The Honorable Mark A. Kearney

Judge, United States District Court
Room 6613, U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
267-299-7680
Fax: 267-299-5023

POLICIES AND PROCEDURES (March 2020)

The Policies and Procedures ("Policies") apply to all matters unless varied by Judge Kearney's Order. The Policies are intended to answer a wide variety of questions. To the extent counsel or a party has a question not addressed by these Policies, telephone inquiries should be directed as appropriate to either:

Civil Deputy: **Kerri Christy - 267-299-7680**

For matters relating to civil scheduling, general procedures, issues arising during a deposition requiring direction, and hiring of law clerks and interns.

Courtroom Deputy: **Ulrike Hevener - 267-299-7688**

For matters regarding all service issues, all criminal cases, civil case management, courtroom procedures, trial protocol, and transcripts.

I. Policies applying to all matters.

A. Correspondence with the Court in limited circumstances is permitted.

We are governed by Fed. R. Civ. P. 7(b) and Fed. R. Crim. P. 47(a). Other than as listed below or otherwise directed by Judge Kearney, a request for the Court's direction must be made through a pleading, motion, application, or similar filing with service upon all parties. Requests for extension of time to respond to a pleading or motion or a request for the extension of the dates in a scheduling order must be made by motion or stipulation demonstrating good cause which can be reviewed and ruled upon. Judge Kearney will not accept letter requests for extensions of time set by the Federal or Local Rules or our scheduling Orders.

Counsel shall not send copies of correspondence among themselves to the Court. Correspondence, not to exceed two pages, may be sent to Chambers copied to all counsel and unrepresented parties by facsimile (no email) only in the following instances:

(1) Counsel are specifically requested by the Court to communicate information by letter;

(2) An uncontested request for an extension of Scheduling Order deadlines or sentencing not affecting the dates for filing dispositive motions or trial date;

(3) A scheduling request based on an unanticipated and irreversible personal matter concerning counsel, a party or counsel's immediate family; or,

(4) A case, or portions of a case, settled.

This limited correspondence must include a specific and candid description of the situation requiring the Court's attention and the position of the opposing party. Correspondence may be sent by fax or mail to the Chambers' Philadelphia address above.

We will not accept unsolicited email communications unless approved by Judge Kearney.

B. Telephone inquiries and conferences will occur as warranted.

Judge Kearney may hold telephone conferences. The Court will notify counsel of the date and time for the telephone conference.

C. No telephone communications from *pro se* parties.

Telephone and fax communications by a *pro se* party are prohibited unless approved by Judge Kearney beforehand and an ESR/Court Reporter is present. *Pro se* parties may not appear for hearings before the Court by telephone unless permitted for good cause, such a prisoner parties in civil cases.

D. No communications with law clerks or interns.

Counsel and parties are not permitted to communicate with the Judge's law clerks or interns unless specifically directed by the Judge on a particular issue.

E. Electronic Case Filing ("ECF") under Rule 5.1.2 is required of all counsel.

Counsel shall file all papers required to be filed under the Federal or Local Rules of Civil and Criminal Procedure electronically through ECF.

F. Courtesy copies of ECF filings shall be provided only as directed.

Courtesy copies shall only be provided to chambers for a filing over thirty-five (35) pages and as required under these Policies (e.g. Rule 56 papers) or otherwise requested by Chambers. The courtesy copy shall be the ECF document with the ECF notation at the top of each page, unless otherwise ordered. All courtesy copies are to be delivered to the Clerk's Office to the attention of Judge Kearney.

G. Sealed or redacted documents.

Except in emergency situations, no documents may be filed under seal without first obtaining leave. All motions for leave to seal documents should be filed of record with a courtesy copy contemporaneously provided to the Court of the motion and all documents to be sealed. If a party files redacted documents, the Court must be provided with a courtesy copy of the documents without redactions. Counsel are expected to comply with Local Rule of Civil Procedure 5.1.3 regarding modification or redaction of personal identifiers.

H. References to websites.

Filings referencing a website shall attach a screenshot of the cited website reference as an exhibit.

I. Encouraging development of trial lawyers.

Recognizing the importance of developing future generations of federal court trial lawyers, we encourage trial counsel to assign court presentations to less experienced attorneys unless we require lead counsel's presence (e.g., Rule 16 and settlement conferences). We are aware experienced trial counsel may not be directly involved in the day-to-day of the discovery process, issues in dispositive motions, or with a particular witness or issue at trial. If warranted, we encourage the parties and thoughtful trial counsel to allow well-prepared but less experienced attorneys to present their client's best position where, for example, the less experienced attorney lived with the facts or drafted or contributed significantly to the briefing. If requested before an argument, we may allow more experienced trial counsel to assist the less experienced attorney arguing the motion, where appropriate during oral argument.

There are many different circumstances where it is not appropriate for a less experienced attorney to solely present the client's position, particularly where we require trial counsel's presence. Depending on the attorney client relationship, strategy on court appearances may be the client's decision and we do not wish to interfere in the client's decision. We draw no inference from a party's decision not to have a less experienced attorney present the position. Similarly, we draw no inference about the importance of a particular position, or the merits of a party's position, from the party's decision to have (or not to have) a less experienced attorney present the position. We only wish to encourage the experienced members of this Court's Bar and their clients to develop their next generation of trial lawyers.

J. *Pro hac vice* motions.

Motions for *pro hac vice* admission should be made as soon as possible and must be filed by an attorney: (1) admitted to practice and in good standing before this Court; (2) whose appearance has been entered in the case in which the motion is made and who confirms his continuing obligations under our Policies (K) below; (3) describing the reasons the client requires this lawyer's special admission; and, (4) reciting the positions of all counsel regarding the motion.

The motion must also be accompanied by the affidavit of each attorney seeking *pro hac vice* admission swearing:

i. Year and jurisdiction of each bar admission;

ii. Status of the attorney's admission(s), i.e., active or inactive, in good standing, etc.;

iii. Whether the attorney has ever been suspended from the practice of law in any jurisdiction or received any public reprimand by the highest disciplinary authority of any bar in which the attorney has been a member;

iv. The affiant/declarant (a) has in fact read the most recent edition of the Pennsylvania Rules of Professional Conduct and the Local Rules of this Court and (b) agrees to be bound by both sets of Rules for the duration of the case for which *pro hac vice* admission is sought; and,

v. If granted *pro hac vice* status, the affiant/declarant will in good faith continue to advise counsel who moved for the *pro hac vice* admission of the current status of the case for which *pro hac vice* status has been granted and of all material developments in the case.

Thoughtful opposition to a motion for *pro hac vice* must be filed within two (2) business days of the filing.

K. Local counsel's continuing obligations.

The admission of counsel *pro hac vice* does not relieve associate local counsel and the attorney moving the admission of responsibility for counsel admitted *pro hac vice*. The Court requires local counsel sign all filings. While local counsel shall be available by phone and prepared to substantively address fact and legal issues for every case, we also require local counsel to be present in Court (or on the telephone with leave of Court) for a presentation on a case designated on the Special Case Management track.

II. Initial steps in civil matters.

A. Rule 16 Conference and Rule 26(f) meeting are substantive obligations.

The initial pretrial conference (*see* Fed. R. Civ. P. 16 and Local Rule 16.1) may be scheduled shortly after a defendant has entered an appearance.

1. Rule 26(f) meeting and joint report.

The Court relies on counsel's good faith compliance in all respects with Rule 26(f). Parties should complete the Rule 26(f) meeting as soon as possible. This meeting is a

meaningful and substantive discussion to address prompt settlement positions, formulate the proposed discovery plan and discuss the parties' factual and legal positions.

Pending motions will not excuse the requirements of holding the meeting and submitting the plan. Parties who do not comply will have no input at the initial pretrial conference.

Unless waived for good cause, at least two (2) business days before the initial pretrial conference, counsel must file a comprehensive joint report of the Rule 26(f) meeting fully compliant with the form provided at www.paed.uscourts.gov.

2. Additional disclosures in patent non-ANDA cases.

In patent non-ANDA cases, the comprehensive joint report of the Rule 26(f) meeting shall include proposed dates for the exchange, in steps, of required information to plan for a Markman hearing as soon as practicable under Fed.R.Civ.P. 1:

a. Plaintiff shall identify the accused product(s), including accused methods and systems, and its damages model, as well as the asserted patent(s) that the accused product(s) allegedly infringe(s). Plaintiff shall also produce the file history for each asserted patent.

b. Defendant shall produce core technical documents related to the accused product(s), sufficient to show how the accused product(s) work(s), including but not limited to non-publicly available operation manuals, product literature, schematics, and specifications. Defendant shall also produce sales figures for the accused product(s).

c. Plaintiff shall produce an initial claim chart relating each known accused product to the asserted claims each such product allegedly infringes.

d. Defendant shall produce its initial invalidity contentions for each asserted claim, as well as the known related invalidating references.

e. The exchange of final infringement contentions.

f. Finally supplement, among other items, the identification of all accused products and of all invalidity references.

g. Date for Markman hearing and scope of Markman hearing.

3. Obligations for the Rule 16 conference.

The initial pretrial conference is a substantive discussion addressing, at a minimum: items listed in Fed.R.Civ.P. 16 and Local Rule 16.1(b); completion of self-executing disclosures under Fed.R.Civ.P. 26(a); a review of the required stipulated facts; disclosure of insurance coverage and deductibles; requests for a Rule 502 Order; status of pending discovery; the preservation, production and cost allocation of electronically stored information; status of settlement demands and offers and proposed timing of mediation; and, specific facts regarding liability, damages and relief sought. Lead counsel must advise the Court of any conflict in scheduling a trial beginning in four months after the Rule 16 Conference and thereafter. Judge Kearney will issue a Scheduling Order shortly after the conclusion of the initial pretrial conference.

Absent compelling grounds provided in writing before the conference, counsel attending the initial pretrial conference shall be designated as lead trial counsel. If lead counsel is excused in advance of the conference, the attorney appearing must have access to lead counsel's calendar during the proceeding. Lead trial counsel shall be prepared to discuss settlement at the initial pretrial conference, including having full authority from clients on settlement. Counsel may not claim lack of authority to discuss settlement with opposing counsel and the Court unless the client or carrier representative with full authority is present at the initial pretrial conference.

B. Threshold motions.

Motions to dismiss, transfer, substitute parties, and other threshold motions should be filed before the initial pretrial conference. Lead trial counsel will discuss the merits of any pending or anticipated threshold motions at the initial pretrial conference, even if not fully briefed at that time.

C. Prompt resolution of matters through ADR and settlement conferences.

To the extent counsel cannot resolve the case before or during the initial pretrial conference, Judge Kearney will direct all parties and client representatives with full settlement authority to meet as soon as possible for a settlement conference with Magistrate Judge Heffley. Counsel must comply with Magistrate Judge Heffley's requirements regarding meaningful settlement efforts.

Counsel are reminded meaningful participation in an early alternative dispute resolution ("ADR") effort is strongly encouraged and will be discussed *passim*, including in the initial pretrial conference. Counsel, familiar with the Court's mediation program and Local Rule 53.3, will have explored ADR feasibility, including court-annexed mediation, not only between themselves but with their clients as well. As shown, the specific reason for any decision not to participate in a form of early ADR shall be specifically detailed in the Rule 26(f) report.

D. Motions to amend pleadings.

A motion to amend a pleading shall: identify all parties' positions on the proposed amendments and attach the proposed amended pleading either blacklined or highlighted solely to show the change in the pleading.

E. Continuances, amendments and extensions of scheduling.

Unless there is demonstrated good cause in writing to justify a change, the parties are expected to adhere to the dates contained in the Scheduling Order. The Court may grant a continuance or extension based on a stipulation of all parties if the continuance or extension does not affect the trial date. If a continuance or extension affects the dispositive motion or trial date, counsel shall file a written motion identifying the basis for the continuance or extension and detail the positions of other parties with a proposed order. A request for an extension or continuance of the trial date or the deadline for filing dispositive motions will not be granted absent extraordinary circumstances.

III. Discovery.

The Federal and Local Rules of Civil Procedure call for voluntary, complete and cooperative discovery in a timely manner. The information required to be disclosed under Fed. R. Civ. P. 26(a) is required to be exchanged no later than seven (7) days after the date of the Order scheduling the Rule 16 conference. The parties and Counsel are expected to act in accordance with both the letter and the spirit of the Rules. The parties should be familiar with *Discovery Proportionality Guidelines and Practices*, 99 JUDICATURE, no. 3, Winter 2015, at 47-60.

Absent demonstrated good cause in a complex case, the parties should expect discovery to be complete after ninety (90) days from the initial Order beginning discovery. If they have not done so yet, the parties are required to commence core party written discovery upon Court Order and immediately upon receipt of notice of the date of the Rule 16 conference unless stayed by statute or order. Core party written discovery includes, among other efforts: document requests; admissions; and interrogatories. It does not include third party discovery or depositions before the initial scheduling conference unless specifically ordered for good cause. Counsel will be required to report on the progress of this core party written discovery at the initial pretrial conference.

It is expected the parties will reach an agreement on conducting electronic discovery. Absent an agreement before the initial pretrial conference, the Court will apply our order incorporating default standards which should be reviewed at www.paed.uscourts.gov.

A. Resolving discovery disputes.

Counsel will proceed in discovery in a cooperative manner consistent with their professional obligations including full disclosure. *See e.g. Ford Motor Co. v. Conley*, 757 S.E.2d 20, 32-33 (Ga. 2014). If a discovery dispute cannot be resolved, Judge Kearney expects the

Local Rule 26.1(f) certification will be substantive, specific and meaningful. For example, it is not sufficient to certify "counsel can't reach opposing counsel"; "reasonable efforts have been made but were unsuccessful"; "counsel have conferred in good faith"; "counsel repeatedly conferred with opposing counsel" or similar generalities. *See, e.g., Naviant Marketing Solutions, Inc. v. Larry Tucker, Inc.*, 339 F.3d 180, 186 (3d Cir. 2003); *Evans v. American Honda Motors Co., Inc.*, No. 00-2061, 2003 WL 22722417, at *1-2 (E.D. Pa. Oct. 30, 2003).

Limited discovery disputes to enforce compliance resolved by short motion. Judge Kearney will promptly consider a short motion of three (3) pages or less, double-spaced twelve (12)-point font, with an attached proposed order seeking to enforce timely and full compliance with discovery obligations under the Federal and Local Rules and Policies. The Judge may resolve the issue before a response unless opposing counsel advises Chambers, by letter faxed within twenty-four hours of filing, noticing their intent to file a response of three (3) pages or less within two (2) business days of the Motion filing.

Discovery motion practice. Every other discovery motion must be filed and served with citations to authority and may not exceed seven (7) pages, double-spaced twelve (12)-point font, along with a proposed order. Absent an Order, a response may be filed within three (3) days, also limited to seven (7) pages, double-spaced twelve (12)-point font. Counsel seeking to file replies or longer motions or responses must move for relief and obtain leave to do so before filing. No memorandum or reply should be filed without leave of Court. The motion does not need to be in a numbered paragraph format.

Discovery motions involving non-party witnesses. A party seeking an order compelling discovery compliance from a non-party must attach a certificate of service to the discovery Motion describing their simultaneous service of the Motion by e-mail, hand delivery or fax upon the non-party possibly subject to the Motion and, in a cover letter, advise the non-party of these Policies on the Court's website and the obligation to respond. Unlike parties, non-parties served with Motions may respond within three days of service, unless otherwise ordered.

Deposition conduct. As in trial, we do not permit speaking objections or coaching the witness. Where warranted, Judge Kearney will allow telephone conferences to resolve disputes during depositions where the deposition would otherwise have to be adjourned. Stopping or "walking out" of a deposition is strongly disfavored, and counsel should not do so before seeking direction from the Court, mindful the parties' time and expense should not be lost due to a discovery dispute experienced counsel in this Court can usually resolve without loss of time or Court direction.

B. Confidentiality agreements, seal or protective orders

Judge Kearney will not enter a protective Order on confidentiality unless statutory required by a government agency or extraordinary good cause, but will enforce private confidentiality agreements as a matter of contract law for good cause shown. *See In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 924 F.3d 662, 671-73 (3d Cir. 2019). Any party seeking to file documents under seal must present the motion (under Section IV below) as narrowly as possible and must articulate good cause.

IV. Motion practice for non-discovery issues, including motions *in limine,* trial and post-trial motions.

A. Proposed orders and motions.

All grounds for relief must be set forth in a single, comprehensive motion, accompanied by a proposed order and memorandum. The proposed order should specifically refer to the motion, docket filing number and specific basis for requested relief. The motion is limited to five (5) pages of double-spaced twelve (12) point font and is analogous to a Summary of Argument which also details the requested relief. Parties opposing the motion must attach a proposed order referring to the motion, docket filing number and specific basis for denying the requested relief.

B. Briefs/legal memoranda.

Mindful "less is often more," memorandum filed in support of, or in opposition to, a motion is limited to twenty (20) pages of double-spaced twelve (12) point font. Reply briefs are not required and Judge Kearney may rule before filing of reply briefs if warranted. Reply briefs, without a proposed order, are permitted if filed and served within seven (7) days of the date a non-moving party files its Opposition, may not exceed ten (10) pages, and must be limited to issues newly raised in the Opposition. Briefs in excess of these page limits and sur-reply briefs are not permitted unless leave is granted upon motion.

C. Post-trial motion procedure.

A party seeking to challenge trial and pre-trial rulings through a timely post-trial motion must strictly comply with Federal Rules of Civil and Criminal Procedure 59 and 60 and with Local Rule 7.1 (e) requiring ordering and paying a deposit for the trial transcript required by the court reporter within fourteen (14) days of filing any post-trial motion unless the Court excuses this requirement for good cause. Upon showing good cause based on a need for the transcript to brief the post-trial issues, the Court will grant a motion allowing the movant to file the memorandum in support of post-trial relief within thirty (30) days of the receipt of the transcript.

V. Additional protocol for Rule 56 motions.

A. Separate statements of material facts.

Any motion filed under Fed. R. Civ. P. 56 shall include a separately filed Statement of Undisputed Material Facts which details, in numbered paragraphs, the material <u>facts</u> the moving party contends are undisputed and entitle the movant to judgment as a matter of law. Only those facts which bear on dispositive material issues shall be included in the Statement of Undisputed Facts. Opposition to a motion for summary judgment shall include a <u>separate</u> filing of a statement of material facts, responding to the numbered paragraphs in the movant's Statement of Undisputed Facts, which the respondent contends present genuine issues for trial. The responding party also shall set forth, in separate numbered paragraphs, any additional <u>facts</u> which the respondent contends preclude summary judgment.

Statements of material facts in support of or in opposition to a motion for summary judgment shall include specific and not general references to the parts of the record supporting each of the statements. Each stated fact shall cite the source relied upon, including the page of any document or line and page number of any deposition to which reference is made.

B. Memoranda.

Memoranda in support of, or opposing, a Rule 56 motion is limited to twenty-five (25) pages, double-spaced, twelve (12) point font.

C. Appendix.

Upon filing, the movant(s) shall also file a separate appendix of all exhibits or its affidavits which may relate to the issues raised in the motion. On all cross-motions under Rule 56, the cross-movants must consult before filing to prepare a joint appendix. All pages of the appendix shall be consecutively "Bates stamped" and referenced in the motions and briefs by the Bates number assigned each page. For example, "111a." The appendix shall include a table of contents. The movant shall make every effort to include all necessary exhibits in the appendix, anticipating the respondent's necessary citations to the fullest good faith extent possible. Should it become necessary for the non-moving party to submit affidavits or additional exhibits, however, it may do so in a respondent's appendix filed with its Opposition. Any additions to the movant's appendix shall also be consecutively Bates-stamped, beginning at the page number where the movant's appendix ended, and shall include a table of contents. Judge Kearney will not consider material not included in the appendix required by this Policy.

Failure of the movant to follow this procedure in all respects may result in the denial of the motion without prejudice to be renewed at trial. Respondent's failure to comply in all respects may result in the Court's considering the motion as uncontested.

D. Courtesy copy to Chambers.

The parties shall provide Chambers with one (1) courtesy copy of all Rule 56 submissions by overnight mail or hand delivery to the Clerk's office to the attention of Judge Kearney within one (1) business day of filing. The parties shall provide copies only of the filed document noted with the ECF Document Number on each page confirming filing of the entire courtesy copy.

VI. Final pretrial proceedings.

A. Pretrial memoranda.

Unless otherwise ordered by the Court, the parties shall prepare simultaneous pretrial memoranda meeting the requirements of Local Rule of Civil Procedure 16.1(c), and also include:

(1) All stipulations of counsel.

(2) Attached highlighted deposition testimony (including videotaped deposition testimony) of admissions or unavailable witnesses which the party intends to offer during its case-in-chief. The pretrial statement should include citations to the page and line number.

(3) The substance of the testimony of each witness. Identifying a witness as offering testimony on liability and/or damages without specifics is insufficient.

(4) A schedule with description of all proffered exhibits.

(5) Two courtesy copies of each contested exhibit shall be delivered (but not filed) to the Clerk's Office on the second floor for delivery to Chambers.

B. Motions *in limine*.

The Court expects counsel attempted to resolve objections to exhibits and testimony before the motion *in limine* deadlines, leaving for the Court only those objections the parties could not resolve. To the extent there are unresolved evidentiary issues, counsel should anticipate the Scheduling Order will require motions *in limine* be filed after the contemporaneous exchange of pretrial memoranda, with a reply due before the pretrial conference. Hearings or arguments challenging expert witness competency or necessity, upon request, will be scheduled at or before the final pretrial conference. Responses to Motions *in limine* do not need to answer each allegation as in state court practice. Oppositions shall be in memoranda form.

Absent a Court Order, parties may file up to five (5) Motions *in limine* grouped by evidentiary review (e.g. hearsay, expert, privilege, competence, etc.)

C. Final pretrial conference.

Sidebar conferences and objections to evidence which should have been anticipated will be strongly discouraged at trial. Consequently, one of the goals of the final pretrial conference is to resolve all evidentiary issues to avoid delay at trial and to provide counsel with advance notice of evidentiary requirements. Therefore, counsel should expect rulings on outstanding motions at, or shortly after, the final pretrial conference. In complex cases, counsel should be prepared to discuss presentation of evidence in terms of hours allocated to their case in chief, defense and rebuttal.

VII. Injunctions.

Judge Kearney attempts to hold a prompt conference with counsel seeking and defending requests for temporary restraining orders and preliminary injunctions following an affidavit of service, unless extraordinary imminent harm. Judge Kearney usually handles filed motions for expedited discovery by conference when scheduling the hearing. Judge Kearney expects a party seeking pre-trial injunctive relief is prepared to imminently move to a hearing within a month. If not ready for an imminent hearing, the party may seek expedited discovery and Judge Kearney will then set the pre-trial injunction hearing.

VIII. Class Action settlement best practices.

Parties seeking or objecting to an order settling a case on a class basis under Fed.R.Civ.P. 23 should fully address their positions on the best practices for implementing the 2018 Amendments to Rule 23, including those described at www.judicialstudies.duke.edu/publications/ with the executive summary: *Guidance on new Rule 23 class action settlement provisions,* 102 JUDICATURE, no. 3, Winter 2018, at 15-21.

IX. Arbitration.

Judge Kearney issues Scheduling Orders in arbitration track cases. Judge Kearney may retain an arbitration case for trial. The parties are expected to complete all discovery and resolve all dispositive Motions before the arbitration hearing. Upon demand for trial *de novo* from an arbitration award, the Court will issue a Scheduling Order setting the date for trial to occur within sixty (60) days of the appeal at the earliest date available to the Court. Neither discovery nor dispositive motions will be allowed after the arbitration hearing absent compelling cause.

X. Trial Procedure.

A. Scheduling.

The date for final pretrial memoranda, trial motions, final pretrial conference and trial will be set in the Order following the initial pretrial conference. Once a case is listed for trial, counsel, parties, and witnesses are attached to start trial on the date noted. Counsel must advise the Court of any irreversible personal conflicts as soon as possible.

B. Courtroom technology.

Judge Kearney holds all proceedings in Courtroom 6-B which is not an electronic courtroom. Parties are responsible for arranging and providing all electronic technology they wish to have brought in during trial. Any party planning to use such equipment must submit a letter to Chambers, as early as possible and copied to all counsel, but no later than one (1) week before trial, identifying the equipment it will use at trial. Any equipment counsel wishes to have brought in for trial must be set up and tested before jury selection. Parties should contact Courtroom Deputy Ulrike Hevener (267-299-7688) before trial to arrange a time to set up and test electronic equipment in Courtroom 6-B.

C. Cases involving out-of-town parties or witnesses.

Judge Kearney schedules the trial of cases involving out-of-town counsel, parties, or witnesses in the same manner as all other cases. Counsel is responsible for the timely scheduling of witnesses to maximize the jury's time.

D. Jury selection in civil cases.

After Judge Kearney's brief introduction to the general nature of the case and standard disqualification questions, Judge Kearney will conduct *voir dire*, with specific approved follow-up questions from counsel. Judge Kearney will then entertain cause and hardship strikes.

Counsel will then exercise peremptory challenges by alternate strikes, plaintiff first, until each side has stricken three (3) potential jurors or opts not to use any or all of their strikes.

After consultation with counsel based on length of trial, Judge Kearney will typically seat eight (8) jurors in a civil case.

E. Courtroom protocol.

Parties may examine witnesses from the lectern, from counsel table, or within hearing distance of the ESR operator or court reporter but not within ten feet of the witnesses. Counsel shall seek permission before approaching witnesses, as warranted. In addition, counsel will direct all comments to the Court or to the witness under examination and not to other counsel or to the jury.

F. Note-taking by jurors.

Judge Kearney may permit jurors to take notes.

G. Trial briefs.

Parties may submit a trial brief only if requested by the Court.

H. Examining witnesses out of sequence.

The Court will permit counsel to examine his/her own witnesses out of turn for the convenience of a witness.

I. Opening statements and summations.

Mindful "less is often more," Judge Kearney does not generally impose time limits less than twenty (20) minutes on opening statements or closing arguments.

J. Examination of witnesses or argument.

Only one attorney for each side may examine the same witness or address the jury during the opening statement or summation.

K. Videotaped testimony.

Videotaped testimony should begin with the witness being sworn. After the Court rules on any objections, counsel must edit the testimony before offering the videotaped testimony at trial.

L. Preparing and admitting exhibits.

The parties will prepare a joint exhibit book with all exhibits counsel may use at trial based on the rulings at or before the pretrial conference along with a schedule of exhibits. Unless otherwise agreed by the parties, the exhibits will be presented in chronological order with the first document representing the oldest dated document. Counsel should provide a copy for the witness which may be provided to the jury during deliberations if requested. Unless all exhibits are shown electronically, Counsel must deliver two (2) copies of the joint exhibit book for the Court at *voir dire*. The cost of producing the exhibit book(s) will be equally shared per capita upon all parties, subject to modification if abused.

Motions to admit exhibits will be considered at the close of a party's case-in-chief and not before. As the evidentiary issues were addressed before or during the final pretrial conference, the parties should expect this short motion to be promptly resolved.

M. Sidebar or the evidentiary conference.

Counsel must confer privately to resolve any unanticipated evidentiary issues which may arise during trial. If unsuccessful in resolving the issues, counsel should only bring a matter to the Courtroom Deputy's attention at the beginning of the day or during an appropriate break when the jury is not present. All evidentiary conferences in the courtroom are on the record.

N. Directed verdict motions.

Motions for judgment as a matter of law in jury trials and motions for an involuntary dismissal in non-jury trials should be filed.

O. Proposed jury instructions and verdict forms.

The Scheduling Order will note the date on which the parties shall file proposed jury instructions on substantive issues unique to your matter, along with proposed verdict forms or special interrogatories to the jury.

In submitting proposed points for charge, the parties are directed to the Model Civil Jury Instructions (available at http://www.ca3.uscourts.gov/model-jury-instructions). Where applicable, the Court will use the Model Instructions to instruct the jury. In submitting points for charge based on the Model Instructions, however, the parties should tailor the proposed instructions to the specific facts of the case.

Proposed jury instructions, separately numbered, shall include a table of contents and be submitted on a separate sheet of paper, double spaced, with accurate quotes from, and pinpoint citations to cases and pattern jury instructions where appropriate. The parties shall also provide the proposed instructions on a CD or thumb drive in Microsoft Word format. All objections to jury instructions shall be filed in one (1) written motion.

P. Proposed findings of fact and conclusions of law in non-jury cases.

Proposed findings of fact and conclusions of law in non-jury cases must be filed as in the Scheduling Order. The parties shall also provide them by email to Chambers, a CD or thumb drive in Microsoft Word format. The parties may submit revised or supplemental findings of fact and conclusions of law with specific reference to trial evidence at the conclusion of the case. A schedule for the submission of revised findings/conclusions will be discussed at the conclusion of trial.

Q. Unavailability of witness.

If a witness is unavailable at the time of trial, the Court expects an oral or videotaped deposition to be used at trial for that witness, whether the witness is a party, a non-party, or an expert. The unavailability of such witness will not be a ground to delay the commencement or progress of trial.

R. Objections.

Judge Kearney does not permit speaking objections. Objections must be made by reciting the appropriate rule number or a one-word basis.

XI. Jury deliberations.

A. Written jury instructions.

If requested by the jury, the Court will give the jury a copy of the complete written jury instructions provided to them in the jury charge.

B. Exhibits in the jury room.

After the jury has been instructed and taken to the jury room to begin deliberations, the Court and counsel will confirm the admissible exhibits from the joint exhibit book(s) to be presented to the jury for its consideration during deliberations if the jury requests.

C. Availability of counsel during deliberation.

Unless excused by the Court, trial counsel must remain in the courthouse during jury deliberations with their cell phone. Counsel are expected to return to the courtroom within ten (10) minutes after receiving a call from the Courtroom Deputy.

D. Taking the verdict and special verdicts.

Ordinarily, the Court will submit interrogatories to the jury. The Courtroom Deputy will take the verdict in the presence of the Court, counsel, and the parties.

E. Polling the jury.

If requested by counsel, the Court will poll the jury.

F. Interviewing the jury.

Judge Kearney will allow counsel to interview jurors but will instruct the jurors they are not required to talk to counsel or any person purporting to represent counsel.

XII. Additional procedures in criminal cases.

Incorporating the Policies to the extent applicable in criminal cases including for *pro hac vice* and other motions and trial procedures, the Court also requires in criminal cases:

A. Motions practice.

All pretrial motions – including motions *in limine* and any motions challenging the indictment, seeking suppression of evidence, or raising any dispositive matters – must be filed in accordance with the deadline set forth in the scheduling order entered in the case. Upon the filing of any motion, the parties shall advise the Court whether they intend to present testimony in support of or in opposition to the motion and the expected duration of any such testimony, so the Court can schedule a hearing, if necessary. The Court will generally permit oral argument on substantive motions upon request.

B. Trial continuances.

Any request for a continuance must be filed no later than fourteen (14) days in advance of the scheduled trial date. Requests for a continuance must be filed as a motion stating the reasons for the request. Any such motion must be accompanied by the form of consent to continuance signed by the defendant, as provided by the Court after receipt of the motion and proposed order which, if approved by the Court, would grant the relief sought by the motion. The proposed form of order must be consistent with the requirements of the Speedy Trial Act, 18 U.S.C. § 3161(h)(8), and must include a proposed finding explaining in reasonable detail why the ends of justice served by granting the requested continuance outweigh the best interest of the public and the defendant in a speedy trial.

Continuances are strongly discouraged, and, if multiple continuances are sought, counsel must appear in person to argue the matter.

C. Pretrial conferences.

The Court does not generally hold telephone conferences with counsel in criminal cases, unless counsel specifically requests one or the Court finds a conference is appropriate. The Courtroom Deputy handles scheduling of criminal matters. If the Court holds a pretrial conference, any issues related to *voir dire*, motions *in limine*, jury instructions, and jury verdict forms must be submitted at least seven (7) days prior to the pretrial conference.

D. *Voir* Dire.

In criminal cases, the Court will conduct the initial *voir dire* regarding hardships, the general suitability of the jurors, etc. Absent specific Order, counsel shall submit and serve proposed *voir dire* questions seven (7) days before jury selection.

E. Guilty pleas.

1. Before a defendant offers a guilty plea, counsel must complete the guilty plea memorandum, guilty plea statement, and acknowledgement of rights and review those documents with the defendant. Counsel must also provide copies of those documents to the Court.

2. The guilty plea agreement must state whether the plea is a general plea of guilty, a conditional plea, or a plea of *nolo contendere*. The guilty plea agreement also must disclose to the defendant and the Court whether the plea is entered under Federal Rule of Criminal Procedure 11(c)(1)(A), (B) or (C), relating to the obligation of the United States regarding other charges under subsection (A), a non-binding sentencing recommendation under subsection (B), or a binding sentencing recommendation under subsection (C). In addition, the plea agreement must inform the defendant and remind the Court, under Rule 11(c)(3)(B), the defendant has no right to withdraw the plea if the Court does not follow the recommendation or request if the plea is entered under Rule 11(c)(1)(B).

3. The United States must submit a guilty plea memorandum at least two (2) days prior to the change of plea hearing. The memorandum shall include the elements of each offense to which the defendant is pleading guilty and legal citations for the elements, the maximum statutory penalties for each offense, the terms of any plea agreement and the factual basis for the plea. The change of plea memorandum shall be provided in Microsoft Word Format by e-mail to Chambers_of_Judge_Kearney@paed.uscourts.gov.

4. If an agreement has been reached to request the Court set an expedited sentencing, the United States must notify chambers and the probation office at least two (2) days prior to the change of plea hearing.

F. Trial memorandum.

At least one (1) week prior to the trial date, the United States must file a trial memorandum setting forth the essential elements of the offenses, the facts which it intends to

present, the identity of each witness it intends to call, a statement of the substance of each witness' testimony and any legal issues. The defendant is not required to file a trial memorandum but may do so.

G. Sentencing.

1. Sentencing will be scheduled on the day the Court accepts a defendant's guilty plea or after a defendant is convicted at trial. Sentencing will generally occur approximately one hundred and ten (110) days after a guilty plea or trial. Sentencing will be continued for good cause only.

2. To avoid delay in sentencing, all objections to the Presentence Investigation Report ("PSR") must be sent to the probation officer in advance of sentencing. In no event shall counsel raise objections for the first time in a sentencing memorandum.

3. Counsel must file sentencing motions and supporting memoranda at least seven (7) days prior to the scheduled sentencing date, and any response thereto must be filed at least three (3) days prior to the scheduled sentencing date. The memorandum must set forth any legal authority relied upon by the party. No replies may be filed without leave of Court.

4. Sentencing memoranda (exclusive of motions), by both the United States and the defense must be filed no later than seven (7) days before the scheduled sentencing date, and any response thereto must be filed at least three (3) days prior to the scheduled sentencing date. Counsel shall serve a copy on the United States Probation Office.

5. Counsel shall provide all character letters by email to Chambers_of_Judge_Kearney@paed.uscourts.gov at least three (3) days before sentencing.

6. If a defendant may be responsible for restitution, the United States must submit sufficient information in its sentencing memorandum to enable the Court to determine entitlement, the name and the address of each victim, the amount of loss for each victim, and documentary support for each amount. If liability for restitution is joint and several, the United States shall itemize the restitution amount for which each defendant may be responsible.

7. Pre-Sentence Investigation Reports and Sentencing Memoranda shall also be promptly delivered to chambers in Microsoft Word Format by e-mail to Chambers_of_Judge_Kearney@paed.uscourts.gov.

For any civil or criminal litigation issues not addressed above, please consult the Local Rules of Civil and Criminal Procedure for the Eastern District of Pennsylvania, available at **http://www.paed.uscourts.gov**