

# **TRIAL BY AGREEMENT**

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# Better Litigating Through Pre-trial Agreements

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*Clients and commentators often criticize the pace, burden, and expense of litigation, principally discovery. They are right. Many lawyers seem to engage in discovery for the sake of engaging in discovery. Opposing counsel fight bitter fights over discovery issues that have no bearing on the results of the case. All too often, the fruits of discovery turn out to be wasted—unused or unusable at trial.*

Too often, at the beginning of a new case, lead counsel will turn over discovery and other pretrial work to junior attorneys who do not have the judgment to know what is important or who are afraid of not turning over every rock. The junior attorneys will mechanically go about the task of asking for every document, noticing the deposition of every witness, and asking every conceivable question at the depositions. They will get crosswise with their opposing counsel, and silly discovery disputes will abound.

This is a problem for everyone involved in litigation.

For the client paying its attorneys by the hour, the cost of inefficient discovery comes right out of its pocket, and the burden and cost of discovery can contribute to the desire to settle, even when settlement is not warranted.

The cost of inefficient discovery can be an enormous burden for contingent-fee attorneys. Time-consuming discovery

disputes are—or at least should be—anathema to the contingent-fee lawyer, who profits from handling cases efficiently.

For the hourly lawyer, protracted and costly pretrial proceedings may seem like a boon. But they're not. Hourly clients first and foremost look for attorneys who can efficiently handle their cases. They are not likely to rehire the lawyer who bills hundreds of hours for taking dozens of depositions that end up on the cutting room floor when trial arrives.

Some commentators have suggested that discovery is inherently burdensome under the rules as they exist in American courts. That's wrong. The Rules of Civil Procedure do not require attorneys to take dozens of depositions or to file motions to compel over every document. And lawyers can make their own rules—pretrial agreements—that enhance the efficiency of each case.

Lead counsel (not junior associates) should discuss pretrial agreements at the very beginning of the case, before discovery picks up steam. At our firm, we have 15 discovery agreements we propose at the beginning of most cases, as well as a few agreements relating to pretrial motion practice and trial. Our experience has shown that these agreements work to reduce the cost and burden of litigation while keeping the focus on the eventual trial of the case. The key has always been to attempt to reach agreement on as many of these items as possible before discovery begins. Once you are in the heat of battle, what appears to be good for one side is often assumed to be bad for the other—making it hard to reach an agreement.

Below are our proposed agreements.

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## Agreeing to Streamline the Discovery Process

**1. Discovery disputes will be resolved with a phone call between lead counsel.** One of the most counter-productive litigation activities is the discovery dispute letter. Lawyers write these multipage, single-spaced tomes not for the purpose of working out discovery disputes but to create a record for an eventual motion to compel. Such a letter typically generates a response in kind from opposing counsel, and then a reply, then a sur-reply. In short, the parties draw battle lines instead of working toward an agreement.

Counsel should raise a discovery issue with the other side only when it involves documents or testimony that is really needed for trial of the case.

If your goal is to get evidence quickly and efficiently, eschew letter-writing and the posturing that goes with it. A phone call typically will bring much better communication, more civility, and better results than an exchange of letters.

The phone call should be between lead counsel. More experienced lawyers are simply more capable of quickly sorting wheat from chaff.

**2. Depositions will be taken by agreement and limited in number and length.** Some counsel try to gain an advantage by unilaterally noticing depositions or by over-strategizing the issue of whose witnesses will be deposed first. These issues tend to waste time while having no effect on the outcome of a case.

The parties should agree at the beginning of the case that depositions will be taken by agreement, with no unilateral deposition notices. Moreover, the parties should agree to alternate witnesses—plaintiffs' witness first, defendants' second, plaintiffs' third, defendants' fourth, and so on.

Lawyers tend to take too many depositions and spend too much time with each witness. There is rarely more than a handful of truly important witnesses in any case. And there is almost never a need to spend more than six hours questioning a witness. So, we typically propose at the beginning of the case that the parties agree to limit themselves to 10 depositions each and to allow no more than 3 hours for each deposition.

**3. No objections at depositions.** Many jurisdictions are moving toward rules that prohibit counsel from asserting deposition objections other than privilege objections and "objection, form."

We like to go one step beyond the limitations in the rules. At the beginning of the case, the parties should agree that at depositions, all objections to relevance, lack of foundation, non-responsiveness, speculation, or the form of the question will be reserved until trial. There will be no reason for the defending

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S U A S P O N T E

## A Judge Comments

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JEFFREY COLE

The author is a U.S. District Court Judge, Chicago.

In 1921, Learned Hand lamented the "atmosphere of contention over trifles, the unwillingness to concede what ought to be conceded, and to proceed to the things which matter." Things are no better today. Recently, Judge Sam Sparks of the Western District of Texas, fed up with the shenanigans of the lawyers in a case before him, entered an order inviting them to a "Kindergarten Party." The order promised that there would be "many exciting and informative lessons, including how to telephone and communicate with a lawyer, enter into reasonable agreements about deposition dates, . . . and an advanced seminar on not wasting the time of a busy federal judge . . . because you are unable to practice law at the level of a first-year law student."

The problem of lawyer misbehavior in discovery is easily stated. The answer has proved elusive. Sanctions have been only partially effective because many judges don't want to be bothered with what they consider a collateral matter. Lawyers get the message, and they are also fearful that they will be on the receiving end of a sanctions motion in the future. And so, nothing changes.

Until now. Steve Susman and Johnny Carter have a solution. In "Better Litigating Through Pre-trial Agreements," the authors recommend that at the beginning of a case, senior lawyers craft a pre-trial agreement setting the ground rules for resolving disputes from discovery through the trial.

The authors begin with the obvious: Much discovery is unnecessary, distracting, and expensive. As they put it, "silly

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 or objections for the jury at trial.

**4. The parties will share the same court reporter and videographer.** Counsel often fail to cooperate on the selection and negotiations with a court reporting firm. This is a mistake. The parties can easily cooperate to choose a court reporting firm at the beginning of the litigation. If counsel can promise the firm that it will handle court reporting and videography for every deposition in the case, the firm should be willing to provide a discount in return for the right to transcribe all depositions. Counsel can also cooperate to solicit competitive bids from multiple court reporting firms. This cooperation at the

beginning of the lawsuit can save considerable money for clients.

**5. Papers will be served by email on all counsel.** Some lawyers still do not serve papers by email unless required by the rules. Their reluctance may in some circumstances be motivated by misguided tactical considerations; they want their opposing counsel to go a few days without realizing that an important motion has been filed. This is particularly a problem in state court jurisdictions where there is no e-filing.

The parties should agree at the beginning of every case that all papers will be served by email as soon as they are filed.

It also is a good idea to agree at the beginning of the case that all filings will be served by email on *all* counsel and legal assistants. Not only is it more efficient for everyone on the trial team to learn immediately of any filings, but also lead counsel can spot a fight brewing and intervene to resolve it before it gets out of hand.

**6. Documents will be produced on a rolling basis.** There is no real advantage to be gained by either side in posturing over when documents will be produced. And delays in document production lead only to inefficiencies and fights about collateral issues.

The parties should agree to produce documents as soon as they have been located and copied. If copies are produced, the originals should be made available for inspection upon request.

**7. Each side will pick five custodians for production of electronically stored information (ESI).** Electronic discovery has become the most expensive and time-consuming part of the pretrial practice in most cases, but pretrial agreements can help to reduce the burden.

Electronic discovery is so burdensome because requesting parties seek over-broad production of electronic documents and because producing parties try to conduct a relevance and privilege review of every single electronic document. In some large cases, each side will end up having several young lawyers spend weeks on end conducting relevance reviews of dozens of custodians' electronic files. This is extremely expensive, and not terribly useful.

Parties can greatly reduce the burden and hassle of producing ESI by focusing on those custodians who really matter. Moreover, the parties can agree not to conduct a time-consuming relevance review prior to production.

We propose that each side must initially produce ESI from the files of five custodians selected by the other side during an agreed period of time. Only documents that have a lawyer's name on them can be withheld from production, and only then if they are actually privileged. After analyzing the initial production, each side can request electronic files from five other custodians. Beyond that, good cause must be demonstrated.

One objection we sometimes hear is that some cases have

more than 10 relevant custodians per side. The parties can always ask the court for electronically stored documents from more custodians. But in our experience, that is rarely necessary. When was the last time that the key email in your case was neither sent to nor received by one of the top 10 most important witnesses on either side of the case? In our experience, 10 custodians will usually be more than enough to capture the relevant documents.

**8. Production does not waive the privilege.** One of the major hindrances to quick and efficient production of documents is most attorneys' fear of producing privileged documents, a fear that often leads to overly long and detailed privilege reviews and production of massive privilege logs. Counsel fear that if they let one potentially privileged document slip into their document production, they will then be faced with an argument for a very broad waiver.

To deal with these concerns, the parties can agree at the beginning of a lawsuit that the production of a privileged document does not waive the privilege as to other privileged documents and that documents can be snapped back as soon as it is discovered they were produced and without any need to show that the production was inadvertent.

For additional protection, if the case is in federal court, the parties can request an order at the beginning of the case under Federal Rule of Evidence 502(d), which provides that "a Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding."

**9. Each side may select up to 20 documents from the other side's privilege log for in camera inspection.** As document productions have become larger in complex cases, so have privilege logs. It is not all that unusual anymore to see privilege logs of more than 100 pages. When faced with such a log, we have found that the best practice is to select 20 documents that, based on the log descriptions, appear to be the most relevant documents that may not actually be privileged and ask the court to rule. Therefore, we suggest agreeing at the beginning of the case that each side has the right to select 20 documents from the other side's privilege log for submission to the court for in camera inspection.

**10. The parties will produce ESI in native, searchable form.** The parties should work in good faith to make sure that their ESI is usable by the other side. To that end, the parties should agree at the beginning of the case that, whether in federal court or not, they will ESI in the native format kept by the producing party or in a common interchange format, such as Outlook PST, Concordance, or Summation, so that 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

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## SUA SPONTE

### A Judge Comments

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discovery disputes . . . abound," and lawyers "get crosswise with their opposing counsel." Depositions are a fertile source of conflict notwithstanding Rule 30(c)'s prohibition of coaching and instructing witnesses not to answer. And lawyers continue to "confer" with deponents in the middle of a question, despite the obvious impropriety of doing so. *LM Insurance Corp. v. ACEO Inc.*, 2011 WL 2937300 (N.D. Ill. 2011). All these problems can be avoided by a pre-trial agreement that spells out what is and is not permissible.

Susman and Carter advocate agreements dealing with the timing of document production, the form in which electronically stored information will be produced, how inadvertent production of privileged documents will be handled, the length and number of depositions, the sharing of various costs, service by email to prevent purposeful delays, the rolling production of documents, protective orders, and a number of other issues that routinely arise and are the subject of needless disputes.

Be careful, however. Some of the proposed arrangements, such as briefing schedules and page limits for motions, require the court's approval. The same is true of agreements regarding voir dire questions and providing for note-taking and the asking of questions by the jury. Although you will need the court's approval of these agreements, it will seldom be denied and will be in accord with modern practice. See James Holderman, *Trying the ABA's Principles for Juries and Jury Trials*, 33 LITIGATION 8 (Spring 2007).

Susman and Carter's invaluable suggestions should be embraced by all lawyers and encouraged by all judges. Their experience proves that cooperation among counsel will help to significantly reduce costs and minimize pointless and corrosive arguments. And that will

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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 the contents of any CDs or DVDs exchanged. Either side may use an email or an attachment to an email from one of these previously produced disks by printing out the entire email (and the attachment, if using a file that came with an email) and marking it at the deposition or trial. In addition, either side may use application data (which was not an attachment to email, so it stands alone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from which it came; (2) the directory or sub-directory where the file was located on the CD or DVD; and (3) the name of the file itself, including the file extension.

**11. The parties will ask the court to choose a protective order.** Discovery can become bogged down from the very beginning when the parties cannot agree on the form of a protective order. This is particularly a problem in patent infringement cases and other big-stakes matters involving sensitive business information.

Most judges have a good sense of what they think a protective order should look like. Rather than negotiate for weeks before inevitably submitting the dispute to the judge, the parties should put a 48-hour limit on protective order negotiations.

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## More experienced lawyers are simply more capable of quickly sorting wheat from chaff.

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The parties should exchange protective order proposals. Then they should negotiate. If agreement cannot be reached on the form of a protective order within 48 hours after proposals are exchanged, both sides will write a letter to the court stating each side's preferred version and, without argument, ask the court to select one or the other as soon as possible.

The court can reduce the time spent on protective orders if it has a standard protective order that it presumptively enters in each case. The court can make it clear that there is a very high burden on anyone who wants something different.

**12. Exhibits will be numbered sequentially.** It becomes apparent that many litigators are not thinking about trial when they start numbering deposition exhibits. It is a particularly annoying practice to number exhibits separately for each deposition. When this is done, the same document can end up being

Smith-1, Jones-4, and Johnson-14 once the parties get to trial. Alternatively, the plaintiffs and defendants can continue the numbering from deposition to deposition but have a separate set of plaintiffs' exhibits and defendants' exhibits. Plaintiffs-14 and Defendants-14 then will be different documents.

Exhibits should be numbered at deposition with the ultimate goal in mind—trial. Each exhibit should have one and only one number, which it carries through trial. This practice greatly reduces confusion over exhibit numbering. At trial, it makes it easier for the parties to play the deposition excerpts in which exhibit numbers are referenced.

**13. The parties will share the expense of imaging deposition exhibits.** Just as the parties should cooperate in selecting a court reporting firm, they should share the cost of imaging all deposition exhibits. There is no advantage to anyone—except perhaps companies that image documents—if the parties fail to share costs in this manner.

**14. Neither side will be entitled to discovery of communications with counsel or draft expert reports.** The parties can greatly reduce the cost of expert work and discovery by agreeing that communications between experts and counsel, as well as draft expert reports, are not discoverable. The preparation of expert reports is not nearly as time-consuming when experts and attorneys can freely communicate in writing.

The federal rules finally have caught up with what we have been proposing for years. Under Federal Rule of Civil Procedure 26(b)(4)(B), draft reports are protected as work product unless they are otherwise discoverable under the catchall discovery “scope” provision of Rule 26(b)(1) or, under Rule 26(b)(3)(A)(ii), the party seeking production shows that it has “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” And under Rule 26(b)(4)(C), attorney-expert communications are protected except to the extent that they “(i) relate to compensation for the expert’s study or testimony; (ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.”

Many state court systems do not yet have equivalent rules, but we have found that state court litigants often are willing to agree by stipulation to apply the common-sense federal rule to their cases.

Even with the federal rule in place, it may make sense in some cases to broadly stipulate that draft reports and attorney-expert communications are not discoverable. Such a stipulation can give the parties more assurance that the opposing side will not prevail with an argument of “substantial need” to see communications or drafts, and that the opposing side will not seek production based on a broad reading of the exception

for communications that identify facts or data that the party's attorney provided and that the expert considered in forming his or her opinions.

**15. The parties will agree to limited rights to take expert depositions.** If a case is in federal court, and the parties provide expert reports in the manner required by Rule 26(a)(2)(B), there should be no need to depose experts. It is more efficient to use the opinions and other information provided in the report to prepare to cross-examine the experts once—at trial. Moreover, it is often strategically advantageous to save the questioning for trial. Depositions often serve only to alert experts and opposing counsel to problems they can fix before trial.

Sometimes parties do not comply with Rule 26(a)(2)(B), which requires detailed and complete reports, including “a complete statement of all opinions the witness will express and the basis and reasons for them,” “the facts or data considered by the witness in forming them,” and “any exhibits that will be used to summarize or support them.” If a report is incomprehensible or incomplete, the parties should reserve the right to depose the expert. However, the parties should agree that the party seeking clarification is required to establish its entitlement to a deposition through a motion filed with the court.

In many state court jurisdictions, it is the norm to provide expert disclosures rather than expert reports. Expert disclosures are often inadequate. Therefore, in jurisdictions where the rules do not require expert reports, we often propose that the parties agree at the beginning of the case that the parties will provide expert reports instead of disclosures.

effectiveness, demonstratives typically need to be reworked and honed until the day they are used in trial. Therefore, the parties should agree in advance that demonstratives need only be shown to the other side before they are shown to the jury, and need not be listed in the pretrial order.

**3. The parties should agree on a jury questionnaire.** To streamline jury selection, the parties should agree up front on a jury questionnaire to be filled out by potential jurors.

**4. The parties will ask the court to allow the jury to ask questions and keep notes.** Imagine taking a class in college and not being allowed to ask questions or take notes. The very idea is ridiculous. For obscure and unconvincing reasons, many courts continue to enforce rules that hinder the jurors' ability to learn and retain information about a dispute. Our court system works much better when jurors are well informed and engaged. Therefore, the parties should agree beforehand to ask the court to allow jurors to take notes and ask questions.

**5. The parties will provide the jurors with an agreed-upon notebook.** To further educate the jurors, the parties should come together ahead of time to prepare a joint juror notebook. The notebook could contain a cast of characters, a list of witnesses (including their photos), a neutral time line, a glossary of special terms that will be heard at trial, any crucial or dispositive documents, and other information that the parties agree will help the jurors follow the trial and deliberate in a reasoned, informed way.

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## Thinking Ahead to Pre-trial Motions and Trial

In negotiating the pretrial agreements at the beginning of the case, counsel should, of course, be thinking about pretrial motion practice and trial, not just discovery. The start of discovery is not too early to begin discussing and trying to reach agreement on the following items.

**1. The parties should agree on a briefing schedule and page limits for all pretrial motions.** When briefing procedures are not otherwise set by rule or court order, the parties should agree in advance on a pretrial motion schedule and page limits. Most consequential pretrial issues can be resolved with short briefs that set out the key arguments and that are filed in a timely way. It is typically a waste of time to bury the court in paper, especially with motions filed shortly before trial.

**2. Demonstrative exhibits need only be shown to the other side before they are shown to the jury.** A trial is a teaching process. The parties should be given maximum latitude to use whatever permissible techniques are available to teach the jurors the facts of the case. For maximum

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## The Advantages

Litigants, judges, juries, and lawyers all win when counsel can work together and agree on some simple rules to streamline discovery and trial from the outset of the case. These agreements can reduce expense, stress, and many of the uncertainties associated with pretrial rulings and jury trials. It always helps that the lawyers seeking agreement have ample trial experience. If they do, they are more likely to recognize the proposals as beneficial to both sides and will be more willing to take a chance on something calculated to ease the process but not affect who wins or loses. We hope that these agreements can prove to be as beneficial in your cases as they have been in ours. ■