

TRIAL RULES

HON. DEBRA A. MARTIN

ACTING SUPREME COURT JUSTICE



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## 1. Trial Procedures

(a) **Trial Schedule.** In general, matters are scheduled for trial in the order of filing the Note of Issue and Statement of Readiness, subject to the availability of the Court, counsel, parties and witnesses.

Once a trial date is set, counsel should immediately determine the availability of parties and witnesses. If, for any reason, counsel will not be prepared to proceed on the scheduled date, the Court is to be notified within 5 business days after scheduling of the trial date or, in extraordinary circumstances, as soon as reasonably practicable. **Failure of counsel to provide such notification will be deemed a waiver of any application to adjourn the trial because of the unavailability of a witness.** Witnesses are to be scheduled so that all trial time is completely utilized.

(b) **Trial Order.** The Court will issue a Trial Order establishing the trial date as a stand-by and/or date certain and setting forth the rules of the Court specific to the trial.

(c) **Jury Selection.** The jury shall be selected in accordance with procedures set forth below.

(d) **Trial Times.** Unless otherwise directed by the Court, the trial day is 9:30 a.m. to 12:30 p.m., and 2:00-4:30 p.m., Monday through Friday. The Court holds Special Term approximately every other Wednesday afternoon, so there will be no trial at that time. Special Term days will be noted in the Trial Order.

(e) **Motions *in limine*.** Unless otherwise directed by the Court, notice of a motion *in limine* shall be filed and served at least 10 business days prior to jury selection. Responses are due 2 days before jury selection. Motions *in limine* will be deemed

submitted unless the Court requests oral argument.

(f) **Exhibits - Pre-Marking.** Prior to the commencement of proof, counsel shall meet with the assigned court reporter to pre-mark exhibits using numbers for plaintiff's exhibits and letters for defendant's exhibits. At that time, counsel shall make a good faith attempt to agree upon the exhibits that will be offered into evidence without objection, including portions of deposition testimony, and request that the court reporter mark those items as received by stipulation.

The parties should delete irrelevant portions from the deposition testimony to be read. Prior to trial, each party should submit to the Court a courtesy copy of any deposition testimony intended to be read at trial.

(g) **Pre-trial Memoranda, Exhibit Book, PJI Charge and Equipment.** For a jury trial, you are directed to submit to the Court **at least 2 weeks before jury selection the following:**

- (1) Marked pleadings and copy of Demand and Bill of Particulars and any other relevant discovery (CPLR § 4012 and 22 NYCRR § 202.35).
- (2) Requests to charge and proposed special verdict sheet shall be provided to counsel and the Court in hard copy and attached to an e-mail to the Court's law clerk at [anichols@nvcourts.gov](mailto:anichols@nvcourts.gov) in Microsoft Word format. Failure to submit requests to charge may waive the right to object to the Court's charge to the jury. If additional or different charges are necessary because of developments at trial, a supplemental request to charge will be permitted.

- (3) Witness lists, including expert witnesses (for medical malpractice cases, this list is to be confidential and submitted to the Court only), the order in which they are scheduled to testify and the estimated length of their testimony.
- (4) A separate itemization of any significant legal or unique evidentiary issues that may arise at trial together with a brief memo setting forth your position on those issues.
- (5) Any requests for special equipment (e.g., blackboard, shadow box, easel, audio-video equipment). **Do not** assume that the Court has access to hi-tech equipment and technicians to assist you.
- (6) Copies of all expert disclosures.

For a non-jury trial, counsel shall submit a book of trial exhibits for the Court's use at trial.

(h) **Scheduling of Witnesses/Video Testimony.** Counsel may be required to videotape a witness's testimony for trial or, upon consent of the Court and opposing counsel, arrange for real-time transmission if that witness is unavailable. At least 1 week before the start of the trial, counsel must make all the necessary arrangements for equipment to play or transmit the testimony with the Court Clerk. Absent exigent circumstances, the Court will not adjourn a trial due to the unavailability of a witness.

(i) **Preclusion.** Except for good cause shown, no party shall present the testimony of a witness, portions of deposition testimony, or exhibits that were not identified as provided above and not identified during the course of disclosure in response to a relevant discovery demand of a party or an order of the Court.

(j) **Expert Disclosure**: The parties are directed to follow CPLR 3101 (d) and (h) regarding expert disclosure. Unless otherwise ordered, the party with the burden of proof on the issue shall respond to the demand for trial experts by providing disclosure 60 days prior to jury selection. Disclosure by the opposition is then due 30 days prior to jury selection.

The word “expert” shall include, but is not limited to, any physician, dentist, chiropractor, psychiatrist, psychologist, other health care provider of any specialty, economist, engineer, architect, lawyer, accountant, appraiser, rehabilitation counselor or other person who will testify concerning his/her qualifications and give opinions concerning the issues in the case. However, “expert” shall not include a treating physician or other treating health care provider whose records(s), and report(s) have been timely provided.

Any motion to preclude, or limit expert testimony under this rule must be returnable as soon as practicable but no later than ten (10) days prior to trial.

Any prior Order or Scheduling Order addressing expert disclosure shall be controlling over this directive.

## **2. Jury Selection Rules**

The “Struck Method” of jury selection will be used (see 22 NYCRR § 202.33[f][2], as modified below). Jury selection should be accomplished in a half day, but, in any event, must be completed in one day. These rules may be adapted for use in a particular case.

(a) **Court Participation.** Jury selection will take place in the courtroom with the Court initially asking the general questions to identify any jurors who should be excused or removed “for cause.” If counsel has additional questions directed toward eliciting “for cause” challenges, those should be submitted to the Court for consideration, with a copy to opposing counsel at least 1 week before jury selection. The Court's general questions are:

- (1) Are you available for the anticipated duration of the trial?
- (2) Do you have any opinions about the civil justice system?
- (3) You will be instructed by the judge on the law that applies to this case. Will you follow the law in your deliberations, even if you do not agree with it?
- (4) Do you know any of the parties?
- (5) Are you an employee of a party to the action?
- (6) Are you a shareholder or stockholder of a party that is a corporation? (if applicable)
- (7) Do you know any of the potential witnesses?
- (8) Do you know any of the attorneys or their law firms?
- (9) Does anyone have any medical concerns which would make jury service difficult or for which accommodation may be made?
- (10) As appropriate, a brief description of case subject matter will be given and jurors will be asked if they, their family members or someone close to them has had a similar experience.
- (11) For personal injury or property damages actions: Are you a shareholder, stockholder, director, officer or employee, or in any manner interested in any insurance company issuing policies for protection against liability for damages for injury to persons or property? (CPLR §4110)

(b) **Counsel’s Questioning.** After the general questioning and the resolution of “for cause” challenges, the Judge may or may not remain in the courtroom. The court clerk will randomly select 16 prospective jurors to sit in the jury box area. Counsel will be given the completed questionnaires. (Upon completion of jury

selection, or upon removal of a prospective juror, all copies of the questionnaire shall be either returned to the juror or collected and discarded by the Court Clerk in a manner that ensures the juror's privacy.) Counsel will begin voir dire, starting with plaintiff's counsel and proceeding in the order in which the parties' names appear in the caption.

(c) **Time limits.** Each side shall have 45 total minutes for the questioning of prospective jurors unless otherwise advised by the Court. This time may be adjusted when there are multiple parties per side with adverse interests.

(d) **Number of jurors.** There shall be a total of 7 or 8 jurors selected (depending on the anticipated length of trial), with the last 1 or 2 jurors selected being designated but not disclosed alternates (*i.e.*, counsel and the Court will know that the last selected juror(s) are alternates, but the jurors will not know this).

(e) **Number of peremptory challenges.** Each side shall have 4 preemptory challenges, including one for the alternates. If there is more than one party per side, the Court may divide or grant additional challenges, as appropriate, after consultation with counsel. Peremptory challenges are to be exercised outside the presence of the panel of prospective jurors.

(f) **Counsel's comments.** Each attorney may generally state the contentions of his/her client(s). Counsel may not read from pleadings or mention the amount of the *ad damnum* or discuss legal concepts (*e.g.*, burden of proof) which are the province of the Court. There shall be no mention of insurance, since the Court will have asked the relevant question concerning insurance pursuant to CPLR §4110.

(g) **Objections.** Objections or for cause challenges are to be made outside the presence of the prospective jurors by quietly discussing the issue at counsel's table. If the issue requires extensive discussion, counsel should go into the jury room or

corridor for discussion. **The Court Clerk should be told immediately of any challenge for cause, *Batson* challenge or other objections.**

**3. Procedures using the “Struck Method” in 22 NYCRR 5202.33(f)(2) (modified)**

(a) Plaintiff’s counsel will start questioning the prospective jurors, followed by defendant’s counsel. Counsel may be permitted to ask follow-up questions. A response from a juror that requires further elaboration may be the subject of further questioning of that juror by counsel on an individual basis which may be conducted outside the presence of the rest of the jury panel, if appropriate, to avoid a possible mistrial. Prior to exercising peremptory challenges, all challenges for cause to any prospective juror on the panel must have been exercised.

(b) After a challenge for cause is exercised, a new juror will be called to fill the vacant seat. Counsel for each party will then question the replacement juror.

(c) After all challenges for cause are resolved, selection of jurors shall be made from the panel of 16 prospective jurors, who will be seated in the same order as they are called by the clerk to the jury box. Counsel will join the judge in the jury room to make their peremptory challenges. Counsel for each party, beginning with plaintiff’s counsel, will exercise allowable peremptory challenges by alternately striking a single juror’s name from a list or ballot passed back and forth between or among counsel until all challenges are exhausted or waived. In cases with multiple plaintiffs and/or defendants, peremptory challenges shall be exercised by counsel in the order in which the parties’ names appear in the caption, unless following that order would, in the opinion of the Court, unduly favor a side. In that event, the Court, after consulting with the parties, shall specify the order in which the peremptory challenges shall be exercised. An attorney who waives a challenge in a round loses that challenge (use it or lose it) but may exercise any remaining challenges in subsequent rounds.

(d) After all peremptory challenges have been made, the trial jurors (including the alternates) shall be selected in the order in which they have been seated from those prospective jurors remaining on the panel.

(e) Counsel will return to the courtroom where the clerk will read the names of the panel and alternate(s), without disclosing the designation of the alternate(s).

#### **4. Using a special jury questionnaire**

Questionnaires shall be used in medical malpractice and complex cases upon request. Jury selection with questionnaires will, ideally, be completed in 1 day but may take up to 2 days. To allow extra time for selection, it will generally be scheduled to start on a Thursday, with Friday allowed for continuing selection and for conferencing with the Court. In addition to the rules in Section 3 above, the following rules apply to jury selection with special questionnaires:

##### **(a) Process for Court Approval of Special Questionnaire**

- (1) At least 3 weeks before the date scheduled for jury selection, the attorneys shall circulate a proposed questionnaire among themselves for comment and agreement.
- (2) At least 2 weeks before the date scheduled for jury selection, plaintiff's counsel is to provide to the Court the proposed special juror questionnaire reflecting agreed upon questions. If counsel cannot agree on a question, that should be set forth in the cover letter to the Court.
- (3) At least 1 week before the date scheduled for jury selection, the Court will advise counsel of the approved questionnaire.
- (4) By 12:00 p.m. of the business day prior to the date scheduled for jury selection, plaintiff's counsel shall deliver to the Central Jury Office

sufficient copies of the special juror questionnaire for the number of jurors scheduled to be brought in for the selection process.

(b) Questionnaire form

- (1) Provide a blank at the top of the form for the juror's name to make it easier for the Court Clerk to sort the completed questionnaires.
- (2) Request only the town or city of residence, not street number/name.
- (3) Request a simple affirmation (not notarized) at the bottom of the form.
- (4) The questions that are most likely to elicit a challenge for cause should be placed at the beginning, such as those regarding availability for the duration of the trial, knowledge of the parties, and having an experience similar to plaintiff's. The instructions should indicate that if the juror responds in such a way that there may be a challenge, they are to stop answering any more questions. Counsel will then question those individuals in the courtroom at the beginning of jury selection to determine whether they can agree on removal for cause. If not, the Court will make a determination. The goal is to complete for cause challenges quickly and then move to resolution of individual juror issues and voir dire.

(c) After completing the special juror questionnaire and preliminary screening for cause challenges, jurors will be excused for a break and the completed questionnaires will be circulated to counsel for review. After the break, any issues that may lead to a for cause removal will continue to be explored by individual questioning of the affected jurors. Once it appears that for cause challenges based on the questionnaire have been exhausted, voir dire by counsel will begin.