. Supp. 2d at 1208 (citation omitted). Consequently, motions in limine are disfavored and courts defer making in limine rulings unless the “evidence is clearly inadmissible on all potential grounds.” *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) (“Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context.”). *See also Stewart*, 2007 WL 1752843, at *1. Moreover, litigants may not raise non-evidentiary matters in limine. *Louzon v. Ford Motor Co.*, 718 F.3d 556, 561 (6th Cir. 2013). In other words, parties may not litigate theories or defenses in a motion in limine which “have been or should have been resolved at an earlier stage” of litigation, such as in a motion for summary judgment. *Id.* Counsel also is reminded that “[a] ruling on a motion in limine is no more than a preliminary, or advisory, opinion that falls entirely within the discretion of the district court.” *United States v. Yannott*, 42 F.3d 999, 1007 (6th Cir. 1994). For that reason, the Court may amend its ruling during the course of trial. *Luce v. United States*, 469 U.S. 38, 41–42 (1984) (holding that in limine “ruling is subject to change when the case unfolds.... Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.”).

IV. EXHIBITS

1. **IN ORDER TO MAINTAIN EFFICIENCY AND ORGANIZATION OF THE COURT’S RECORD OF THE PARTIES’ NUMEROUS EXHIBITS DURING TRIAL, PARTIES SHALL FILE THEIR FINAL EXHIBIT LISTS**

WITH THE COURT PRIOR TO TRIAL. Charts, plats, diagrams, etc., will be marked and ready as to measurements, landmarks, and other identifying factual material before trial. Counsel is strongly encouraged to stipulate to exhibits wherever possible, particularly regarding their authenticity.

2. Any offer of exhibits into evidence that results from discovery later than seven (7) days before trial will be denied, except on a showing of good cause.
3. Exhibits shall be marked and identified (Plaintiff's on *yellow* labels by *numbers* and Defendant's on *blue* labels by *letters*, e.g., A,B,C, . . . AA, AB, AC). Use of exhibit notebooks (Plaintiff's and Defendant's) is encouraged for those exhibits to which neither party has objections. Counsel is to identify each exhibit with its own individual number or letter; do not group exhibits together, *e.g.*, photographs, diagrams, etc. These should be individually marked. If necessary, an exhibit which has subparts may be identified as Plaintiff's 1.1, 1.2, 1.3 or Defendant's A.1, A.2, A.3. This step is not necessary if an exhibit has multiple pages and would normally be treated as a single document, *e.g.*, reports, letters, etc.

V. **WITNESSES**

1. Clients and witnesses are expected to be on time, and counsel should always have witnesses available to fill a full trial day (*i.e.*, 9:00 a.m. - 5:00 p.m.).
2. Cumulative expert testimony will not be permitted.

VI. **DEPOSITION TESTIMONY**

1. Consistent with the Federal Rules of Criminal Procedure, deposition testimony may be introduced into evidence.
2. If a deposition is used in part, counsel shall mark the parts to be used for opposing counsel. The court copy shall also be marked. Plaintiff will use *yellow* marker and Defendant *blue* marker. This does not apply to cross-examination or rebuttal.

VII. **GUIDELINES FOR TRIAL**

1. The Court may schedule a pre-trial conference to be held 1-3 days prior to trial. During this conference, counsel shall be prepared to address any unresolved issues prior to the commencement of trial. Counsel is to bring copies of all exhibits with them to the pre-trial conference.
2. Trial will begin at 9:00 a.m. Counsel shall be in the courtroom no later than 8:30 a.m. and be prepared to discuss any matter that should be addressed outside the presence of the jury. Be on time for each court session. **Counsel shall follow the time as displayed on the clock inside the courtroom.** Trial engagements take

precedence over any other business. If you have matters in other courts, make other arrangements in advance for the handling of such matters.

3. A multi-day jury trial generally will recess at about 5:00 p.m. The Court generally will recess each morning and afternoon for a 15-minute comfort break and a 60-minute lunch break for attorneys (75-minutes for the jury).
4. Stand when you speak. Do not refer to any party or attorney by their first name. Always use surnames. Always address the Court only; do not address or argue with opposing counsel in the presence of the jury. If counsel must confer with one another, please request permission of the Court for a moment to do so privately and quietly.
5. In opening statements, present a concise summary of the facts. Do not argue the facts nor discuss law. Do not describe in detail what particular witnesses will say. The time for opening statements will be limited to the amount of time determined by the Court. Counsel will be responsible for monitoring their own time limit, but the Court may remind counsel if s/he exceeds limit.
6. When you object in the presence of the jury, make it short and to the point. Be prepared if asked by the Court to provide authority for the basis of the objection. Do not argue its merits in the presence of the jury. Do not argue the ruling in the presence of the jury.
7. Remain behind the podium when addressing the Court or speaking to the jury.
8. In final argument, you may paraphrase an instruction but do not quote extensively from any instruction.
9. Parties should notify the Court at least **two** weeks in advance of trial if they require audio-visual or other special equipment. If parties are unfamiliar with the operation of courtroom technology, they shall make arrangements with my judicial assistant, Theresa Hall at (575)528-1640, to schedule a time to test and run the equipment. Parties are responsible for operating any of this equipment. ***Please bring in actual DVD(s) and/or other electronic or technical exhibits to be used in the trial to assure their compatibility with the Court's equipment.***

VIII. PREPARATION OF JURY INSTRUCTIONS

*Prepare your proposed jury instructions in accordance with these directions. File the proposed jury instructions with citations with the Clerk's office in accordance with D.N.M. LR-Cv 5.1 at least **SEVEN (7)** days before trial is scheduled. Refer to the Court's external website in order to access Judge Gonzales's trial preparation materials: www.nmcourt.fed.us.*

1. Parties shall meet and confer in advance of the deadline to agree on as many instructions as possible. **PARTIES SHALL SUBMIT A SET OF MUTUALLY ACCEPTABLE JURY INSTRUCTIONS ON THE SUBSTANTIVE CLAIMS OR BE PREPARED TO SUBMIT A LEGAL BASIS FOR THEIR OBJECTIONS TO EACH INSTRUCTION ON WHICH THEY DO NOT AGREE.**
2. Parties shall file written objections to an opposing parties' submitted instruction. These objections are due **THREE (3)** working days after jury instructions are due.
3. **IN ADDITION TO ELECTRONICALLY FILING THEIR SUBMISSIONS REGARDING JURY INSTRUCTIONS**, Plaintiff and Defendant shall submit to the Court through the email address (kjgproposedtext@nmcourt.fed.us) on the chambers web page for proposed orders, the following: (1) the set of mutually acceptable jury instructions; (2) disputed jury instructions; and (3) proposed special verdict forms.
4. The requested instructions must be submitted in Word or Rich Text format.
5. Jury instructions without citations are no longer needed.
6. Directions regarding submission of STOCK instructions: Parties should not submit stock instructions. Instead, parties should refer to the Court's approved set of stock instructions, available on the chambers web page under "Stock Criminal Jury Instructions." Parties should include a separate page with a list of requested stock instructions as each is described at the bottom of the web site instructions. The parties should refer to Tenth Circuit pattern criminal instructions for substantive instructions.
7. Carefully proofread each instruction for errors in spelling, grammar, punctuation, and citations, and for unintended deviations from pattern instructions used as sources.
8. Submit a cover sheet on all sets of instructions.
9. Submit no more than one instruction per page. (*See* Fig. 1 below).

(PLTF'S) OR (DEFT'S) OR (JOINT)
INSTRUCTION NO. 1

Members of the Jury,

You have now heard all of the evidence in
the case and will soon hear the final
arguments
of the lawyers for the parties.

It becomes my duty, therefore, to instruct
you on the rules of law that you must follow
and apply in arriving at your decision in the
case.

Citation . . .

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CR No. ##-#### KG

(Defendant's name),

Defendant.

ORDER CONTINUING TRIAL SETTING

This matter is before the Court on Defendant's [**Unopposed**] Motion to Continue Trial Setting (Doc. #). The Court having reviewed the defendant's motion, having been advised that Assistant U.S. Attorney [**Name**] does not oppose this motion, and; further, the motion by [**Defendant's name**] having been filed in accordance with the provisions of 18 U.S.C. § 3161 (h)(7)(A) and it appearing that the ends of justice served by allowing this continuance outweigh the best interest of the public and the defendant in a speedy trial; the Court thus being fully advised in the premises finds that defendant's motion is well-taken and should be granted.

The Court having considered the motion and subsequent to any hearing to determine the appropriate length to continue the trial, being fully advised in the premises and in light of the holding in *United States v. Toombs*, 574 F.3d 1262 (2009), finds that the defendant has by his motion, created a sufficient record to justify granting the motion to continue. *See id.*, 574 F.3d at 1271 (requiring that the record on a motion to continue "contain an explanation of why the mere occurrence of the event identified by the party as necessitating the continuance results in the need for additional time").

[Specify the number motions to continue that have been filed in the underlying case and shall specify the facts and circumstances giving rise to a continuance of trial setting]

IT IS HEREBY ORDERED that Defendant's unopposed Motion be granted; and that the trial setting is continued for thirty (30) days;

IT IS FURTHER ORDERED that Defendant's Unopposed Motion to Continue Jury Trial Setting until _____, **2022 at 9:00 a.m.** be granted; and that pursuant to 18 U.S.C. § 3161(h)(7)(A), the delay resulting from the continuance shall be excluded for purposes of the Speedy Trial Act.

UNITED STATES DISTRICT JUDGE