UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

TYRONE BROOKS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: 2:21-cv-1028-ACA-NAD**
	)	
AKEEM EDMONDS,	)	
	)	
Defendants.	)	
	)	

PRETRIAL ORDER

A pretrial scheduling conference was held in the above case on January 24, 2024, wherein, or as a result of which, the following proceedings were held and actions were taken:

1. Appearances. Appearing at the conference were:

   For Plaintiff: J.S. "Chris" Christie

   For Defendant Akeem Edmonds: J. Matt Bledsoe

2. Nature of the Action, Jurisdiction and Venue.

   a. The nature of this action is as follows: Civil rights 42 U.S.C. § 1983 action alleging constitutional violations through excessive force.

b. The court has subject matter jurisdiction of this action under the following statutes, rules or cases: federal jurisdiction: 28 U.S.C. §§ 1331 and 1343(a)(3) and 42 U.S.C. § 1983; supplemental jurisdiction: 28 U.S.C. § 1367.

c. All jurisdictional and procedural requirements prerequisite to maintaining this action have been met.

d. Personal jurisdiction and venue are not contested.

3. Parties and Trial Counsel. Any remaining fictitious parties are hereby **STRICKEN.** The parties and designated trial counsel are correctly named as set out below:

	Parties:	Trial Counsel:
Plaintiff:	Tyrone Brooks	**Dentons Sirote PC** J.S. "Chris" Christie R. Terrell Blakesleay **Menefee Law** Andrew Menefee
Defendant:	Akeem Edmonds	**Office of Attorney General** J. Matt Bledsoe

4. Pleadings. The following pleadings have been allowed:

a. Plaintiff's Complaint (Doc. 1)

b. Defendant Akeem Edwards's Special Report and Answer (Doc. 18)

5. Statement of the Case.

(a) Narrative Statement of the Case.

Mr. Brooks brings a civil rights action under 42 U.S.C. § 1983 against Defendant Akeem Edmonds, alleging that Mr. Edmonds violated Mr. Brooks's Eighth and Fourteenth Amendment rights by using excessive force when he injured Mr. Brooks. Mr. Brooks seeks monetary damages, including punitive damages.[1]

Mr. Edmonds denies Mr. Brooks's allegations, asserts he is entitled to qualified immunity, and denies liability for the federal and state law claims.

(b) Undisputed Facts.

1. Plaintiff Tyrone Brooks is an inmate in the custody of the Alabama Department of Corrections.

2. On May 28, 2021, Mr. Brooks was incarcerated at Donaldson Correctional Facility in Jefferson County, Alabama.

3. On May 28, 2021, Mr. Brooks set a fire outside his cell and Mr. Edmonds put the fire out.

[1] Mr. Brooks contends that the inmate complaint drafted *pro se* (doc. 1) incudes assault and battery claims and negligence and wantonness claims. For this reason, Mr. Brooks's position is that, after "when he injured Mr. Brooks," the Narrative Statement should include "and committed an assault and battery and acted negligently and wantonly."

4. After putting the fire out, Mr. Edmonds ordered Mr. Brooks to put his arms outside the tray door so he could be handcuffed to the rear.

5. Mr. Edmonds sprayed Sabre Red pepper spray into Mr. Brooks's cell. Whether he sprayed Mr. Brooks before or after telling him to put his arms outside the tray door is disputed.

6. For pepper spray, the Alabama Department of Corrections ("ADOC") buys and gives correctional officers Sabre Red, a brand of pepper spray.

7. The ADOC's Sabre Red pepper spray is commercially available. https://www.sabrered.com/login.php?from=account.php%3Faction%3D.

8. After spraying Mr. Brooks, Mr. Edmonds again ordered Mr. Brooks to put his hands behind his back and through the cell's tray door for handcuffing and Mr. Brooks complied.

9. Mr. Brooks's arms were burned while Mr. Edmonds handcuffed Mr. Brooks's hands behind his back and through the cell's tray door.

10. Mr. Edmonds walked Mr. Brooks, with his hands cuffed behind him, to the health care unit for treatment of his burns and pepper spray.

11. In the health care unit, Mr. Brooks took a shower to wash the pepper spray off his face.

(c) Mr. Brooks's Claims.

1. Eighth Amendment civil rights violation based on excessive force

While incarcerated at Donaldson Correctional Facility, Mr. Brooks started a fire outside his cell. Mr. Edmonds put out the fire and then ordered Mr. Brooks to put his hands behind his back and through the shoe-box size tray opening slot in the cell door so Mr. Edmonds could handcuff him. Mr. Brooks reminded Mr. Edmonds that, due his shoulder injury, the doctor had ordered that Mr. Brooks was to be handcuffed in the front only. Mr. Edmonds responded by pepper spraying Mr. Brooks in the face and again ordering him to put his hands behind his back and through the shoe-box size opening in the cell door.

Despite the pain, Mr. Brooks complied with Mr. Edmond's order. While Mr. Brooks hands were through the door opening, Mr. Edmonds pushed Mr. Brooks's arms against the hot metal of the cell door and held them there, causing second and third degree burns on Mr. Brooks's arms. On the way to the health care unit for treatment of his burned arms and pepper sprayed face, Mr. Edmonds repeatedly used his fists to hit Mr. Brooks in the back, the back of the neck, and back of the head. In the health care unit's shower to wash the pepper spray off Mr. Brooks's face, Mr. Edmonds ordered Mr. Brooks to take off all his clothes. In the shower where no witnesses could see, Mr. Edmonds choked the hand-cuffed Mr. Brooks and then grabbed Mr. Brooks by the genitals and threatened him.

Legal authority:

Eleventh Circuit Pattern Jury Instructions, Civil, Instruction 5.6 (excessive force) and cases cited as support for the pattern instruction.

2. Assault and battery[2]

Same facts as for (1) above.

Legal authority: Alabama Pattern Jury Instruction 5.00 and cases cited.

3. Negligence

Same facts as for (1) above.

Legal authority: Alabama Pattern Jury Instruction 28.00 and cases cited.

4. Wanton and Willful conduct

Same facts as for (1) above.

Legal authority: Alabama Pattern Jury Instruction 29.00 and cases cited.

(d) Defendant's Defenses.

1. Any force used by Mr. Edmonds was justified.

When evaluating the conduct of prison officials, the Eleventh Circuit has emphasized that management of inmates may "require or justify the occasional use of a degree of intentional force," and decisions made to restore order are entitled to deference. *Bennett v. Parker*, 898 F.2d 1530, 1533 (11th Cir. 1990); *see also Whitely*

[2] Mr. Edmond's position is that no state law claims remain based on the Report and Recommendation. (Doc. 22).

v. Albers, 475 U.S. 312, 321–22 (1986) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.") (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)); *Rhodes v. Chapman*, 452 U.S. 337, 349, n.14 (1981) ("[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators.").

In determining whether an excessive force violation has occurred, the proper inquiry is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320–21; *Bozeman v. Oliver*, 422 F.3d 125 (11th Cir. 2005). This analysis is broken down into two prongs or aspects, a subjective component and an objective component, that is, "(1) whether the 'officials act[ed] with a sufficiently culpable state of mind,' and (2) 'if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation.'" *Johnson v. Moody*, 206 F. App'x 880, 883 (11th Cir. 2006) (quoting *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)); *see also Sims v. Mashburn*, 25 F.3d 980, 983 (11th Cir. 1994).

The factors to be considered in evaluating whether the use of force was wanton and unnecessary include the following: 1) the need for application of force; 2) the relationship between the need and the amount of force used; 3) the threat reasonably

perceived by the prison official; 4) any efforts made to temper the severity of a forceful response; and 5) the extent of the injury suffered by the inmate. *Whitley*, 475 U.S. at 320–21. Mr. Edmonds contends that these factors are satisfied because Mr. Brooks started a fire and according to Mr. Edmonds, refused to obey direct orders.

2. The nature of Mr. Brooks's injuries preclude him from recovering money damages under the PLRA.

Despite Mr. Brooks's claim he was assaulted, Mr. Edmonds contends that Brooks presents no qualified medical evidence of any need for immediate medical care, nor has he presented evidence of serious or permanent injury. Consequently, the *de minimis* injuries the court has before it do not justify any award of money damages pursuant to the PLRA. *See* 42 U.S.C.A. § 1997e(e) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody. . . . ").

3. Mr. Edmonds asserts the defense of qualified immunity.

A. Mr. Edmonds contends he was acting in his discretionary authority.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In order to establish that he was acting within his "discretionary capacity," a public official asserting qualified immunity need only show "objective circumstances which would

compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988) (quoting Barker v. Norman, 651 F.2d 1107, 1121 (5th Cir.1981)).

Mr. Edmonds contends that he has carried this burden. According to Mr. Edmonds, everything alleged in the complaint describes Mr. Edmonds doing what correctional officials do: supervising and controlling inmates. Of course, Mr. Brooks may allege that Defendant carried these duties out negligently, incompetently or even unconstitutionally, but they are still duties normally associated with what correctional officials do—that is the standard for the finding of discretionary authority.

B. Mr. Edmonds contends that Mr. Brooks has not carried his burden to establish a constitutional violation or that the violation was clearly established.

Once an official has asserted the defense of qualified immunity and shown that he was acting within his discretionary capacity, the threshold inquiry a court must undertake is whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In other words, do the facts show that Mr. Edmonds's conduct violated Mr. Brooks's constitutional rights?

"The next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201. In this part of the analysis, the reviewing court determines whether Mr. Edmonds had "notice" or "fair warning" that his conduct would violate Mr. Brooks's constitutional rights. *Willingham v. Loughnan*, 321 F.3d 1299, 1301 (11th Cir. 2003).

The burden is on Mr. Brooks to show that Mr. Edmonds has violated a clearly established right and that the law was clearly established. *Travers v. Jones*, 323 F.3d 1294, 1295 (11th Cir. 2003) ("Once the defendants established that they were acting within their discretionary authority, a point not in dispute here, the burden shifted to the plaintiff to show that qualified immunity is inappropriate.").

Mr. Edmonds contends that in the instant case, Mr. Brooks has failed to state a constitutional claim and he has failed to show that Mr. Edmonds crossed a bright line in excessive force law.

6. Discovery and Other Pretrial Procedures.

(a) Pretrial Discovery.

In addition to paragraph 9 below, two discovery issues remain:

(1) ADOC's producing subpoenaed deposition transcripts and exhibits from depositions of Mr. Edmonds in other actions,

(2) Mr. Edmonds opportunity to take Mr. Brooks's deposition;

In this action, Judge Danella has been handling discovery issues and has been

notified that these issues remain.

(b) Pending Motions.

None.

(c) Motions *In Limine*. Motions *in limine* must be filed on or before **March 4, 2024,** and shall be accompanied by supporting memoranda. The court expects the parties to file a separate motion *in limine* for each issue or piece of evidence a party seeks to exclude. The parties should not file an omnibus motion. If the court would need to review the evidence to rule on a motion *in limine*, the party seeking exclusion must attach the evidence that the party seeks to exclude. Parties should file motions *in limine* only with respect to evidentiary matters that can be resolved before trial. Matters that can only be resolved during the course of trial—for example, whether something is appropriate impeachment material—should not be raised in a motion *in limine*, and the court will not consider a failure to move *in limine* a waiver of those matters. As to each matter counsel seeks to exclude, counsel shall indicate whether the exclusion is "opposed" or "unopposed" by counsel for the other side. Parties must meet and confer about their opposition to each motion *in limine*. Parties are encouraged to resolve evidentiary issues by stipulation whenever possible. Responses in opposition to the motions *in limine* must be filed on or before **March 14, 2024**. After briefing is complete, the parties must jointly provide the court with a binder or binders containing courtesy copies

of each motion *in limine*, each response to a motion *in limine*, and corresponding exhibits, separated by tabs. Each page must be three-hole punched and securely bound in a three-ring binder or a large clip. Courtesy copies should reflect the CM/ECF case number, document number, date, and page stamp on each page. The parties must submit the courtesy copies within three days after the completion of briefing on the motions *in limine*.

7. Trial Date.

(a) This case is set for jury trial on **April 8, 2024**.

(b) The trial of this matter is expected to last **three (3)** days.

(c) The court sets a final pretrial conference for **April 4, 2024**, **9:30 a.m.**, Courtroom 6B, Hugo L. Black United States Courthouse, Birmingham, Alabama.

8. The parties are to comply fully with each provision contained in Exhibit A – Standard Pretrial Procedures which is incorporated into this order by reference as if fully set forth herein.

9. As to witnesses on Mr. Brooks's witness list to be filed on or before February 20, 2024, Mr. Edmonds's counsel is to work with Mr. Brooks's counsel to have the ADOC provide an individual to accept service of trial subpoenas for ADOC former or current employees or, if the ADOC is not in a position to provide an individual to accept service of trial subpoenas, to provide the work and home

addresses reflected in the ADOC records of such current or former ADOC employees.

10. As to the parties' Exhibit Lists to be filed on or before February 20, 2024, on that day a party shall also serve (not file) copies of his listed exhibits on the opposing party with any redactions or serve a list identifying by Bates number and indicate how the exhibit is proposed to be marked to be filed under seal.

11. If a party intends to seek to have information on an exhibit listed by the opposing party be redacted or be an exhibit filed under seal at trial differently than how proposed by the listing party, the non-listing party shall notify the opposing party by February 26, 2024, and shall also serve (not file) copies of those exhibits on the opposing party with any redactions or serve a list identifying by Bates number and indicate how the exhibit is proposed to be marked to be filed under seal.

12. The parties shall attempt to agree on redactions and under seal filings and by March 4, 2024, send to Chambers (not file) the parties' proposed redactions and documents to be filed under seal, and, to the extent the parties do not agree, their positions as to redactions and filings under seal.

13. The parties are to read and comply fully with each provision contained in Exhibit B – Guidelines for Conduct of Trials, which is incorporated into this order by reference as if fully set forth herein.

The court **ORDERS** that the above provisions be binding on all parties unless modified for good cause shown.

DONE and **ORDERED** this February 13, 2024.

ANNEMARIE CARNEY AXON
UNITED STATES DISTRICT JUDGE

EXHIBIT A – STANDARD PRETRIAL PROCEDURES

1. **Damages**. No later than thirty (30) calendar days before the date set for trial, the parties shall file and serve a list itemizing all damages and equitable relief being claimed or sought; such list shall show the amount requested and, where applicable, the method and basis of computation.

2. **Witnesses**.

The parties shall file witness lists **on or before March 4, 2024.** If a witness shown on the list will be presented by deposition, the party designating that witness must specify the pages of the deposition to be used.

Objections to witness lists due **on or before March 14, 2024**.

Unless specifically agreed by the parties in writing or allowed by the court for good cause shown, the parties shall be precluded from offering substantive evidence through any witness not included on the party's witness list. The listing of a witness does not commit the party to have that witness available at trial or to call that witness to testify, but it does preclude the party from objecting to the presentation of that witness's testimony by another party.

As to any witnesses shown on the list to be presented by deposition, within seven (7) business days after the filing of the list, an opposing party may serve a list of additional pages of the deposition to be used, and may serve and file a list disclosing any objections to the use of the deposition testimony under Federal Rules of Civil Procedure 32 or 26(a)(3)(B). Any objections to deposition testimony should be accompanied by excerpts from the depositions including the testimony to which the objection relates. Objections not made within such time, other than objections under Federal Rules of Evidence 402 and 403, shall be deemed waived, unless such failure to timely object is excused by the court for good cause shown.

3. **Exhibits**.

The parties shall file exhibit lists **on or before March 4, 2024.**

Objections to exhibit lists must be filed **on or before March 14, 2024**.

(a) **Marking**. Each party that anticipates offering more than five (5) exhibits as substantive evidence shall premark the exhibits in advance of trial, using exhibit labels and lists available from the Clerk of Court. The court will provide up to 100 labels; if any party needs more labels, that party must use labels of the same type as those supplied by the court. Counsel must contact the courtroom deputy for the appropriate exhibit list form for use at trial. The court urges counsel to be judicious in determining which documents are actually relevant to necessary elements of the case.

(b) **Examination by Opposing Party**. Except where beyond the party's control or otherwise impractical (*e.g.*, records from an independent third-party being obtained by subpoena), each party shall make exhibits available for inspection and copying. The presentation of evidence at trial shall not ordinarily be interrupted for opposing counsel to examine a document that has been identified and was made available for inspection.

(c) **Court's Copies**. The court requests for the bench an exhibit notebook of anticipated trial exhibits. The notebook should include a copy of the exhibit list. The parties should submit the exhibit notebook to the court two days before the final pretrial conference.

(d) **Limiting Personal Information in Transcripts and Exhibits**. The judiciary's privacy policy restricts the publication of certain personal data in documents filed with the court. The policy requires limiting Social Security and financial account numbers to the last four digits, using only initials for the names of minor children, and limiting dates of birth to the year. However, if such information is elicited during testimony or other court proceedings, it may become available to the public. The better practice is for you to avoid introducing this information into the record in the first place. Please take this into account when questioning witnesses, presenting documents, or making other statements in court. If a restricted item is mentioned in court, you may ask to have it stricken from the record or partially redacted to conform to the privacy policy, or the court may do so on its own motion.

THE PARTIES ARE REMINDED THAT THEY WILL NOT BE ALLOWED TO USE AT TRIAL ANY WITNESS OR EXHIBIT NOT DISCLOSED IN

ACCORDANCE WITH FEDERAL RULES OF CIVIL PROCEDURE 26(a) OR 26(e), UNLESS THE FAILURE WAS SUBSTANTIALLY JUSTIFIED OR THE OFFERING PARTY CAN SHOW THAT ITS FAILURE TO DISCLOSE WAS HARMLESS. *See* Fed. R. Civ. P. 37(c)(1).

4. Use of Depositions at Trial.

(a) The court will accept the parties' written agreement to use a deposition at trial even though the witness is available. In the absence of such an agreement, parties must comply with Federal Rule of Civil Procedure 32.

(b) Before trial, counsel must provide the courtroom deputy with a copy of all depositions to be used as exhibits at trial.

(c) Counsel must designate the portion of any deposition that counsel anticipates reading by citing pages and lines in the final witness list. Objections, if any, to those portions (citing pages and lines) with supporting authority must be filed at least TEN (10) business days before trial.

(d) Use of videotape depositions is permitted and the parties must make good faith efforts to agree on admissibility or edit the videotape to resolve objections.

(e) In a non-jury trial, for any deposition offered as a trial exhibit, counsel shall attach to the front of the exhibit a summary of what each party intends to prove by the deposition testimony, with line and page citations, and include an appropriate concordance of the deposition pages offered.

5. Trial Submissions to Court.

The court does not request and the parties shall not file trial briefs.

6. Jury Charges and Verdict Form.

On or before **March 25, 2024**, the parties shall file a **single, joint proposed jury charge**, including all necessary instructions, or definitions applicable to the specific issues of the case.

(a) **Each** requested **instruction** must be numbered and presented on a separate sheet of paper with authority cited.

(b) In their joint proposed jury materials, counsel are to include all necessary instructions or definitions, specifically including: (1) the *prima facie* elements of each cause of action and defense asserted; (2) legal definitions required by the jury; (3) items of damages; and (4) methods of calculation of damages. Counsel are to use the Eleventh Circuit Pattern Jury Instructions, or appropriate state pattern jury instructions, as modified by case law or statutory amendments, wherever possible. Any deviations must be identified, and accompanied with legal authorities for the proposed deviation.

(c) Even if the parties, in good faith, cannot agree on all instructions, definitions or questions, the parties should nonetheless submit a single, **unified** charge. Each disputed instruction, definition, or question should be set out in bold type, underlined or italics and identified as disputed. Each disputed item should be labeled to show which party is requesting the disputed language. Accompanying each instruction shall be all authority or related materials upon which each party relies. **The parties shall email the unified charge in Word format, to the chambers email address at axon_chambers@alnd.uscourts.gov.**

Together with the joint proposed jury charge, the parties must file a **joint proposed verdict form**. The court expects that shortly after the close of evidence, the parties will submit any amendments to the proposed jury charge and verdict form required by the evidence presented at trial.

7. Final Pretrial Conference

The court will set a final pretrial conference in the week preceding the trial date. During the pretrial conference, the parties shall be prepared to present argument on all opposed motions in limine and all objections to designated portions of deposition testimony. To the extent possible, the court will rule on all motions in

limine during the pretrial conference. The court will rule on all objections to designated portions of deposition testimony so that counsel may prepare excerpts of only the admissible portions of the depositions ahead of trial.

EXHIBIT B – GUIDELINES FOR CONDUCT OF TRIALS

These guidelines reflect the standard practices of this court in the trial of cases. They do not alter the rules of civil or criminal procedure, the rules of evidence, or local rules.

1. Hours. Trials ordinarily commence at 9:00 a.m. and continue until approximately 5:00 p.m., Mondays through Fridays.

a. Punctuality. You, your client, and your witnesses should be present and ready to proceed promptly at the appointed time, both at the beginning of the day and after recesses. Counsel should be present at the courthouse at least 30 minutes before the beginning of each trial day to avoid delays and to be available to discuss unanticipated problems.

b. Recesses. A witness whose examination has not been completed at the time of a recess or adjournment should be back in the witness box at the time trial is scheduled to resume.

c. Requests for changes. Make known to the court as soon as can be anticipated any requests for changes in the trial schedule, including those relating to religious holidays or arising because of unavailability of witnesses.

d. Conferences. In jury cases, the judge may hold a brief conference in chambers at the end of the trial day or before the trial commences or resumes, or both, at which time counsel can discuss the schedule of witnesses and documents and any anticipated evidentiary problems. Alert the court reporter if you want to have some motion, argument, proffer, or other matter placed on the record during the conference.

e. Settlement discussions. Although settlements should occur to the extent possible before the trial is scheduled to begin, counsel are encouraged to discuss settlement as the trial progresses. These discussions should, however, ordinarily be conducted during recesses and adjournments. Do not assume that the court will delay the start or resumption of trial for such discussions. Advise the court if at any point you believe the court's assistance might be helpful in arriving at a settlement.

2. Selection of jury.

a. Voir Dire. At the conclusion of general voir dire by the court, counsel will be allowed 20 minutes per party to conduct their own voir dire.

b. Size. The size of the jury in civil trials ranges from six to twelve, taking into account such factors as the expected length of trial and the number of jurors available for that and other scheduled trials. Absent special agreement by the parties, only a unanimous verdict of all selected jurors not excused or discharged for good cause may be received.

c. Peremptory challenges. The number of peremptory challenges to be allowed will depend upon (1) the number of jurors not excused or challenged for cause and (2) the size of the jury to be selected. For example, if 18 jurors remain after any challenges for cause, the court might allow each side five peremptory challenges to select a jury of 8 or might allow each side four peremptory challenges to select a jury of 10. Peremptory challenges are exercised by indicating on a form (provided by the court) the name and juror number of the person(s) so challenged. When completed, these forms are shown to the court and opposing counsel at the bench, outside the hearing of the panel; at this time, the court can consider any "Batson" issues. Subject to consideration of any "Batson" issues, the peremptory challenges shown on the lists will be accepted by the court. Jurors not peremptorily challenged by either side will, in the order in

which they were presented, be deemed as selected, up to the number of jurors previously determined by the court. As an example, for a jury of eight, the first 8 jurors not peremptorily challenged by either side will constitute the jury.

3. Opening statements. Opening statements are limited to 20 minutes per party. Although a description of the basic claims and defenses and of the principal factual disputes between the parties is usually helpful, do not be argumentative and do not in jury cases refer to disputes about questions of law. In non-jury cases, opening statements are frequently omitted or limited to stating what claims and defenses are being pursued and what witnesses will be called.

4. Witnesses. Cooperative witnesses not immediately needed should, to the extent practical, be placed "on call." However, you remain responsible for having sufficient witnesses available in court so that, absent developments that could not have been reasonably anticipated, the trial may proceed during the normal trial hours without the need for adjournments or lengthy recesses to obtain further witnesses. Since defendants should be ready to proceed with their evidence promptly at the conclusion of the plaintiff's presentation, plaintiff's counsel should keep defendants' counsel advised as to when they expect to complete their presentation of evidence.

a. Order. Counsel are expected to cooperate in resolving scheduling problems, including agreement in most circumstances for a witness to be called out of the normal order, even if the testimony of another witness is interrupted. Such accommodations are the norm for physicians and other similar professionals called as witnesses and may be appropriate for other witnesses with personal, family, or occupational conflicts. Counsel are also expected to cooperate in placing "on call" those employees of another party whose absence would disrupt such party's normal business activities.

b. Production. Do not ask opposing counsel to produce a witness or a document in a way that might suggest to the jury that such counsel would be concealing evidence if the witness or document is not produced. Address such requests to opposing counsel (or,

if necessary, to the court) in a manner that will not be heard by the jury.

c. Oaths. The courtroom deputy ordinarily administers an oath/affirmation to the witnesses and immediately asks their name and place of residence. If you know that the standard questions might be inappropriate (for example, the witness is in prison), so advise the deputy before the witness is called to the stand.

d. Release. Witnesses should be released from further attendance or subpoena as soon as they are no longer needed. After testifying, a witness shall be deemed as released by consent unless counsel or the court indicates that the witness should not be so excused. You should not consent to release of a witness if you will later offer in evidence a prior inconsistent statement about which the witness was not examined or if you wish to make a proffer of testimony of that witness to which an objection was sustained.

e. Exclusion. Requests under Federal Rule of Evidence 615 for exclusion of witnesses from the courtroom should be made before examination of the first witness begins, preferably before opening statements. Be alert for witnesses arriving during trial and inadvertently coming into the courtroom. Although the Rule does not prevent talking with excluded witnesses during recesses about their expected testimony, do not in such discussions disclose the courtroom testimony given by other witnesses. After testifying and provided they will not be recalled, witnesses are no longer subject to the Rule and may remain in the courtroom.

5. Examination of witnesses. Absent physical disabilities, examination of a witness should ordinarily be conducted while the witness is seated in the witness box and counsel is standing at the lectern.

a. Approaching clerk's desk or witness box. Permission of the court to approach the clerk's desk or the witness box is not necessary if for the purposes of submitting or obtaining an exhibit, handing an exhibit to the witness, or conducting examination about an exhibit when counsel needs to be next to the witness during the examination. Return to the lectern after such examination is finished.

b. Other locations. Request permission of the court if you wish the witness to step from the witness box (for example, to display an injury, to prepare a sketch, or to identify objects in a photograph). Assist the court in assuring that your voice and that of the witness are sufficiently loud to be heard and that opposing counsel's view is not obstructed.

c. Depositions. As you use or read from a deposition, indicate the page and line number of the starting and stopping points. Colloquies and objections of counsel should ordinarily be omitted, as should questions that are rephrased or changed prior to the answer being given. When the deposition refers to an exhibit, counsel may, in addition to the identification used in the deposition, indicate the exhibit number used during the trial. Persons asked to read the deponent's testimony should do so fairly and impartially. Depositions are not ordinarily read aloud in non-jury cases; you should submit to the court well before the trial is completed a list of the portions you want the court to read.

d. Harassment. Treat witnesses with courtesy, even when conducting vigorous impeachment. Do not shout at, ridicule, harass, or unfairly embarrass a witness. Use temperate language when requesting the court's assistance to control or direct a witness who is giving unresponsive or argumentative answers.

6. Objections. Rise before (or as) you object; this draws the attention of the court and other counsel to you and should alert the witness not to answer until your objection is ruled upon. While standing, state that you are objecting and specify concisely the ground(s) of your objection (for example, "hearsay," "irrelevant," "lack of personal knowledge," "leading question"). Do not make a speech or

argument to the jury. Do not disparage opposing counsel or the witness. Do not attempt to summarize other evidence. Do not suggest an answer to the witness.

a. Response by offeror. The person who asked the question should not interrupt the person making the objection except to withdraw the question or if the objection itself is being made in an improper manner (for example, as an argument to the jury or to suggest an answer to the witness). After the objection has been stated, you may indicate if the evidence is being offered only for a limited purpose or only against certain parties.

b. Argument on the objection. Neither counsel should present arguments regarding the objection unless authorized or invited by the court. If you wish to be heard in argument, request the court's permission.

c. Continuing objection. In some circumstances you may be allowed to have a "continuing objection" to a particular line of inquiry, and therefore, you may not have to repeat your objection to a series of questions. Typically, this occurs when your objection on the grounds of relevancy is overruled and you wish to make a relevancy objection to further questions on the same subject.

d. Anticipating evidentiary problems. Evidentiary questions which may involve extended discussion and argument should be anticipated and called to the court's attention at the start or end of the trial day so that the question can be adequately considered without having to interrupt the trial schedule.

7. Special equipment. Audio-visual equipment should be brought into the courtroom and tested before or after trial hours or during a recess. You are responsible for seeing that the trial is not substantially delayed while such equipment is being set up. Make arrangements with the courtroom deputy if you need special access to the courtroom.

8. Closing arguments. Unless otherwise allowed by the court, closing arguments are limited to 30 minutes to the side. Counsel for the party having the burden of proof shall be the first to present closing argument and may reserve a portion of the allotted time (not in excess of initial time taken) to respond to the other parties' arguments. A party seeking damages and who is permitted to divide its time of argument should address both liability and damages issues in its initial argument. Do not express your own personal opinions about the facts. Do not invite jurors to return a verdict as if they were in the position of one of the parties. You may leave the lectern, but keep your voice sufficiently loud to be heard by other counsel, the judge, and the court reporter.

9. Instructions. Persons are not ordinarily permitted to enter or leave the courtroom during the time the court is instructing the jury. The court will provide counsel with an opportunity to present objections or exceptions to the instructions outside the hearing of the jury and before the deliberations begin either at the bench or after excusing the jurors from the courtroom. Counsel are expected to remain in general attendance at the courthouse while the jury is deliberating; the failure to do so may be treated as a waiver of any right to object should the jury request and be given supplemental instructions.

10. Other Matters of Proper Decorum and Conduct.

a. Do not argue with or disparage other counsel in the hearing of the jury. In most situations, the court's permission should be obtained before counsel engage in dialogue between themselves in the courtroom. Side comments between counsel should be limited to situations in which such conversations are intended to facilitate the fair and efficient conduct of the trial and not for any tactical advantage; they should, moreover, be done in a respectful and courteous manner that does not detract from the dignity of the proceedings. In-court offers to stipulate should ordinarily be made only if previously agreed upon or if counsel has reason to believe the offer would have been accepted if made outside the courtroom.

b. All should rise and remain standing and quiet while court is being formally opened. Counsel should rise and remain standing while examining a witness, making an objection, presenting a motion, request, or argument, or otherwise addressing the court. At other times while court is in session, remain seated.

c. Address or refer to witnesses or other parties using their surname.

d. While opposing counsel is presenting a matter to the court or the jury or is examining a witness, other counsel and their clients or associates should not engage in conversation or activity at counsel table or otherwise move about the courtroom in a manner that might be distracting.

e. Indicating agreement and disagreement. No one should by words, facial expressions, or other conduct indicate personal agreement or disagreement with what is being said by the court, the jury, an attorney, or a witness. Counsel are responsible for assuring that their clients and the friends or supporters of their clients are warned about such behavior.

f. Attendance. Parties are not required to remain in continuous attendance during civil trials. To facilitate arranging for the attendance of witnesses and procuring documents, attorneys may, without need for permission from the court, enter and leave the courtroom during the trial from time to time if their client remains represented by co-counsel. Such movements should, however, be done in an unobtrusive and non-distracting manner. Paralegals not expected to testify may, without the need for special permission from the court, be inside the railing to assist counsel.

g. Findings under Federal Rule of Evidence 104(a). Do not disclose to the jury in any manner the findings of the court made under Federal Rule of Evidence 104(a) in connection with questions of admissibility. For example, do not argue to the jury

that you were allowed to present evidence of A's statement because the court found under Federal Rule of Evidence 801(d)(2)(E) that A and B were engaged in a conspiracy. Similarly, do not ask in the presence of the jury for the court to "recognize" a witness as an "expert" or as "hostile."

h. Smoking, eating, and drinking. Smoking, eating, and drinking (other than water) are never permitted in the courtrooms.

i. Cellular telephones; recording devices. Keep cellular telephones in an "off" position while in the courtroom. Recording devices may be used in the courthouse only with express permission of the court.