Wyoming Judges' Benchbook

Name: Richard L. Lavery

Court: District – Sweetwater County

Judicial District: Third

SCHEDULING CONFERENCES

Q. How are scheduling conferences set and used in your court? Are they conducted by you? When done by telephone, are the attorneys responsible for setting up a conference call or does your office have enough lines to allow attorneys to call in? If yes, how many lines are available?

A. Attorneys should request a scheduling conference after all responsive pleadings have been filed. Conferences are set at the request of the attorneys. Typically, scheduling conferences are conducted by telephone conference call. Generally, the Plaintiff will initiate a conference call to the Court. Scheduling Conferences are conducted by the Judge. There are only two phone lines available, so it is preferable to have a conference call with all parties on one line.

Q. What do you expect from the attorney(s) at the scheduling conference?

A. I expect the attorneys to be prepared to discuss deadlines for discovery, (including but not limited to discovery cut-off, discovery phases, expert witness designations, IME, and depositions), anticipated motions, deadlines, and briefing schedule for motions. Following the scheduling conference, the Court will issue a Scheduling Order. The attorneys should be prepared to certify that they are in compliance with Rule 26 of the Wyoming Rules of Civil Procedure. They are also expected to be realistic as to deadlines and trial time.

Q. Do you use multiple scheduling conferences? Why?

A. Generally, one scheduling conference is enough; however, in some cases more than one may be necessary. Complex cases, or cases where the original schedule has been modified by Court Order, may require more than one scheduling conference. In

complex cases, the case can be scheduled in phases - especially in anticipation of numerous motions and motion hearings.

Q. Do you use court-directed discovery conferences?

A. I would use a court-directed discovery conference as a last resort if requested by one of the parties (Per Rule 26(f)). If the attorneys are concerned about discovery it should be raised at the scheduling conference or as soon as possible after it becomes apparent that there is a need for court intervention. The Wyoming Rules of Civil Procedure and this Court's Scheduling Order require that any party seeking a court-directed discovery conference must certify, prior to filing the motion, the movant has in good faith conferred with the opposing person or party to resolve the discovery dispute before seeking court intervention and/or state the opposing person's or party's position on the motion. If the movant has been unable to confer with the opposing person or party to resolve the discovery dispute before seeking court intervention, then the movant must certify a description of all good faith efforts taken by the movant to resolve the discovery dispute.

Q. What are your preferences regarding scheduling/discovery conference orders? Do you require that specific things be included in such orders?

A. Most often the Court prepares its own scheduling orders. A sample Civil Scheduling Order is included with this benchbook (Att. 1.). If the discovery dispute is resolved by the Court after a discovery conference, I would also prepare the order or modified order on discovery.

PROTOCOL

Q. What are your thoughts on courtroom protocol?

A. The attorneys, parties and witnesses are expected to comply with Rule 801 of the Uniform Rules For District Courts as amended. I appreciate and expect the parties to respect the institution by their dress, demeanor and behavior towards the litigants, opposing counsel and the Court. Your credibility before the Court is impacted by the manner in which you adhere to these rules.

I expect the lawyers to speak from the podium - that's the rule and that's where the microphone is located so it helps to hear counsel. I allow parties to move around the podium, but approaching a witness or a jury requires permission of the Court.

Q. What things do lawyers do that are particularly helpful?

A. In preparing this bench book, I have the good fortune of viewing the bench books of all the other judges. Being on time, well prepared and focused are elemental components of success in the courtroom and frankly in life.

I appreciate bench trials where the parties stipulate in writing to as many agreed upon facts and conclusions of law as possible. Then the parties can focus their evidence on the issues that remain in dispute. It saves time to stipulate to the admission of as many exhibits as possible.

I like to receive a copy of all exhibits just before trial begins.

It is helpful when the lawyers are ready and prepared with their direct examination of witnesses. Think about the questions you intend to ask, ask them in a way that doesn't invite objection and be prepared to respond to objections when they occur. If you lead your client or witness through a direct exam, I don't learn much about your client or witness from the exercise. It helps me to get of sense of them if you let them talk.

The use of technology in the courtroom is encouraged. If the parties intend to produce exhibits manually, I expect a copy of each exhibit for the Court, opposing counsel and the witness.

I appreciate it when lawyers use their opening and closing to explain what they want. In motion practice detail what relief is sought from the Court with an explanation of the law that supports the relief.

Q. What things do lawyers do that are not helpful?

A. It is not helpful when lawyers file a motion and fail to include a proposed order (it doesn't need to say "proposed") and a request for setting, providing available dates and the amount of time needed to hear the motion along with a notice of setting for the court's signature. When possible, please use the Court's Request for Setting (Att. 3).

While I understand that the rules of evidence are somewhat relaxed during a bench trial, it is not helpful to lead a witness or otherwise stray from the rules of evidence to the extent that the witnesses' credibility is called into question.

Sarcasm and hyperbole directed at opposing counsel, witnesses or the Court only damage the lawyer's own credibility before the Court.

MOTIONS PRACTICE

Q. Do you require that submitted motions include a proposed order?

A. Include a proposed order and a Request for Setting (Att. 2), which sets forth the amount of time needed to hear the motion along with a notice of setting for the Court's signature.

For more legally or factually complex motions, also include proposed findings and conclusions of law or a brief.

In a request for setting, please indicate whether you intend to introduce evidence, make a legal argument, or both.

Please send courtesy copies to the Court in an electronic format (Word or Word Perfect - Exhibits by PDF) at the same time that the motion is filed. The time from filing in the Clerk's office to the time that the motion is presented to the judge by the Clerk's office can be up to 7 days. As a result, the Court may not be apprised of your emergency until after the damage is done.

Q. Do you appreciate courtesy copies of briefs being delivered to your chambers prior to hearing on a motion? If so, how early would you like them?

A. I prefer to receive courtesy copies in an **electronic format** (Word or Word Perfect - exhibits in PDF) at the same time that the briefs are filed with the Clerk of Court.

Q. Do you schedule hearings on motions automatically upon receiving a request for setting, or do you prefer or require that counsel call to schedule hearings?

A. Some motions can be decided on briefs without an evidentiary hearing or oral argument. The parties should notify the Court if that is the case. When you Request a Setting (Att. 2), my judicial assistant will call you and give you a selection of available dates. I expect counsel to then contact opposing counsel and determine the most

suitable date. Then, notify my judicial assistant of the date agreed upon. Please understand that we do not reserve dates so it is incumbent that you contact the Court as soon as possible. In addition, since time is valuable, please state in any request the amount of time you anticipate for a complete hearing of the matter. Be honest about the time you need. Underestimating will result in an unfinished hearing and a second setting.

Q. Under what circumstances do you decline to grant a request for oral argument?

A. I would generally not decline a request for oral argument.

Q. Do you prefer that counsel provide copies of the relevant cases prior to a hearing?

A. It is generally not necessary to provide copies of relevant cases. The Court has access to Westlaw so unless it is something that is not a part of the Westlaw service it is unnecessary.

Q. Is there anything about the way you handle requests for temporary restraining orders and preliminary injunctions that you think the bar should be aware of?

A. I find in my experience that they are overused. Where applicable, I require strict compliance with W.R.C.P Rule 65. I rarely grant ex-parte relief in domestic or guardianship cases. Serve the opposing side and I'll get you a quick setting if it is a true emergency. I have regretted those few times when I have not followed this rule and I have been burned by lawyers who have misrepresented the underlying facts. Remember that ex-parte relief is extraordinary relief and I expect your complete candor in any pleading or argument.

FINAL PRETRIAL CONFERENCE

Q. In your view, what is the purpose of a final pretrial conference?

A. The final pre-trial conference is an opportunity to alert the Court regarding issues that could disrupt the trial presentation to a jury or to obtain advance rulings as to particular evidentiary or legal questions that could interrupt the trial process. Attachments 3 and 4 are the Court's Order After Pretrial Conference in civil and criminal cases.

Q. Do you have a specific format for pretrial statements? If so, please provide a copy.

A. In non-domestic relations civil cases, please see the Court's Order for Final Pretrial Conference (Att. 5). In criminal cases, please see the Court's Order for Pretrial Conference (Att. 6).

Q. What steps do you take, if any, before the final pretrial conference to encourage settlement of the case? Do you require mediation?

A. I do not take any steps to encourage settlement. I will order mediation if requested by one of the parties.

JURY TRIAL PRACTICE

Jury Selection:

Q. How is voir dire conducted in your courtroom?

A. I have allowed voir dire to be conducted by the lawyers; however, as my experience increases I find that some attorneys think that a lengthy voir dire examination is productive. I don't. I expect voir dire to take one half of a day or less and if any party expects more time, it should be discussed with the Court in advance.

Generally, we call between fifty-five and seventy-five jurors. After the jurors are qualified, we call a number equal to the total of jurors to be seated, agreed upon alternates and the number of preemptory challenges for each party. The lawyers then qualify the panel for cause, we replace any jurors excused for cause and the lawyers then exercise all of their preemptory challenges.

Q. Do you allow or encourage the use of jury questionnaires?

A. The jury questionnaire obtained by the Clerk of Court is the only questionnaire we use. If the parties in a particular case requested one, I would consider it and allow it, if appropriate.

Q. What is your due date for proposed jury questionnaires?

A. For most jury trials the panel is drawn by the Clerk of Court about two weeks before trial. If the Court were to allow the additional questionnaire, I would anticipate that the Clerk would have to draw the panel about a month before trial and send out the agreed upon questionnaire. With that it mind, I would think that the due date would be 45 - 60 days prior to trial.

Q. What do you prefer in regard to the length of the jury questionnaire?

A. Shorter is always better.

Requested Jury Instructions:

Q. When do you require requested jury instructions to be submitted?

A. At the time of the Pretrial Memorandum required in the civil Order for Final Pretrial Conference (Att. 5) or criminal Order for Pretrial Conference (Att. 6).

Q. What form do you prefer requested jury instructions to take (e.g. do you prefer jury instructions accompanied by supporting cases, etc.)?

A. I like to receive an index of proposed instructions. The index should cite the pattern instructions, where applicable, and indicate whether an instruction has been modified from the pattern instructions or whether it is a non-pattern instruction. Do not file pattern proposed jury instructions with the Clerk of the Court or submit them to me electronically. Don't submit courtesy copies of proposed jury instructions to the Court in paper form unless specifically requested by the Court. Please attach with citation to authorities, and file with the index, any proposed <u>modified</u> pattern jury instructions; any proposed non-pattern or special instructions; any contention instruction you would like me to read prior to jury selection; and, a proposed verdict form with any special interrogatories, with citation to authorities.

Q. What is your view of the Wyoming Pattern Jury Instructions?

A. I think they are good and I use them. I don't believe in over instructing the jury. Just because a particular case stands for a particular rule of law doesn't make that proposition a jury instruction. Instructions are meant to help the jury understand the law as it applies to the facts they find.

Q. Do you have a set of stock jury instructions that you use?

A. I'm building a library of instructions that I use and I have the basic instructions that I always use.

Q. Do you prefer to receive an electronic copy of requested jury instructions?

A. Yes, please submit the index and proposed modified or non-pattern instructions to jd3lawclerkb@courts.state.wy.us in *Word* format.

Trial Procedures:

Q. What is your preferred trial schedule (e.g. 9 to 5 with an hour for lunch, 8 to 2 with no lunch, etc.)?

A. 9:00 to 5:00 with about an hour and fifteen minutes for lunch. I try to break on approximately one hour and fifteen minute intervals to give my court reporter and the jury a break. When the jury is at the courthouse I want to spend as much of their time in the courtroom. I do not like to send the jury to the jury room to hash out issues that should have been resolved prior to trial.

Q. What are your preferences with respect to motions in limine and other trial related motions?

A. Motions are to be filed and briefed so that they can be argued at the pretrial conference. That way the Court can issue a written decision in advance of trial. No motions which could be anticipated in advance of trial will be heard during trial.

Q. What are your preferences and/or procedures related to witness scheduling?

A. Have a witness ready to testify. The Court conducts jury trials at the convenience of the jury according to the schedule set out in the Order After Pretrial Conference (Att. 3,4). I don't have special preferences or procedures. I understand that sometimes witnesses run long or short and there can be gaps of time, but I try to avoid them at all costs for the jury's sake. If time is at a premium, I may require that the attorneys submit (and live by) a trial budget in which limits for direct, cross-examination, and redirect are imposed by agreement or by order of the Court. I expect counsel to provide opposing counsel their anticipated order of calling witnesses.

Q. What are your preferences with respect to trial exhibits? Do you allow/require the use of exhibit notebooks for the court and jurors?

A. See generally the Order After Pretrial Conference (Att. 3, 4). I allow the use of exhibit notebooks for jurors and I require it for the Court. Exhibit notebooks for jurors can be a distraction especially when there are numerous or lengthy exhibits.

Q. Do you find the use of computer-assisted presentations (e.g. PowerPoint) effective and/or useful?

A. Yes, if they are well done. It is the best opportunity for the jury to see your exhibits prior to deliberation. On the other hand, I don't like the time wasted by power up, boot up, malfunction, etc. There are some good free programs that help in the presentation and counsel should investigate and find something that works. Problems in the presentation tend to make the lawyer look inept - even though it happens to the best of us. Trial will not be delayed by technical difficulties.

Q. Do you permit “speaking objections” in jury trials?

A. No. Never! I don't like them because too often lawyers state improper information to the jury in the argument over admissibility. If you can make your objection in a word, like "hearsay" or "leading," then I don't mind. Otherwise, ask to approach the bench. I generally don’t decline requests to approach the bench.

BENCH TRIAL PRACTICE

Q. What are the major differences in procedures in your courtroom between bench trials and jury trials?

A. Jury trials are more formal and a stricter adherence to the rules of evidence is required. I also believe that one of my roles is to make the trial as comfortable and time efficient as possible for the jury. We are always on time for the jury. For example, if I tell the jury we will start at 9:00, don't come to my chambers at 8:55 and say we need to talk about some things - you will only have two minutes to talk. If there are matters that must be taken up outside of the hearing of the jury, tell me so that I can schedule the jury accordingly. Generally I would ask counsel to come in early, use the lunch hour, or stay late to handle these kinds of things. Juries are just too important to be treated badly. I do everything I can to avoid it and I expect counsel to do the same.

Bench trials are more relaxed, but I still expect people to be mindful of the Court's schedule and the need to be on time. In addition, relaxed does not mean the rules of evidence don't apply. Please don't expect to lead your witness all over the place because you don't think the other side will object. Design your questions so that they conform to the rules of evidence.

Jury trials take precedence over everything else on the calendar. On the other hand, bench trials don't so if a bench trial runs long and the court has scheduled other time sensitive matters then the bench trial may have to be continued to finish at a later date.

Q. Do you appreciate or require trial briefs or proposed findings of fact and conclusions of law from counsel? Do you prefer proposed findings of fact and conclusions of law be submitted before or after trial or both?

A. For a description of the requirements for pretrial or trial memoranda, in non-domestic relations civil cases, please see the Court's Order for Final Pretrial Conference (Att. 5). In criminal cases, please see the Court's Order for Pretrial Conference (Att. 6).

If a party requests findings of fact and conclusions of law in a bench trial the Court would order all parties to prepare proposed findings of fact and conclusions of law.

THOUGHTS ON EFFECTIVE ADVOCACY

Q. What makes an effective advocate in jury arguments?

A. Have a message that you want to convey to the jury and talk about those things that convey that message in a logical and understandable way. Since people absorb information differently, the use of demonstrative aids, exhibits, blow-ups and computer presentations mixed with effective oral argument helps significantly, but don't be overpowered by your technology.

Q. What makes an effective advocate in bench arguments?

A. Tell me what relief you want from the Court and then, make an on point, succinct, and direct argument telling me why your client is entitled to the relief you want. Be prepared to answer the Court's questions. If you don't know the answer, admit it - don't wing it.

Q. What are the most common mistakes made in argument?

A. Failing to clearly state what the client wants the jury or Court to decide and the reasons why the decision should be made that way. Don't argue to argue. Don't argue too long and wander off point. Arguing in a manner which causes a loss of credibility is a serious mistake.

Q. What are some techniques that do, or do not, work effectively in the examination of witnesses?

A. Techniques that should be employed begin with an outline of what the attorney intends to elicit from the witness and how this expected testimony relates to an essential element of the case. Conduct the examination in a professional and succinct manner. Except in rare instances, sarcasm, argumentative questions, and emotionally charged attacks should be avoided. Examine the witness so that the jury or Court can assess the witnesses' credibility - not the attorney's credibility.

For direct examination, have a solid outline or write out your questions. Anticipate objections and ask the question in a form that avoids the objection. Be prepared to answer the objection.

Conduct a surgical cross examination. Plan the examination with meaningful leading questions. Don't ask a question you don't know the answer to unless you are just entertaining the Court by demonstrating what happens when unknown answers blow up in your face. Seriously, know the questions that will score points for your position and ask them. Otherwise, you just reinforce the direct examination.

CRIMINAL MATTERS

Q. How do you handle requests for continuance on pretrials, arraignments and trials?

A. In Sweetwater County, one courtroom for two judges means that continuances of trial dates are rarely granted. If there is a very good cause for a continuance, one may be granted. I am always mindful of the Defendant's right to a speedy trial when making decisions on continuances. I have also established a fairly detailed Case Management Order (Att. 7) with a number of pertinent deadlines, including settlement conferences (Att. 8). My view is that once the Court establishes key dates and deadlines, they will rarely be changed. I can be a bit more flexible on pretrials and arraignments. Even if you are the fifteenth case on a particular month's trial stack, you should be prepared to try your case. You can always call my judicial assistant to find out where your client sits on the trial stack.

Q. When may the issue of bail best be addressed in your courtroom?

A. Bail can be addressed at any hearing before the Court.

Q. What information do you want from counsel at the time of sentencing?

A. I want the parties to be prepared to recommend a sentence and to provide supporting information and argument to support the recommended sentence.

Q. Are private pre-sentence evaluations useful or encouraged?

A. I haven't seen one to date. I'm open to using them. I have experienced and I don't mind additional substance abuse or sex offender evaluations.

Q. Do you have any standard sentences the bar should be advised about (i.e. DUI sentencings, acceptance of alcohol-related reckless)?

A. No.

SPECIAL ISSUES FOR DOMESTIC CASES

Q. Are there any special issues that arise in your courtroom in domestic cases of which you would like the bar to be aware?

A. In a property and/or debt division case, the Court requires the parties to jointly prepare a single list of all the parties' assets and debts using a form prepared by the Court which the parties submit to the Court in Word or Excel format 7 days prior to trial. Failure to timely submit the joint asset and debt spread sheet will result in a continuance of your trial.

Domestic cases seem to result in practices that take advantage of procedural rules to gain a substantive advantage in the case. Parties seek emergency ex parte orders when no emergency exists. Sadly, but realistically, parties to domestic cases are some of the most unhappy people with whom we all come into contact. Please don't let their unhappiness and anger guide your practice of law before the Court.

Q. What do you want to have on temporary order issues?

A. If the order is ex parte, be sure that the affidavit is accurate and doesn't exaggerate the condition. Otherwise, remember that temporary orders (custody, support, etc.) are just that, temporary. I don't need to hear the whole case to decide the temporary order. Focus on the issue before the Court because temporary order hearings are usually set for a short period of time.

Q. Do you have a policy on child interviews with respect to custody?

A. I will do child interviews in chambers, off the record, and outside the presence of counsel and parents only on stipulation of the parties. Absent stipulation, the child will have to testify in open court like any other witness (assuming he/she is old enough).

Q. When do you require guardians ad litem? What do you expect from a guardian ad litem?

A. I will generally order one when the parties so request but rarely do so on the Court's own motion. I do not like to impose the expense of a GAL, especially when most people can't afford the additional cost. My Order Appointing Guardian ad Litem (Att. 9) sets out my expectations. I find that a GAL is often helpful.

DISCOVERY PRACTICES

Q. What is your approach to resolving discovery disputes?

A. The Scheduling Order (Att. 1) sets forth the procedure for resolving discovery disputes. Generally I will decide motions involving discovery disputes without a hearing after written submissions by the parties. Prior to filing the motion I expect the parties to confer to resolve the dispute and understand opposing counsel's position.

Q. What are your thoughts on imposing sanctions for discovery abuses?

A. The rules of civil procedure require courts to impose sanctions when discovery abuses occur. In cases where sanctions are justified, I have and will continue to impose them. In the past I have imposed sanctions from awarding attorney fees and costs against the offending party and/or attorney to entering judgment against the offending party, or both.

Q. Are you generally available to solve problems that arise during a deposition?

A. Availability is dictated by the Court's calendar but, to the extent that I can be available I will be available.

THOUGHTS ON COURTROOM PROTOCOL

Q. Is lack of civility a recurring problem in your courtroom? What steps do you take to improve civility in your courtroom?

A. Generally, lack of civility is not a problem. When it is, I will point it out. I expect the parties to conduct themselves in a professional and civil manner.

Q. What do you expect of lawyers (and their staff) in your courtroom? Clients? Witnesses?

A. Be courteous, polite and professional.

Q. Do you impose any limitations on courtroom movement (approaching witness, podium, etc.)?

A. Yes, stay at the podium and request permission to approach the witness, jury or bench. See the Uniform Rules of District Court.

Q. What kind of lawyer conduct is unacceptable to you in your courtroom?

A. It is unacceptable to commit violations of the Code of Professional Conduct, the Uniform Rules of District Court, or engage in other unprofessional or disrespectful behavior. Arguing over a ruling or decision which has been made, or interrupting another person (including the judge), should also be avoided.

OTHER MISCELLANEOUS ISSUES

Q. What are your opinions regarding courtroom dress?

A. In Court, wear business attire - the dress of attorneys when present during any court proceeding shall reflect respect for the dignity and authority of the Court.

Counsel should instruct their clients and witnesses as to appropriate demeanor and dress. Inappropriate attire affects credibility.

Q. Do you allow children in your courtroom?

A. I am not a fan of children in the courtroom generally and I wonder about the judgment of people who bring small children to Court. Sometimes the subject matter is not appropriate for young children. On the other hand, it is sometimes unavoidable and, depending on the age and subject matter it can be educational. Children cannot be disruptive.

Q. Do you allow cell phones in your courtroom?

A. Only lawyers are allowed to keep their cell phones when they enter the building. If a party's cell phone is going to be used as part of an evidentiary hearing, then please let the security officers know and the cell phone will be given to the lawyer to bring into

the building. I am aware that cell phones are used for calendaring and more, but the ring of a telephone, regardless of the catchy or trendy ring tone is not well taken by me. It is a distraction and an insult to the proceeding.

Q. What, if anything, do you do to enforce promptness in your courtroom?

A. If you are scheduled for trial or hearing at 9:00 a.m., then 8:55 a.m., is not the time to meet with your clients and attempt to settle the case. We have an extremely busy docket and time is our most valuable commodity. I can always find time to do office work, but my trial time is the hardest to come by. I will hold habitually late lawyers in contempt and fine them.

CLERK'S/ADMINISTRATIVE ASSISTANT'S COMMENTS

Q. What do you expect of attorneys in their dealings with you?

A. To be thoughtful of the Court's calendar. In the event a scheduled hearing is resolved, please promptly notify our office. Do not assume that because the Court's calendar appears light, that the Court will be available to see you if you drop by. It is always best to call to see if the Court has time available to meet with you.

Q. What do you expect of attorneys in regarding to scheduling hearings?

A. It's fine to call or stop by the office to schedule a hearing. You may also submit a written request for setting. Either way, just be sure to have the case name, case number, length of time needed, and if you want the hearing as soon as the calendar permits or if you need additional time for publication, service upon the parties, etc.

Q. What is your protocol for scheduling hearings?

A. Once a request for hearing is received, available dates are provided to the requesting party who is then requested to contact opposing counsel to determine a workable date. As soon as a workable date is established, the Court's JA should be notified to "hold" that date until the proper request and order can be submitted to the Court. It is advisable that the setting documents be received by the Court within 3-5 days. The requested date is not official until the paperwork is received and the order has been entered by the Court.

Q. What can attorneys do to improve communications with you?

A. Call with any questions and don't forget to notify the JA as soon as possible should your hearing settle.

Q. What would you like attorneys to keep in mind?

A. My goal is to be helpful. If there is anything I can do to better coordinate hearings or to provide you with what you need from our office, please let me know.

Q. What size paper does your judge prefer or require for pleadings and briefs?

A. All documents should be submitted on 8-1/2 x 11 paper. The days of 8-1/2 x 14 paper are over for the reason that more often than not, documents are reviewed electronically and the smaller paper size improves the view.