Judge Whitehill's Guidelines

Business disputes require economic and efficient business solutions. This court's approach is to promote party autonomy during the process—with active judicial decision making when needed.

Every case has unique issues and requirements. However, the court provides these *guidelines* so the parties will know from the outset the court's expectations. This transparency will help parties make realistic planning, staffing, and budgeting decisions on the front-end and avoid delays and waste as the case progresses.

Parties should expect the court to follow these guidelines considering each case's unique issues and characteristics. Parties should also follow the court's local rules found on the court's website.

Judicial Philosophy

The rule of law, predictability, and consistency are critical to the proper administration of justice. The public is best served when cases are decided on their substantive merits. So, the court's job is to correctly decide issues by applying existing law to facts proven by admissible evidence, while ensuring that the parties have a fair opportunity to develop and present their cases.

The court's legal rulings will be based on the text of governing statutes, judicial decisions, recognized common law and equity principles, applicable procedural rules, and standard document and statutory construction rules.

Professionalism

The court respects zealous advocacy but expects parties and their counsel to follow the Texas Rules of Professional Conduct, The Texas Lawyer's Creed, and *Dondi Properties Corp. v. Commerce Savs. & Loan Ass'n*, 121 F.R.D.284 (N.D. Tex. 1988) (en banc). Valuable judicial, legal, and client resources are wasted when counsel or their clients do not follow these standards.

The court requires utmost candor from parties and counsel. The court expects legal statements to be supported by authorities that fairly support the offered legal principle. Likewise, the court expects factual statements to be supported by specific record citations.

The court will carefully read important authorities and check the important record cites. The court will also conduct independent legal research as needed.

Early Management and Accessibility

1. Focus

Most cases turn on a few key-pivotal issues and a handful of important documents. The court encourages the parties to identify and focus on those issues and documents as soon as possible.

2. Planning Conferences

Creating a case specific discovery plan and scheduling order is important for an efficient and effective trial plan. Thus, the court intends to conduct an in-person planning conference within thirty days after the first defendant appears by answer, special appearance, removal, or other procedure. During that conference, the court and the parties will develop a plan with a goal to try the case within a year of the signed scheduling order date. *See* TEX. R. CIV. P. 166(a).

The parties are to attend the planning conference in person, to the extent possible, with counsel and a responsible client representative.

The court expects the parties to meet before the planning conference and discuss their expected document production plans, including ESI plans, and identify potential deponents. Specifically, as to ESI, the court expects the parties to have discussed their plans for searching and producing ESI (including search terms, databases, protocols, and other methodologies). *See* TEX. R. CIV. P. 190.5.

Unlike the Federal Rules, these Guidelines do not impose specific deadlines regarding when before the scheduling conference the parties must provide the court with their report and proposed scheduling order to the court. However, providing the court with that document at least three business days before the scheduling conference will facilitate a more productive conference.

The parties will find a Planning Conference Report, Discovery Control Plan, and Scheduling Order (Scheduling Order) template on this chamber's website. The court expects the parties to discuss any desired modifications to the otherwise applicable discovery control plan and jointly complete the Scheduling Order before the planning conference. At the planning conference, the court will resolve any unresolved control plan or scheduling order issues. The court will sign the Scheduling Order at the planning conference or soon afterwards.

The parties may later modify the control plan or scheduling order to meet their needs except for the dispositive motion cutoff and the trial date. The dispositive motion deadline

needs to be set far enough before the trial date that the court has time to decide the motions, write an opinion, and give the parties time to adjust their trial plans accordingly.

The parties will also find protective order templates on the Texas Business Court's main website. The court expects the parties to complete a protective order before the planning conference. The court will resolve any unresolved protective order issues during the conference.

See BUSINESS COURT LOCAL RULE (BCLR) 4(a).

https://www.txcourts.gov/media/1459346/local-rules-of-the-business-court-of-texas.pdf.

3. Flowcharts

Within thirty days after the scheduling order is signed, the court expects the parties to informally submit a flowchart or outline mapping what the jury charge or findings and conclusions should be based on the existing pleadings. The parties are expected to update their submissions as causes of action or defenses are added or dismissed. These are not formal documents. The court prefers joint submissions but does not require them. The court will accept a jury charge outline or other graphic map instead if the parties cannot produce a flowchart.

4. Status Conferences

The court will schedule brief conference calls every two or three months to discuss the parties' progress and address any issues that threaten to impair the trial date. The goal is to identify and resolve issues that might impair the trial date.

5. General Accessibility

The court is available to address simple issues, like agreed extensions or unopposed motions, by email exchange involving all counsel and the court's staff. Email decisions will be documented in the case record with a formal order.

All emails involving the court must be through the Court Manager or the Staff Lawyer if the Court Manager is unavailable.

The parties must create a single email list that they and the court will use when communicating by email. Emails with the court will use the applicable court email address found on the court website.

The court expects parties to contemporaneously send the court and all other parties an email copy of all documents they file through the e-filing system. Likewise, the court

will email the parties a copy of all orders, judgments, or other documents the court submits through the e-filing system.

The court will schedule as soon as practical a conference call any party requests to address emerging issues. The goal is to address issues before they mature into motions. The court may initiate conference calls on short notice should it appear to the court that judicial intervention may help resolve issues before the court.

Discovery Disputes and Motion Practice

1. Document Requests

Modern document production in complex business cases involves electronic database searches. Each party is expected to explain to the opponent(s) prior to the planning conference what the producing party proposes to do for a preliminary electronic document production search. The proposal will include initial proposed search terms, databases, and parameters. The parties are expected to discuss these variables in good faith.

The court expects written document requests to be specific and targeted. Document requests that ask for, "All documents that record, reflect, or relate to X" tend to create unnecessary discovery motions. Boiler plate objections should be avoided. Objections need to comply with the rules. *See* Tex. R. Civ. P. 193.2(e).

2. Disclosures and Interrogatory Answers

The court expects initial disclosures and interrogatory answers to be prompt, full, and complete. Parties should expect that their ability to discuss and offer evidence about issues or contentions will be better received the more complete their written responses are. *See* TEX. R. CIV. P. 193.6(a).

3. Discovery Disputes

The court expects counsel to meaningfully cooperate with each other to avoid discovery disputes. When a disagreement happens, counsel with authority to agree to solutions must actually communicate with each other in good faith to resolve their dispute before involving judicial resources. The court's experience is that most disputes can be resolved when parties discuss what they really want and what the opponent can reasonably provide.

If parties cannot resolve their differences, the court will conduct a brief phone conference to suggest non-binding guidance. If the parties cannot resolve their differences after a phone conference, within seven days after the conference the complaining party may submit a letter discussing the issue(s). The opposing party may submit within seven days thereafter a response. After reviewing both submissions, the court will provide its guidance. If that guidance does not resolve the issue(s), the complaining party may then

file a motion addressing only the remaining issues. The court will then notify the parties whether a hearing is needed for the court to rule on the dispute(s). (The court-phone conference is a chamber specific modification to the court's local rules.)

See the court's local rules regarding the length of pre-motion letters and motion filings. This chamber permits short replies, but the court may rule any time after a response is filed.

Pre-Trial Motion Practice

1. Summary Judgments and Motions to Dismiss

The scheduling order will set a dispositive motion and response deadlines far enough before the trial date that the motions can be submitted, the court can issue an opinion, and counsel will be able to adjust their trial plans accordingly. Once the last response is filed, the parties will advise the court whether they want oral argument and how much time they think is needed for oral argument. The court will advise whether it will hold oral arguments and, if granted, when they will be held and how much time will be allowed.

Once the final replies are filed, the court asks the parties to deliver as soon as possible a joint set of courtesy notebooks with the motions, responses, and replies. The court will rely on electronic copies of related records when considering motions.

The parties should treat motions to strike an expert in whole or in part as a dispositive motion.

2. Special Appearances

Within a week after a defendant files a special appearance, the parties are expected to confer and propose a joint plan for resolving the challenge. The court will review the plan and decide whether a hearing or conference call is necessary to implement a schedule for resolving the special appearance. Filing a special appearance should not delay the planning conference, but the special appearance may affect the scheduling order.

3. Miscellaneous Motions

The discovery dispute guidelines apply to other non-dispositive motions that require briefing. The court, however, may accelerate those procedures.

Unless the Rules of Civil Procedure or Local Rules require otherwise, responses to contested, non-dispositive or expert motions should be filed no later than fourteen days after a contested, non-dispositive or expert motion is filed. At that time, the court considers the motion ripe for submission unless an oral argument has been set.

See BCLR 5 regarding motion practice for further guidance regarding contested, non-dispositive motions.

4. Hearings

The court will conduct as many oral arguments as possible in person in the court's hearing room. Parties are to discuss and propose an expected amount of time needed for a particular hearing before contacting the Court Manager for scheduling the hearing. The court expects counsel to start hearings on time, and parties should arrive early enough to do so. The parties should expect hearings to last no longer than their allotted times.

The Pre-Trial Order and Conference

The scheduling order should provide for a pre-trial conference no less than fourteen days before the trial date. No less than a week before that conference, the parties will submit a proposed pre-trial order that has been agreed to in good faith as much as possible. They will find a pre-trial order template on the court's website. The court will decide unresolved issues at the pre-trial conference. And the court also expects to consider motions in limine and document-related evidentiary issues. The parties will also submit revised charge flowcharts or outlines for discussion.

Parties should file their motions in limine at least one week before the pre-trial conference.

At the pre-trial conference, the court will adopt expected time limits for voir dire, opening statements, evidence, closing arguments, and other trial management issues.

Mediation

Many parties want to engage in settlement discussions but are afraid to begin the process over concern they will be perceived as weak. To remove that concern, the scheduling order will include a deadline to conduct mediation.

Consistent with party autonomy, the court defers to the parties to select their own mediator and to conduct the mediation before the deadline. If the parties cannot agree to a mediator, the court will recommend several. If the parties still cannot agree to a mediator, the court will appoint one. The parties should select a mediator well before the deadline to conduct the mediation because many mediators are booked more than a month in advance.

Trials

1. Jury Trials

The court will conduct a brief, final pre-trial conference the day trial begins to address any new or remaining issues that need to be decided before beginning the trial.

The court will conduct basic juror qualification examinations, incorporating approved topics suggested by counsel. The court expects that in most cases an additional thirty to forty minutes per party will suffice. In most cases, the court anticipates allotting ten to twenty hours per party for witness examinations and no more than twenty-five to thirty minutes for closing arguments. However, the court will look at each case's unique circumstances when considering different time limits.

The parties are to submit formal, requested jury charges (or findings and conclusions) by the first day of trial. The court will consider Texas and Fifth Circuit Pattern questions and instructions, as applicable, for guidance. The court anticipates submitting only basic instructions and definitions needed to allow the jury to understand the questions. The court discourages requesting excessive instructions that are comments on the evidence. The court emphasizes the need to avoid *Casteel* problems.

2. Non-jury Trials

The court expects to conduct non-jury trials in the court's hearing room. Non-jury trials will conform to the time limits for opening statements, presenting evidence, and closing arguments as apply in jury trials. The court will decide whether to accept post-trial briefs in addition to or in lieu of closing arguments.

The jury charge guidelines and timetables will also apply to proposed findings and conclusions. The court expects proposed findings to follow appellate court standards. The court will not accept overly detailed findings and conclusions. Rather, proposed findings and conclusions should simulate jury charges for the subject causes of action and affirmative defenses.

3. Objections

The court expects parties to make non-speaking objections. An objecting party should state the nature of the objection and a supporting rule. Non-objecting parties should not respond unless the court requests a response.

Settlements

See BCLR 6 regarding settlement announcements. The court expects parties to promptly submit appropriate agreed orders documenting their settlements. The court will presume the parties desire a dismissal with prejudice and may enter the same without further notice if the parties do not submit final dispositive orders within thirty days after announcing settlement.

Briefs

All briefs or motion related submissions should comply with at least the Business Court Rules regarding word limits and any other formatting requirements. However, this

chamber prefers fourteen-point Century Schoolbook or a similar serifed font. All submissions of ten pages or more should include a table of contents, table of authorities, and table of abbreviations and defined terms. And they should use Arabic numbers throughout, beginning with the title page.

See the Business Court Local Rules for appendix standards. However, the court prefers lengthy exhibits or appendices to be filed as separate documents.

All pleadings, briefs, appendices, or other filed documents should be numbered with only Arabic numbers that begin on the document's first page. Document page numbers should match .pdf page numbers for easier viewing.

Legal Writing Tips

Following these suggestions will improve your chances of the court understanding your writings:

- Write with the judge's perspective in mind. It is your job to make it easy for the court to understand your arguments.
- Get to the point.
- Understand that the court is busy and every case before it is important, your case included. Similarly, every case on the docket is important to those parties too. The court will be fair, impartial, and efficient with all of them.
- Although you are familiar with your case, it may take the court a while to become familiar with it also.
- Start with your requested relief. Tell the court the precise relief you want and where the court can find the supporting evidence.
- Identify and focus on the critical issues. Tell the court what those issues are upfront. Use "deep issues" to educate the court about those issues and why your party should prevail on that issue.
- Understand that "Brevity is the soul of wit." (*Hamlet* Act 2, scene 2, 86-92). Every word the court reads is work.
- Follow Occam's Razor.
- Avoid hyperbole. "Punching it up" is distracting, counterproductive, and annoying.
- Use complete topic sentences: a premise and supporting rationale.

- Be well-structured using classic outlining principles.
- Use headings and sub-headings.
- Connect thoughts with threading principles.
- Be fair and accurate with the facts as you in good faith understand them.
- Understand that syntax matters. Sentences flow best downhill.
- Avoid "ly" adverbs; use power verbs instead. Saying that a case, document, or testimony "clearly" says something does not make that point clearer than it is based on a plain reading.
- A picture is worth a thousand words. Include pictures, document excerpts, and charts as appropriate.
- Beware the multiple personal pronouns.
- BEWARE OF ALL CAPS. USING ALL CAPS SCREAMS AT ME, DOES NOT ADD CLARITY, AND MAKES THE WRITING HARD TO READ. THE COURT WILL READ WHAT YOU SAY WITHOUT THEM.
- Beware the "over-bold" and "over-italics."
- Avoid clutter. Remove unnecessary words, especially unnecessary prepositional phrases.
- Do not use string cites for non-controversial legal points.
- Put record citations in footnotes, and legal citations in text. Don't use "Id." in record cites.
- Put all evidence in a separate, single appendix with pages numbered consecutively from one to the end.
- Responses and replies should remind the court of the point being addressed and then address that point.