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Lessons from Big Cases for Small Cases and *Vice Versa*

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LESSONS FROM BIG CASES FOR SMALL CASES AND *VICE VERSA*

By Erica W. Harris

One of the best things about my practice is that it is incredibly varied. Because my firm is known for representing both plaintiffs and defendants on contingency and other alternative fee bases in a variety of civil contexts, the types of cases I have handled runs the gamut. I have worked on multi-state class actions and single party employment disputes; multi-party antitrust and environmental cases that span decades; and individual versus individual breach of contract actions involving only a single disputed question of fact. The benefit of the vast array of cases – besides staving off boredom – is the education each case provides. Those lessons go beyond just learning about a different field of law or about a different series of facts. To the contrary, there are many generally applicable lessons learned from handling big cases that are applicable to small cases and *vice versa*.

I. LESSONS FROM BIG CASES FOR SMALL CASES

A. Use a task sheet.

Larger matters generally have large trial teams. That means you need greater coordination to ensure that each team member knows what he or she is supposed to be doing. A detailed task sheet is the standard tool to accomplish this.

The task list sets forth each task assigned to any trial team member. Tasks are set forth in great detail. So if there is legal research to be done, the task is not just "legal research" but rather "legal research to determine whether we can challenge standing." Tasks are generally assigned to one – and no more than one – team member. (If you assign a task to more than one person, the chance of the task getting done in a timely manner substantially decreases.) Exceptions to this general rule may include meetings, hearings or trial, which may require the presence of more than one team member. All deadlines are included on the task sheet. So, for example, task lists

will reflect every deadline found in the court's scheduling order, every deadline dictated by the applicable rules of civil procedure, and all internal deadlines necessary to meet external deadlines and move the case forward. Task lists are circulated to all trial team members, and at least one representative of the client is on each trial team. An example task list is included in the Appendix at Tab 1.

Using a task list in even the smallest case is a valuable tool that is worth the few minutes it takes to create. A formal task lists reflects all the work you are doing, gives the client an appreciation of how much work there is in each case, and keeps the client apprised at all times of the status of the case and work being done. If a paralegal is employed, a task list ensures that the paralegal knows what he or she is tasked with and by what date the task must be completed. Tasks are more likely to be completed if they are listed on a task list just by virtue of the task list including due dates for each task.

Even if you are the only person working the case, task lists keeps you organized and on course. For practitioners who handle a large number of small cases at any one time, a task list is a perfect way to avoid missing a deadline and having a quick reference to remind you of where you are in the case. Simply put, using a task list in even a case where you are the only lawyer working the case will keep you on task and the case moving forward.

B. Arrange standing conference calls.

In large active matters, we use weekly calls with the entire trial team to review the task list, keep the client informed, and ensure the case is moving forward. Clients are invited to each call. The weekly calls are generally thirty minutes or less no matter how large the case. The purpose of the call is to make sure everyone is on the same page as to the status of the case, to ensure that tasks are being completed in a timely manner, and to avoid the multiple calls that

would otherwise occur between the various team members each day. For example, instead of the client calling me for an update on document review, me then calling an associate to find out where they are on document review, and then calling the client to report on that issue, the discussion is a thirty second item on the weekly call. If a task is not completed by the deadline reflected on the task list, the trial team member has to explain to the entire trial team the reason for the delay, and the call leader determines how to resolve the delay right then and there. If time permits, strategy decisions are discussed on the call. If strategy discussions would push the call beyond thirty minutes, then another call is set up for that strategy discussion; the weekly trial team calls are kept on schedule so that everyone is encouraged to carve out the thirty minutes needed to attend even if in the middle of other things.

For smaller cases, a regular, repeating conference call with the client is an inexpensive mechanism for ensuring that your client is informed and the case moves forward. On a small matter, calls may only be needed once a month. Having the call preset and reoccurring avoids the lawyer having to play phone tag with the client to provide case updates. For clients who are not repeat litigators, preset conference calls encourage them to hold their questions until the standard pre-arranged call rather than calling whenever they have a question. Regularly scheduled calls also ensure that you inform your client of important rulings or case strategy decisions on a regular basis.

C. Propose pretrial and trial agreements.

Saving time and money works in every case no matter how large or small, and one way to save time and money is to enter into pretrial agreements at the very start of a case. A list of pretrial and trial agreements that will increase efficiency and decrease costs is attached in the Appendix at Tabs 2 and 3. While opposing counsel may be wary of agreeing to all, most lawyers

will agree to some of the proposed agreements. Any agreement on any of the proposals is an improvement over none.

One word of caution on the pretrial agreements: the only chance to get any of the pretrial agreements is to propose them at the very outset of each case. If you wait until you are well into a matter, the other side will think the proposal must favor your client and will likely refuse on that basis alone. It is very hard to get agreement on anything once you are in the full throes of litigation.

Also, if you get a pretrial agreement, put the pretrial agreement in the scheduling order signed by the court or a protective order if one will be signed. If you do not, then parties added subsequently will not be bound by the agreement. For example, getting an agreement from a defendant that expert communications and drafts are not discoverable will do you no good if later on a defendant is added who will not sign onto the prior agreement.

D. Do not scrimp on case analysis in contingency fee cases.

Case analysis before taking a case on contingency is the only protection a lawyer has against making a bad bet with his client. With rare exception, no case looks as good as on the day it is first presented to you by the client. Inevitably, bad facts turn up that the client either did not think was important or did not know about.

In every case, there is a temptation to short circuit case analysis. No lawyer wants to invest one hundred hours in a case analysis, only to determine that the case is not worth taking. This is especially true in those cases where you are just one of many pitching in a beauty contest.

However, the temptation to short-cut case analysis is greatest in small cases. In small cases, the pressure to keep invested time to a minimum is strong from the start. Yet, the sting of investing hundreds of hours in a contingency case that ends up with a zero judgment is just as

strong in a small case as it is in a large case.

The lesson learned from large cases is that the hours spent on case analysis are the most valuable hours spent on a contingency fee case. Exposing the weaknesses in a case early on through legal research and factual investigation means you take the case with eyes open or turn down a case that had a risk/return profile that did not work for you. You are better off investing the hundred hours and declining the contingency case than investing a thousand hours over the life of the case and losing.

E. Write out your argument.

In large cases with large trial teams, the lawyer who is making the argument, opening, or closing has to write out either an outline of what he'll say or the statement verbatim. The lawyer in a large case has to do this, because it's the only way for everyone on the trial team to get a chance to provide input. In large trial teams, multiple lawyers will each have led a particular part of the case. Consequently, you need the benefit of all the "in the weeds" knowledge to contribute to the key presentations in the case, and you need a team approach to oral statements so that your team presents a consistent set of themes and facts. As a practical matter, you can only achieve that team approach by circulating a draft of what you are going to say before you say it.

The lesson learned from this necessity is that every oral statement is better if drafted beforehand. Even if the statement is not recited exactly as written, oral statements are better organized and tighter if they have gone through multiple rounds of editing before being spoken. No matter how good you are on your feet, you're even better if you've taken the pains to organize your thoughts and reduce them to sentences and paragraphs.

So even in smaller cases, where there is no one but your client to review and comment,

draft your arguments, or at least a detailed outline of your arguments, before you present them orally.

F. Remember that two brains are better than one.

In large litigation matters, the trial team usually includes more than one lawyer. One of the greatest benefits of having other lawyers on a case is the discussion of strategic decisions. Strategic decision making benefits from discussion and different perspectives.

In small litigation matters, costs may prohibit employing more than one lawyer on a case. In situations where the sole lawyer on a case is also a solo practitioner, he may not have any ability to discuss strategic decisions with anyone other than the client without losing the privilege.

Even in these circumstances, lawyers can benefit from remembering that two brains are better than one. Google the issue with which you are struggling, and you may find a blog post right on point. Search online for a CLE on the issue that is troubling you. In half an hour, you'll have your answer and some CLE credit.

G. Use the first-mover advantage.

There is an inherent plaintiff-side time advantage. Plaintiffs get to choose when to file and, absent a soon to expire statute of limitations, how large the pre-suit preparation window is.

Because larger cases generally justify great investment of attorney time and expense, larger cases often result in a tremendous amount of work going into a plaintiff's-side case before the case is filed. One lesson from the larger cases that is equally true for smaller cases is that the plaintiff-side time advantage is huge.

Do not give up the first mover advantage just because your case is a small case that needs to be worked leanly. Use the pre-suit preparation window to review your side's documents,

interview witnesses, and identify and hire experts before filing. It is all work that will need to be done anyway. If anything, the pre-suit work will decrease total litigation costs, because your discovery requests will be better tailored since you'll know the case well from the moment you start requesting documents and depositions from the other side. You can engage an expert but tell him not to start work to ensure you get the best experts available and preclude your opponent from retaining them. In some cases, particularly streamlined arbitrations, good use of the first mover advantage may mean that the other side will never fully catch up.

H. The best documents are on the privilege log.

In larger cases, you generally have more manpower and more time to run avenues of attack. In contrast, in smaller cases, you are generally light on manpower and the amount of time you can invest in any one task. Put simply, in larger cases you can turn over more stones than in smaller cases.

One of the lessons learned from larger cases is that a stone you should turn over in every case is the privilege log. The best non-privileged documents are often hidden on the privilege log. You need to challenge the privilege claim, get those documents and use them.

Pressing for an *in camera* review of documents claimed to be privileged is a better use of your time and the court's patience than a motion to compel an entirely new category of documents.

I. Westlaw and LEXIS do not always produce the same results.

Another lesson that has come from the luxury of running identical searches on both LEXIS and Westlaw is that the search results are not always the same. As an example, a search to see if an opponent's expert is mentioned in any case produced no results in LEXIS but a devastating hit in Westlaw. While a small matter may not justify running every search in both

legal databases, if you have to get ammunition against a key expert on the other side, that may be one area where you go to the extra expense.

J. Be open to bifurcation.

It is more common to bifurcate liability and damages in a large case than a small one. Surprisingly to me, one of the lessons learned from the larger matters is that bifurcation is not always a bad thing for plaintiffs and not always a good thing for defendants. For example, if you are the plaintiff and you are seeking a multi-million dollar judgment based on a one page letter agreement, you might be better off trying just the question of liability to the jury first.

K. Prepare a hardest questions and answers memo.

Part of the "Susman Godfrey Way" is to prepare the top ten hardest questions and answers for every case. The "hardest questions and answers memo" is a living document that is continually edited and revised through the life of the case, as new evidence comes to light and new hard issues appear. The document is for the attorney only, although every trial team member should review the memo regularly and provide input to create the best answers.

One of the lessons I learned the hard way is that even in the small matters, you need to prepare this memo. You would think that you could keep the hardest questions and best answers in your head in a small case – that the evidence is so limited and issues are so few that you wouldn't miss anything. Wrong. You will miss something. Forcing yourself to sit down and really think about what the hardest questions are and organizing your evidence into the best answers to each of those hardest questions is the best way to ensure that you are not overlooking a weak spot. Take the time to write it down.

II. LESSONS FROM SMALL CASES FOR BIG CASES

A. Do not forget the "one lawyer, one task" rule.

In small cases, one lawyer often does all the legal work on the case. One of the lessons

from that experience is that nearly all tasks can be handled by one lawyer. As an illustration, no lawyer needs another lawyer to hold a binder at a deposition even if the client is willing to pay for it. Lawyers on large matters would please their clients and their partners to remember that "one lawyer, one task" is the default rule.

B. Document review is not a one-time or associate only task.

In smaller matters, there is often only one lawyer looking at documents. If you have ever been the sole lawyer litigating a case, you know that you miss much of what is important when you look at the documents the first time. As your understanding of your case evolves, the importance of particular documents changes.

In larger matters, it is typical to assign the associate to review documents and have the partner review only what ends up being used as exhibits at depositions or trial. It is also typical to conduct document review only once, at the start of the case, because the size of the document collections tends to be so large. Yet, the associate will likely not appreciate all the nuances that the documents reveal, at least not on a first pass that is conducted early in the case. Instead, the lead lawyer should take the time to review all the relevant documents regularly through the life of the case or at least any document tagged potentially hot by the associate! A gold mine is waiting in the documents if only they were re-reviewed once the case has progressed.

C. Pick your battles.

In smaller cases, you cannot afford to fight about everything so you tend to pick your fights carefully. You should be just as cautious in larger cases even where resources are unlimited. A clear lesson from those complex cases where this advice was ignored is that you lose credibility and get less than if you had just picked one or two things to challenge.

D. Focus on identifying bad witnesses, not arguing your case during voir dire.

In small cases, you often get so little time for voir dire that you have to spend all of it finding your nightmare jurors. You simply don't have time to argue your case.

You should use the same approach in large cases. Arguing your case identifies for your opponent who is going to be good for you. Yet, of course, your goal is to identify those panel members who will be bad for you, particularly those who will be leaders. As a result, your questions should be directed to the weaknesses of your case, not the strengths. You should start extreme and then work little by little in from the extreme until you get close to your facts. Then stop!

E. Remember what is free.

In smaller matters, cost considerations often drive attorneys to be creative when it comes to research, both on the law and the facts. No-fee data sources should not be forgotten in big cases as they are a treasure trove of information. Did you know that you can obtain access to Hein Online and Mathew Bender's practice guides and legal treatises for free? Sign up for a Texas law library account online at http://www.sll.texas.gov/about-us/public-services/research-from-home/, and you'll get access to a long list of digital legal media online. Google scholar is probably the quickest and easiest way to pull up cases online, and using Facebook and LinkedIn for the first search on a witness is often more useful than what is found in the so-called "people-finder" databases.

F. Keep your eye on trial.

In small matters, it is generally easy to remember what you have to prove at trial and litigate accordingly. In a two party breach of contract action where the applicable law is known, parties can pull pattern jury instructions and know easily what elements the plaintiff will have to prove and what verdict form the jury will have to complete. Where there are only a handful of

fact witnesses to depose, the deposing attorney can focus with relative ease on the facts that will be presented at trial.

In contrast, larger matters may be so complicated that lawyers lose the forest for the trees. Large matters may include state law claims, federal claims, and sometimes different states' laws. In multi-party actions, the number and variety of affirmative defenses and cross claims can make it challenging to know what the jury instructions and verdict form will look like. Lawyers litigating large cases would do well to draft their jury instructions and verdict form before beginning discovery so as to have a clear roadmap of what will matter at trial.

G. Just because you can, doesn't mean you should.

In smaller matters, courts generally allow less time for trial than larger complex matters. As a result, in smaller matters, lawyers are often better at getting in and getting out when it comes to witness presentation. The lesson learned from those experiences is that less is more when it comes to presenting witnesses at trial.

Long directs means that your key points are lost in the middle. Videotaped depositions are incredibly boring to watch at trial. At the end of day, no matter what the size of your case, only 5-15 minutes of video is going to be effective. Making more than four or five cross points with an expert just gives the expert the opportunity to obfuscate. You'll never win an argument with an expert, so better to get the four or five points you can get and sit down.

H. Simple demonstratives are powerful.

We all know that a good demonstrative on a critical point is often the best way to drive a point home. What lawyers litigating large cases sometimes forget is that the demonstrative does not have to be fancy or expensive. Sometimes a hand-drawn diagram at the easel is more powerful than any computer animation. Before investing in trial graphics, consider how you

would demonstrate the point with pencil and paper. You may be surprised how often your bad artwork is more effective in its simplicity than a professionally produced slide.

APPENDIX – TAB 1

TASK LIST

No.	Task	Due Date	Assigned To	Status
1.	Monitor production of expenses on joint project.	4/11/14	J. Doe	
2.	Prepare mediation statement and circulate draft by 4/18/14.	4/11/14	S. Associate	
3.	Forward CD with aerial photos to B. Man at SG so that B. Man can upload to FTP site and distribute to experts.	4/11/14	H. Help	
4.	Ensure that Harry Truman's documents are reviewed and produced.	4/18/14	B. Catskill	
5.	Ensure that co-plaintiff produces consultant files in response to 3/5/14 R. Rip letter claiming that Ps have failed to supplement production with documents regarding consultants' work since January 2014.	4/18/14	M. Marigold	

APPENDIX – TAB 2

TRIAL AGREEMENTS

1. 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

2. The length of the trial (excluding openings and closings) will be ___ days and that time will be split equally. Each party will get ___ to open and ___ to close.

3. 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.

4. 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.

5. An agreed Motion in Limine (see Exh. A) plus a briefing schedule for contested limine motions

6. 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

7. All un-objected-to trial exhibits listed on the exhibit lists at the time the trial begins are deemed admitted when mentioned by any party during trial

8. All exhibits produced by a party are deemed authentic. All exhibits produced by certain third-parties are authentic

9. The parties will exchange proposed jury questionnaires on _____ and try to reach agreement before the final pretrial conference

10. An agreed juror notebook containing a glossary, cast of characters, chronology and any key documents

11. 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 loose-leaf paper with a photo and the name and title of the witness, suitable for taking notes on and placing in the juror notebook.

12. 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.

13. 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

14. 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.

15. 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.

16. The parties will ask the court to instruct the jury before final arguments

17. The parties will jointly request real-time reporting

18. The parties will share any courtroom audio-visual equipment and will provide each other electronic versions of whatever they display immediately after the display

19. 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

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.

EXHIBIT B

Questions by the Jurors During Trial

1. The court will read the attached instructions included to the jury after the jury is seated and may repeat any or all of these instructions to remind the jury of its role. These instructions explain the procedure that will be used to allow jurors to submit written questions.

2. After the parties have asked their own questions of each witness who appears and testifies, jurors will be given the opportunity to write any questions they may have for the witness on the attached juror question form.

3. To the extent possible, the court will take steps to maintain the anonymity of any juror who asks a question. The court will instruct jurors not to put their names on juror question forms. The court will provide each juror a juror question form in the jury box and ask each juror to pass the form to the bailiff at the end of the witness examination. The court will have every juror pass down his or her juror question form—even if the juror did not write a question on the form—in order to preserve anonymity.

4. Upon receipt of a written question from the jury, the court will allow the parties, outside the hearing of the jury, to make objections to the question on the record and obtain a ruling. On its own initiative or upon a party‘s request, the court may remove the witness from the courtroom before reviewing the question or allowing the parties to object to the question.

5. In its discretion, the court may reword the question or decide that the question should not be asked. If the court rewords the question, the court should read the reworded question and allow the parties to make objections to the reworded question on the record and obtain a ruling outside the jury‘s hearing.

6. If the court allows a verbatim or reworded juror question, the court may either ask the question or allow a party to ask the question of the witness. The parties will be allowed to ask any follow-up questions.

7. The court will include any completed juror question form in the record.

Attachments: 1) Instruction on Juror Questions

2) Juror Question Form

Attachment 1

INSTRUCTION ON JUROR QUESTIONS

After the parties have asked their own questions of each witness and before each witness is excused, you may submit in writing any questions you have for that witness. Any questions you submit should be about the testimony the witness has given. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You should not argue with the witness through a question.

I will review all your questions with the parties privately. Keep in mind that the rules of evidence or other rules of court may prevent me from allowing some questions. I will apply the same rules to your questions that I apply to the parties' questions. Some questions may be changed or rephrased, and others may not be asked at all. If a question you submitted is not asked, do not take it personally and do not assume it is important that your question is not asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give to particular testimony.

Remember that you are neutral fact finders and not advocates for either party. You must keep an open mind until all the evidence has been presented, the parties have finished their summations, and you have received my instructions on the law. Then, in the privacy of the jury room, you will discuss the case with the other jurors.

Any question you submit should be yours alone and not something you got from another person. That is because of my overall instruction that you must not discuss the case among yourselves or with anyone else until you have heard my final instructions on the law, and I have instructed you to begin your deliberations.

Attachment 2

JUROR QUESTION FORM

You may submit one or more questions about the witness's testimony. Your questions should be short. You may not give an opinion about the case, criticize the case, or comment on the case in any way. You may not argue with the witness through a question. Your questions should be yours alone and not something you got from another juror.

Write your questions, if any, on this form. Do not put your name on the form. The judge will apply the same rules to your questions that the judge applies to the parties' questions. These rules are based on various rules of law and procedure. Some questions may be changed or rephrased, and others may not be asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony. And you must not discuss this case with a fellow juror until the judge has told you to begin your deliberations.

_____

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APPENDIX – TAB 3

(Style of Case)

PRETRIAL AGREEMENTS WITH OPPOSING COUNSEL

Here is a list of pretrial agreements to try to reach with the other side before discovery begins. These agreements will make life easier for both sides and do not advantage one side over the other. Waiting until you 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
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.	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.		
3.	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 ___ hours to depose fact witnesses and only one of such depositions can last more than 3 hours. This does not include 30(b)6 depositions.		
4.	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		

Item No.	Description	Agreed	Source of Agreement
5.	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.		
6.	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		
7.	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.		
8.	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 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		

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	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.		
9.	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.		
10.	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.		
11.	The parties will share the expense of imaging all deposition exhibits.		
12.	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. 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		
13.	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.		
14.	Each side has the right to select 20 documents off the other's privilege list for submission to the court for in camera inspection.		
15.	We will agree to a briefing schedule and page limitations for all pretrial motions.		
16.	We will agree upon jury questionnaire.		