

REPORT

The Federal Rules of Civil Procedure, most state rules, and many judges authorize or require the parties to prepare final pretrial submissions that will set the parameters for how the trial will be conducted.

The Federal Rules of Civil Procedure do not actually require final pretrial submissions. Rule 16(e) merely provides that the court “may” hold a final pretrial conference. Rule 16 also does not prescribe any particular filings or what should be included in a final pretrial order. It simply states that the final pretrial conference is intended “to formulate a trial plan, including a plan to facilitate the admission of evidence.”

Most local rules or individual judges’ practices, however, require the parties to submit final pretrial statements that are then incorporated into a final pretrial order. Some courts require relatively simple final pretrial filings. The Eastern District of Virginia, for example, merely requires the parties to file witness and exhibit lists, the exhibits themselves and any objections to them.

Other courts demand much more, turning the optional final pretrial procedure into what some practitioners refer to as “pretrial by ordeal.” A standard pretrial order template – not the actual order itself – used by some judges runs to six, largely single-spaced pages. Some judges around the country routinely require counsel to engage in lengthy consultations over stipulated facts.

An argument can be made that these burdens run afoul of both Rule 1 (the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action”) and 16(e). *See, e.g., McCargo v. Hedrick* 545 F.2d 393 (4th Cir. 1976) (local rule on pretrial submissions held to be void as inconsistent with Rule 16’s requirements designed to simplify, not complicate, counsel’s final pretrial preparations).

A related issue is, if a final pretrial conference is held, when it should be held. Federal Rule of Civil Procedure 16(e) provides that it “must be held as close to the start of trial as is reasonable.” The rationale for this requirement is that the parties and the court will have completed all the tasks necessary for trial, including discovery, so that they should know what their case is going to look like and have a reasonable expectation that the case is actually going to be tried.

This necessarily assumes that dispositive motions, including motions for summary judgment or adjudication, have been filed and ruled on. It makes no sense for the parties to go to the considerable expense of preparing for trial if there is an outstanding dispositive motion that, if granted, will avoid a trial or, if granted in part, will eliminate some issues for trial. For the same reason, if a court requires a mandatory settlement conference before trial, it too should be held after the resolution of dispositive motions and before the trial preparation process begins.

Another issue is how and when the date of the final pretrial order is set, and then how the trial date is set. If the final pretrial conference is held too soon, and trial does not actually occur until several months later, then both the parties and the court may essentially have to repeat much of their final trial preparations to “get back up to speed” for trial.

Experienced trial judges and trial lawyers therefore believe that the final pretrial conference and ensuing order should accomplish five basic things.

First, the final pretrial conference should be held (a) after all dispositive motions have been decided and, (b) as Rule 16(e) requires, as close to the actual trial date as possible, preferably no more than four to six weeks before trial.

Second, it should promote fairness by providing notice to each side of what the other side generally intends to do and therefore avoid the potential for unfair surprises at trial.

Third, it should provide for the orderly admission of evidence.

Fourth, it should give the court the information it needs to understand the issues and exercise control over the trial.

Fifth, consistent with these requirements, it should minimize the amount and need for final pretrial paperwork and the related costs and effort.

The following standards are intended to apply these principles to govern final pretrial submissions and conferences in the federal courts. To the extent that a state court’s practice follows the practice in the federal courts, they would also be appropriate for a state court. The approach of these standards would also be appropriate even for state courts that do not follow federal court practice: their intent is to provide a schedule that moves the case forward to trial, but does not impose unnecessary burdens or require pretrial submissions too early in the parties’ final pretrial preparation.

1. (a) As soon as practicable after the complaint is filed, the court will set a date for an initial conference at which it will enter an order setting the dates for milestones in the case. The order may (i) include the dates for motions to dismiss, the close of fact and expert discovery, motions for summary judgment (subject to Standard 2), final pretrial submissions and the final pretrial conference and/or (ii) set the dates for certain of these events followed by further conferences.
- (b) If the court does not hold an initial conference, the court will set these dates by order as soon as practicable after the complaint is filed.
- (c) Where discovery is stayed pending resolution of motions to dismiss, the court will not set subsequent dates until the motions are decided.

Comment: By having a fixed date for the final pretrial conference, the parties will know when they will have to begin their final pretrial preparations. In more complex cases, particularly ones where discovery may be stayed pending initial motions to dismiss (for example, under the Private Securities Litigation Reform Act (“PSLRA”)), the court ordinarily would not set dates other than for filing and ruling on motions to dismiss; other pretrial deadlines would be set in a subsequent pretrial conference or order as the case progresses.

An argument can be made that the court should not set the dates for final pretrial submissions until it has decided any summary judgment motions. Whichever way the court wishes to proceed, we believe the better practice, as reflected in Standard 2, is to set the date for summary judgment motions sufficiently in advance of the date the parties’ final pretrial submissions are due so the court has enough time to decide the motions for summary judgment before the parties have to start preparing their final pretrial submissions. The court can always alter these dates if appropriate, but having a set date for the final pretrial submissions will keep the parties and the court on track.

2. The parties’ final pretrial submissions will not be due until a reasonable time after the court has ruled on all pending summary judgment motions.

Comment: The parties should not have to begin preparing final pretrial submissions until they know the case is going to trial. Proposed Federal Rule of Civil Procedure 56(c)(1)(A) (August 15, 2007) provides that “a party may move for summary judgment at any time until 30 days after the close of all discovery.” The Advisory Committee Note states that this is intended to “set a presumptive deadline” that presumably will be well before the final pretrial conference is scheduled.

3. Trial should be held reasonably soon but normally no more than four to six weeks after the final pretrial conference (in some courts referred to as the “docket call”).

Comment: Consistent with Rule 16(e) and good practice, the final pretrial conference should not be held until it is clear that there is a reasonable chance the case will be tried. For the same reason, the date of the final pretrial conference should be close enough to the actual trial date so that the parties do not have to prepare for trial twice, once in preparation for the final pretrial conference and again, if the trial is postponed, prior to the actual trial.

Four to six weeks before the trial date therefore should be the outer limit of when the final pretrial conference is held in most cases. Complex cases may require more time between the final pretrial conference and trial, while relatively simple cases may require less.

4. Counsel who will try the case will confer sufficiently in advance of the final pretrial conference to be able to prepare their final pretrial conference submissions.

- (a) In their conference(s), counsel will exchange:
- (i) a list and copies of the exhibits to be used at trial;
 - (ii) objections to the other side's exhibits;
 - (iii) a list of witnesses they genuinely expect to call (either in person or through deposition testimony), including a short description and estimate of the length of each witness's testimony;
 - (iv)(1) designations of any deposition testimony they anticipate offering as part of their respective cases in chief, (2) counter-designations of deposition testimony and (3) objections to an opponent's designated testimony;
 - (v) a brief description of any anticipated *in limine* motions (e.g., to strike proposed experts under *Daubert* or similar state law standards); and
 - (vi) the parties' disclosures, admissions, interrogatory answers or other written discovery responses they intend to offer into evidence.
- (b) Counsel should also try to agree on (i) proposed stipulations of uncontested facts and (ii) the anticipated length of the trial.

Comment: Consistent with Rule 16's only requirement – that, if a final pretrial conference and order occur, the court is to “formulate a trial plan, including a plan to facilitate the admission of evidence” – the parties should exchange their proposed exhibits and give the other side a reasonable description of the witnesses they expect to call, what they will testify to and how much time their testimony is expected to take. If deposition testimony is going to be offered, they should also exchange that so the other side can decide if it will object to any part of it or if it wants to counter-designate additional deposition testimony.

These requirements are also consistent with and supplement Fed. R. Civ. P. 26(a)(3)'s provisions.

The descriptions should be relatively simple, e.g., “Mr. Smith will testify as to his observations about the accident.” The parties presumably will have conducted sufficient discovery to know in detail what each designated witness will say. The requirement of a short description is therefore intended only to give the other side and the court a general idea of the subject matter of the witness's testimony, without requiring an exhaustive description.

Each party should inform the other side, preferably in writing, whether it will object to any proposed exhibit and, if so, the basis for the objection.

The parties should also identify any *in limine* motions they anticipate filing (unless the court has previously set some other deadline for doing so).

And the parties should confer on whether they intend to offer any disclosures, admissions, interrogatory answers or other written discovery responses and, if so, if there will be any objections to them.

If the parties can agree on stipulations of uncontested facts, they should do so, but they should not be required to engage in elaborate exchanges or dialogues on the issue, which are usually not worth the effort they require.

The conference(s) should take place far enough in advance of when the parties have to submit their final pretrial materials (discussed in Standard 5 below) so they can meaningfully discuss their positions and objections.

5. At a date at least five days before the final pretrial conference, to be agreed or set by the court, the parties will file with the court their:
 - (a) list of witnesses they genuinely expect to call (either in person or through deposition testimony) in their respective cases in chief, including a short description and estimate of the length of each witness's testimony;
 - (b) (i) designations of all deposition testimony they anticipate offering as part of their respective cases in chief, (ii) counter-designations of deposition testimony and (iii) objections to an opponent's designated testimony, with objections not made being waived;
 - (c) list of all proposed exhibits in their respective cases in chief;
 - (d) written objections to proposed exhibits, with any objections not made being deemed waived and any exhibits not objected to being deemed admissible at trial;
 - (e) anticipated *in limine* motions that have not already been filed or required by previous court order to be filed at a set time (including motions addressed to experts under *Daubert* or similar state law standards);
 - (f) admissions, interrogatory answers or other written discovery responses they intend to offer into evidence, together with any objections to these materials;
 - (g) stipulations of uncontested facts; and
 - (h) brief statements of the parties' respective claims and defenses and the relief sought, including (i) each element of damages and, other than for intangible damages (e.g., pain and suffering, mental anguish or loss of

consortium), the monetary amount, including prejudgment interest, punitive damages and attorneys' fees, and (ii) other requested relief.

Comment: As noted above, the purpose of the final pretrial conference and order should be to "formulate a trial plan, including a plan to facilitate the admission of evidence." This would include the witnesses the parties intend to call and the exhibits or other evidentiary material they intend to offer, as well as any uncontested facts on which they can agree.

By this point in the litigation, the parties should be in a position to know which exhibits, deposition testimony, admissions and discovery responses they can offer without objection and those that will be subject to objection.

The statements of the parties' claims and defenses, and the relief sought, are intended to make clear just what is at issue in the case. They may also facilitate settlement. Again, these should be in summary or outline form rather than lengthy or detailed submissions.

6. At a date at least two days before the final pretrial conference to be agreed or set by the court, the parties will submit any additional objections or points pertinent to the court's consideration of the submissions listed in Standard 5 above.

Comment: The parties' submissions set forth in Standard 5 should be complete enough for the court to rule, at least tentatively, on any disputed issues. The parties may, however, wish to submit additional materials for the court's consideration of these issues, and this additional time will allow them to do so but also give the court enough time to consider them before the final pretrial conference.

7. (a) The court will enter an order reciting the actions taken at the final pretrial conference, including (i) any tentative or final rulings based on the parties' submissions, (ii) date(s) for submitting any additional matters, including *in limine* motions and (iii) a date and time to begin trial and its anticipated length and daily schedule (*e.g.*, from 9:00 a.m. to noon and 1:30 to 5:00 p.m., with one 20-minute break in the morning and afternoon).

(b) The court's order also should provide that:

- (i) only witnesses or exhibits listed will be permitted at trial, except for impeachment or rebuttal;
- (ii) any objection to an exhibit not made will be deemed waived, any exhibit not objected to will be deemed admissible at trial and any party may introduce into evidence or otherwise use any other party's exhibits;

- (iii) no person may testify whose identity, being subject to disclosure or timely requested in discovery, was not disclosed in time to be deposed;
 - (iv) any facts stipulated to by the parties will be deemed established; and
 - (v) the parties will identify to the opposing parties the witnesses they expect to testify on a given day no later than one hour after the conclusion of trial on the day before that testimony.
- (c) If the court sets time limits on the parties' trial presentations, the order also will set those limits and provide how they are to be determined.

Comment: Each of these items has become a general pretrial practice and is consistent with the parallel goals of facilitating the admission of evidence and avoiding unfair surprise. The court's order may rule, either tentatively or finally, on objections to exhibits, deposition testimony, admissions, etc., or it may reserve ruling until trial.

The court should be in a position at the final pretrial conference to give the parties a firm, fixed date for trial no more than four to six weeks after the conference. Some courts may be in a position, if counsel can agree, to have trial occur sooner.

The duty to identify reasonably in advance what particular witnesses will testify on a given day is also consistent with these goals.

8. Any party wishing to use a demonstrative exhibit (e.g., a chart based on other evidence or exhibits in the case) will provide it to the opposing party or parties at least 48 hours in advance of offering or using it in evidence.

Comment: This is a standard trial protocol and courtesy. It will give the parties time to make and attempt to cure objections to proffered demonstrative exhibits; if a party still objects to the demonstrative exhibit, the court will resolve the issue at trial.

9. At a date reasonably close to but no less than seven days before trial, to be set by the court based on the complexity of the case, the parties will submit their preliminary proposed *voir dire* questions, jury instructions and verdict forms, along with a short proposed description of the case and the parties' respective claims. If the parties cannot agree on the proposed jury instructions, they will submit separate jury instructions with supporting legal authority on any disputed issues.

Comment: Although Fed. R. Civ. P. 51(a)(1) seems to contemplate that jury instructions ordinarily will be filed after the close of evidence, modern practice, particularly where the parties wish to submit proposed *voir dire* questions and preliminary instructions, is to have them submit their instructions or proposed instructions in advance of trial. Again, this should be done reasonably close to when the trial is set to begin to (a) avoid trial preparation that may turn out to be unnecessary if the case settles and (b) have the *voir dire* questions and proposed jury instructions conform to what the parties' actual cases are expected to be. By having the jury instructions submitted in advance of trial, the court can begin its own trial preparation. The date for submitting them should be determined by the complexity of the particular case. For example, the court may have the parties submit these materials as part of their submissions described in Standard 5.

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