Sample Form 4

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GUIDELINES FOR DISCOVERY, MOTION PRACTICE AND TRIAL

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GUIDELINES

These guidelines are furnished for the convenience of counsel and the Court to promote the just, speedy and economical disposition of cases. They should be accepted in that spirit.

GENERAL MATTERS

Attorneys appearing in the District Court in civil litigation must observe three sets of rules:

The Federal Rules of Civil Procedure,
The District Court's Local Rules, and
The rules and practices of the particular judge to whom the case is assigned.

You can become familiar with the rules and practices of the judge assigned to your case in two ways:

(i) By obtaining from that judge's courtroom deputy copies of the standing orders used by that judge; and

(ii) By inquiring of the deputy (not the law clerks) how that judge wants things done.

The following matters require particular attention:

1. *Removal From the State Court.* Before filing a petition to remove from state to federal court, consider the jurisdictional facts carefully in light of 28 U.S.C. § 1441 and other applicable law. Do not attempt to remove unless you are satisfied that good grounds exist.

Note that (1) the existence of a federal law defense does not normally create federal jurisdiction and (2) the presence of fictitious defendants may destroy diversity of citizenship.

2. *Related Cases* (L.R. 205-2). If you have a case that you believe may be related to another case on file in the court (whether closed or not), you must promptly file a notice of related case. The judge with the lower numbered case will decide whether to relate the cases, depending on whether assignment to a single judge will be conducive to economy or efficiency.

3. *Status Conferences* (L.R. 235-3; Fed.R.Civ.P. 16). Judges generally hold a status conference in a case within three months of filing of the complaint. The purpose of this conference is to formulate and narrow the issues; to schedule a discovery cutoff, pretrial conference and trial date and to explore the possibility of settlement. The conference should be attended by an attorney who is thoroughly familiar with the case and is authorized and prepared to speak on these matters. Use the conference to inform the judge about your case and to propose a practical litigation program for it. A brief, informative and non-argumentative statement filed at least seven days in advance is helpful to the judge. Some judges will hear status conferences by conference telephone call if requested. Consult the assigned judge's status conference order for details.

4. *Settlement.* Over ninety percent of all civil cases settle before trial. You can expect the judge to inquire about prospects for settlement at every opportunity. Always be prepared with a reasonable negotiating position and a credible and persuasive explanation for it. At the request of any party the Court will arrange a settlement conference before another judge or magistrate. Brief settlement conference statements should be submitted to the settlement judge in advance of the conference but not filed.

5. *Rule 11 Sanctions.* As amended in 1983, Rule 11 now provides that an attorney who signs a pleading or other paper filed with the Court certifies that, after having made a reasonable inquiry, the attorney believes it to be well-grounded in fact and warranted by existing law or a good faith argument for modification or extension of existing law and that it is not interposed for an improper purpose such as to harass, delay or unnecessarily increase expense. Thus, Rule 11 requires a lawyer to make a reasonable prefiling inquiry and not to misuse the litigation process by frivolous litigation or harassment of an opponent. See also 28 U.S.C. § 1927.

Lawyers can expect the pleadings, motions and other papers they file to be scrutinized by the judge in light of this rule, regardless of whether a motion to impose sanctions is filed. When a paper is filed that does not appear to conform to Rule 11, the lawyer will be called on to explain; in the absence of a satisfactory explanation, sanctions such as the resulting costs and fees incurred by the opponent may be assessed.

Rule 11 should not be permitted to generate satellite litigation. Do not file a Rule 11 motion unless you are certain it is well-founded. It is advisable to take up the matter with the Court before filing. Generally, discovery will not be permitted in Rule 11 proceedings.

DISCOVERY

1. General Principles of Discovery. Counsel should be guided by courtesy, candor and common sense, and conform to the Federal Rules of Civil Procedure, the Local Rules, and any applicable orders. In particular, counsel should have in mind the restrictions on the scope of discovery stated in Rule 26(b)(1) and the good faith obligations implicit in Rule 26(g). Direct and informal communication between counsel is encouraged to facilitate discovery and resolve disputes.

2. Timeliness. The time limits specified in the rules and applicable orders must be observed. If additional time is needed, a continuance must be sought in advance by stipulation and order.

3. Discovery Cut-Off. Discovery cut-off dates in orders are the last date for filing discovery responses, unless otherwise specified. To be timely, therefore, discovery requests must be filed sufficiently in advance of the deadline for responses to be made. The Court will normally set cut-off dates only after consultation with counsel. Once they are set, however, they will be changed only for good cause shown.

4. Supplementing Discovery Responses. Rule 26(e) requires that an earlier discovery response be supplemented if it was incorrect or is no longer true or to the extent it relates to potential expert or other witnesses. Failure to comply may result in exclusion of evidence or witnesses at trial.

5. Depositions

a. *Scheduling.* Barring extraordinary circumstances, opposing counsel should be consulted and the convenience of counsel, witnesses and parties accommodated before a deposition is noticed. Concurrent depositions are not permitted in the absence of stipulation or order. Note that it is often less expensive to bring the witness to the deposition (and for the parties to share the expense) than for the lawyers to travel.

b. *Stipulations.* When counsel enter into stipulations at the beginning of a deposition, the terms of the stipulation should be fully stated on the record of the deposition.

c. *Questioning.* Questions should be brief, clear and simple. Rarely should a question exceed ten words. Each question should deal with only a single point. Argumentative questions are out of order. The purpose of a deposition is not to harass or intimidate, but simply to make a clear and unambiguous record of what that witness's testimony would be at trial.

d. *Documents.* Normally, except in the case of impeachment, a witness should be shown a document before being questioned about it.

e. *Objections.* Under Rule 30(c), objections to the manner of taking the deposition, to the evidence or to the conduct of a party shall be noted on the record but the evidence objected to shall be taken subject to the objection. In the absence of a good faith claim of privilege, instructions not to answer are rarely justified and may lead to sanctions under Rule 37(a)(2) and (4). Speaking objections and other tactics for coaching a witness during the deposition may also be cause for sanctions. If counsel believes that a motion to terminate or limit the examination under Rule 30(d) would be warranted, counsel should promptly initiate a conference call to the Court with opposing counsel for a pre-motion conference to attempt to resolve the problem. (See ¶ 9.a. below.)

f. *Persons Attending Depositions.* In the absence of a specific order, there is no restriction on who may attend a deposition. Only one lawyer may normally conduct the particular deposition for each side.

g. *Expert Discovery.* Rule 26(b)(4) should be consulted. However, experts who are prospective witnesses are normally produced for deposition by the opposing party as a matter of course. If the expert is expected to testify at trial, a written statement of his anticipated testimony should be given to opposing counsel in advance of the deposition.

h. *Number of Depositions.* Counsel are expected to observe the limitations specified in Rule 26(b)(1), and, in particular, to avoid unnecessary depositions. Counsel should explore less expensive alternatives for obtaining the needed information.

6. Interrogatories

a. *Informal Requests.* Whenever possible, counsel should try to exchange information informally. The results of such exchanges, to the extent relevant, may then be made of record by requests for admission. (See ¶ 8, below.)

b. *Number and Scope of Interrogatories.* Although the Court has no standing limitation, it will be guided in each case by the limitations stated in Rule 26(b)(1). Counsel's signature on the interrogatories constitutes a certification of compliance with those limitations. (See Rule 26(g).) Interrogatories should be brief, simple, neutral, particularized and capable of being understood by jurors when read in conjunction with the answer. Ordinarily they should be limited to requesting objective facts, such as identification of persons or documents, dates, places, transactions and amounts. Argumentative interrogatories, attempts to cross-examine, multiple repetitive interrogatories (such as "state all facts on which an allegation or a denial is based") are objectionable. Except in certain specialized areas of practice, such as maritime personal injury cases, standard interrogatories generated by word processors should be avoided.

c. *Responses.* Rule 33(a) requires the respondent to produce whatever information is available (but only what is available), even if other information is lacking or an objection is made. When in doubt about the meaning of an interrogatory, give it a reasonable interpretation (which may be specified in the response) and answer it so as to give rather than deny information. Generally, the responding party is required to produce information only in the form in which it is maintained. If an answer is made by reference to a document, attach it or identify it and make it available for inspection. (See Rule 33(c) and ¶ 7, below.) Generalized cross-references, such as to a deposition, are not an acceptable answer.

d. *Objections.* Unless the objection is based on privilege or burdensomeness, or a motion for protective order is made, the information requested must be supplied to the extent available, even if subject to objection. Counsel's signature on the answer constitutes a certification of compliance with the requirements of Rule 26(g).

e. *Privilege.* A claim of privilege must be supported by a statement of particulars sufficient to enable the Court to assess its validity. (See L.R. 230-5.) In the case of a document, such a statement should specify the privilege relied on and include the date, title, description, subject and purpose of the document; the name and position of the author and the addresses of other recipients. In the case of a communication, the

statement should include the date, place, subject and purpose of the communication and the names and positions of all persons present.

7. Requests for Production of Inspection

a. *Informal Requests.* See ¶ 6.a. above.

b. *Number and Scope of Requests.* Requests should specify with particularity the title and description of documents or records requested. Information needed for specification can often be obtained by informal discovery, or by depositions or interrogatories if necessary. Argumentative or catch-all requests, such as "all documents which support your claim," are objectionable. The certification requirement of Rule 26(g) applies.

c. *Responses.* Materials should be produced either with labels identifying the specific requests to which they respond or in the manner in which they are kept in the ordinary course of business. Opening a warehouse for inspection by the requesting party, burying documents, and similar procedures do not meet the good faith requirements of the rules. (See Rule 26(g).)

d. *Objections.* See ¶ 6(d) above.

e. *Privilege.* See ¶ 6(e) above.

8. Requests for Admission

a. *Use of Requests.* Requests for admission are an economical and efficient means of making a record of informal exchanges of information, stipulations, matters subject to judicial notice, and of narrowing issues.

b. *Form of Requests.* Each request should be brief, clear, simple, addressed to a single point and stated in neutral, non-argumentative words. Requests ordinarily should deal only with objective facts. They may be combined with interrogatories to ask for the factual basis of any denial.

c. *Responses.* Rule 36(a) requires that a response shall specifically deny a matter or set forth in detail the reasons why the party cannot admit or deny. A denial shall fairly meet the substance of the request and, when good faith requires, a party shall specify so much as is true and qualify or deny the remainder. The responding party has a duty to make reasonable inquiry before responding. The certification requirement of Rule 26(g) applies.

d. *Objections.* See ¶ 6(d) above.

9. Motions to Compel or for Protective Orders

a. *Pre-motion Conference.* Counsel are required to confer in good faith before bringing a discovery dispute to the Court. If they are unable to resolve it, they should arrange a telephone conference with the Court through the courtroom deputy. If the differences cannot be resolved, the Court will direct further proceedings. Motions to compel should ordinarily not be filed without a prior conference with the Court.

b. *Memoranda.* In the event memoranda are submitted, they should be brief, focus on the facts of the particular dispute, and avoid discussion of general discovery principles.

c. *Sanctions.* If sanctions are sought, include a declaration to support the amount requested.

d. *Reference to Guidelines.* The Court will be guided by these guidelines in resolving discovery disputes and imposing sanctions.

MOTION PRACTICE

1. General. Do not file a motion without first exploring with opposing counsel the possibility of resolving the dispute by stipulation. Many motions now being filed could be avoided.

2. Motion to Dismiss or for Summary Judgment. Motions to dismiss for failure to state a claim under Rule 12(b)(6) must be made solely on the pleadings. If matter outside the pleadings is referred to, the motion is treated as a motion for summary judgment. Fed.R.Civ.P. 56. Do not file a summary judgment motion unless you are satisfied that a material issue can be resolved without reference to disputable evidentiary facts. A motion devoted to arguing evidentiary facts is likely to lose. If you think your opponent has admitted the material facts, make it of record by using requests for admission.

3. Supporting Memoranda and Other Papers. Follow these guidelines:

Be helpful: State the grounds for the motion and the issues clearly at the outset, marshal the supporting facts and law and distinguish opposing authority. Check all citations, include jump citations, and verify the continuing validity of decisions relied on.

Keep it short: Rarely if ever should it be necessary to exceed the 25-page limit under L.R. 220-4. Approval for filing a brief in excess of 25 pages will only be grudgingly granted and without it the brief will not be filed. Avoid voluminous supporting documentation; the larger the motion, the less its chance for success.

Be candid: Address directly the hard issues that must be decided; do not sweep them under the rug. Cite adverse authority and explain why it does not support a ruling against you. Don't gamble on the judge not finding it. Don't mislead the Court, either as to the facts or the law; once your credibility is in question, it is difficult to restore it.

Avoid invective and vituperation: Argument advances your case far less than exposition and analysis. Adjectives and adverbs, other than those having independent legal significance, do not make a brief persuasive; avoid them.

Submit a proposed order, retaining the original.

Submit an extra copy of all papers for use by the judge's chambers.

4. Time Limits. Observe the time limits in L.R. 220-2 and 220-3. Responses must be filed not less than fourteen days before the noticed hearing date; replies not less than seven days. The judges need that time to prepare. Late filed papers may be disregarded.

5. Continuances. Motions will not be continued without a good reason once an opposition is filed. Even then a court order must be applied for not less than seven days before the hearing date. Contrary to the practice in some state courts, most judges will not take motions "off calendar." Continuances must be requested to a specified date and for good cause. (L.R. 220-9)

Reduce all stipulations extending time to writing. After the first extension, a court order is required. (L.R. 220-10)

6. Hearings. The judge may decide the motion without hearing or by holding a hearing by conference telephone call.

If a hearing is held, assume the judge is familiar with the matter. State the issue succinctly, fairly and persuasively and limit your argument to the heart of the matter. Deal with adverse authority and whatever other matters you believe may be obstacles to a

ruling in your favor. Don't overstate your case but don't give away a good point. Be prepared to answer questions.

Although the papers filed will usually determine the outcome, don't underestimate the effect of a good oral argument. It can turn a case around if it is well-prepared, brief and to the point, and presented with conviction, common sense and candor. You will not harm your case by being courteous to the Court and counsel, observing proper demeanor and making a dignified appearance.

CONDUCT OF TRIALS

1. Pretrial. Ordinarily the Court will determine at pretrial what claims and defenses will be tried, what witnesses will testify and what exhibits will be received at trial. Except for proper impeachment, trial by ambush is not acceptable. Therefore do not expect to raise new issues or offer new evidence at trial. Consult the judge's form of pretrial order for specific requirements.

2. Opening Statements. An opening statement is simply an objective summary of what counsel expects the evidence to show. No argument or discussion of the law is permissible.

3. Questioning of Witnesses

a. Conduct the examination from the lectern. Ask permission to approach the witness when necessary and return to the lectern as soon as practicable. Treat witnesses with courtesy and respect; do not become familiar.

b. Ask brief, direct and simply stated questions. Cover one point at a time. Do not ask a witness "do you recall . . ." unless the fact of his recollection is material. Use leading questions for background material. Write out the examination or have at least a complete outline.

c. Cross-examination similarly should consist of brief, simple and clearly stated questions. It is helpful to write out questions in advance but do not read them. Cross-examination should not be a restatement of the direct examination nor should it be used for discovery or to argue with the witness.

d. Only one lawyer for each party may examine any one witness.

4. Using Depositions

a. The deposition of an adverse party may be used for any purpose. It is unnecessary to ask a witness if he "recalls" it or otherwise to lay a foundation. Simply identify the deposition and page and line numbers and read the relevant portion. Opposing counsel may then immediately ask to read such additional testimony as is necessary to complete the context.

b. The deposition of a witness not a party may be used for impeachment or if the witness has been shown to be unavailable. For impeachment, allow the witness to read to himself the designated portion first, ask simply if he gave that testimony, and then read it. Opposing counsel may immediately read additional testimony necessary to complete the context.

c. A deposition may be used to refresh a witness's recollection by showing it to him, or, just as any other document, as a basis for relevant questions.

d. In bench trials, do not offer depositions wholesale. Unless all of the testimony is important, copy the relevant pages only, staple the extracts from each deposition, and offer each as an exhibit.

e. Note: It is the responsibility of counsel anticipating use of a deposition at trial to check in advance of trial that it has been made available to the witness for signature and that the original is filed with the clerk's office.

5. Objections

a. To make an objection, rise, say "objection" and briefly state the legal ground (e.g. "hearsay," "privilege," "irrelevant").

b. Do not make a speech or argument, or summarize evidence, or suggest the answer to the witness. If argument is desired, ask for an opportunity to argue the objection.

c. Where an evidentiary problem is anticipated, bring it to the Court's attention in advance to avoid interrupting the orderly process of a jury trial.

6. Exhibits

a. All exhibits must be marked before the trial starts, using the clerk's standard form of label. Normally plaintiff's will be numbered, defendant's lettered. Copies must be provided to opposing counsel and the Court before trial.

b. When offering an exhibit follow this procedure to the extent applicable (unless foundation has been stipulated):

Request permission to approach the witness;

Show the witness the document and say:

I show you (a letter) premarked Exhibit ___, dated _____, from A to B. Please identify that document.

Identification having been made, make your offer as follows:

I offer Exhibit ___.

Note: In some circumstances additional questions may be necessary to lay the foundation.

c. It is the responsibility of counsel to see that all exhibits counsel wants included in the record are formally offered and ruled on, and that they are in the hands of the clerk. Take nothing for granted.

d. Avoid voluminous exhibits. When possible offer only relevant extracts.

7. Interrogatories and Requests for Admission

Counsel wishing to place into the record an interrogatory answer or response to request for admission should prepare a copy of the particular interrogatory or request and accompanying response, mark it as an exhibit and offer it.

8. Use of Prepared Direct Testimony

In bench trials when the direct testimony of witnesses has previously been submitted in narrative written statement form, the proponent of the witness must have the witness available for cross-examination unless cross-examination has been waived.

The following procedure should be followed:

When the witness is called to the stand, ask the witness to identify the statement, which should be premarked as an exhibit, as his testimony and to state that it is true and correct. Then offer the exhibit.

9. Conduct of Trial

a. The Court expects counsel and the witnesses to be present and ready to proceed promptly at the appointed hour—normally starting at 9:30 a.m. A witness on the stand when a recess is taken should be back on the stand when the recess ends.

b. Bench conferences should be minimized. Raise anticipated problems at the start or the end of the trial day or during a recess.

c. Have a sufficient number of witnesses available to fill the time available. Running out of witnesses may be taken by the Court as resting your case.

d. Trials normally are conducted each day except on the day scheduled for the motion calendar (normally Friday). Do not assume that the Court will recess on any of those days unless prior arrangements have been made with the Court and counsel.

e. Counsel are expected to cooperate with each other in the scheduling and production of witnesses. Witnesses may be taken out of order where necessary. Every effort should be made to avoid calling a witness twice (as an adverse witness and later as a party's witness).

f. Counsel should be prepared each day to discuss with the Court the next day's schedule of witnesses and exhibits.

10. Jury Trial

a. When trial is to a jury, counsel should present the case so that the jury can follow it. Witnesses should be instructed to speak clearly and in plain language. When documents play an important part, an overhead projector and screen should be used to display the exhibit while a witness testifies about it.

b. Jury instructions must be submitted no later than the pretrial conference but may be supplemented during the trial. Only those dealing with the particular issues in the case need be presented—the Court's standard instructions may be obtained from the clerk. Instructions are to be drafted specifically to take into account the facts and issues of the particular case, and in plain language; do not submit copies from form books. Do not submit argumentative or formula instructions. Consult the Court's order for pretrial preparation for additional guidance.

c. Do not offer a stipulation in the presence of the jury unless agreement has previously been reached. Preferably stipulations should be in writing.

d. In final argument, do not express personal opinions or ask jurors to place themselves in the position of a party or to consider possible consequences of the litigation beyond the evidence presented.

e. Normally, the Court will instruct the jury before closing argument. Accordingly, there will be no need to explain the law in the closing argument.

11. General Decorum

a. A trial is a rational and civilized inquiry to seek a just result. Counsel are expected to conduct themselves with dignity and decorum at all times, which include appropriate dress and courtroom behavior. Disruptive tactics or appeals to prejudice are not acceptable.

b. Colloquy between counsel on the record is not permitted—all remarks are to be addressed to the Court.

c. Vigorous advocacy does not preclude courtesy to opposing counsel and witnesses and respect for the Court. Calling witnesses or parties by first names or the Court "Judge" on the record is not appropriate.

d. Do not engage in activity at counsel table or move about the courtroom while opposing counsel is arguing or questioning witnesses, or in other ways cause distraction. Neither counsel nor client while at counsel table should indicate approval, disapproval or other reactions to a witness's testimony or counsel's argument.

e. If you have a question or problem, contact the judge's court room deputy but not the law clerks.