BLS BENCH NOTES

MBA Complex Commercial Litigation Section
Business Litigation Session Practice Guide

Prepared by the 2024 Justices of the Business Litigation Session
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Second Edition – May 2024

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Acceptance Into BLS

(1) What factors are relevant to your decision whether to accept a case into the BLS? Are there types of cases you generally do not accept in the BLS?

Salinger, J.: The BLS Administrative Justice (currently me) decides whether to accept a case into the BLS. The process and standards for accepting a case are governed by Superior Court Administrative Directive No. 24-1.[1]

When considering a request for a case to be filed in or moved to the BLS, I rely on the BLS cover sheet (when a plaintiff seeks to have a case accepted into the BLS) or motion to transfer (when another party asks that a case by moved to the BLS), and also look at the complaint and docket.

Please note that we now require that the BLS cover sheet or transfer motion specify the amount in controversy.

I will accept a case if the party or parties asking to be in the BLS show that the action falls within one of the categories listed in AD 24-1, raises complex issues with something substantial at stake, and either will benefit from the case management and attention that BLS judges are able to provide or will raise issues that are often addressed in the BLS but arise much less frequently in other sessions.

I will reject a request for a case to be assigned to the BLS if the matter appears to be a relatively simple dispute that does not require unusual attention from the session judge, or primarily concerns issues that are not related to the sorts of business disputes that this session handles.

Cases that were originally assigned to other Suffolk County civil sessions or were originally filed in other counties may be transferred to the BLS. For transfers, either venue must be proper in Suffolk County or any venue objection must be waived. AD 24-1 provides that parties may waive a venue objection either expressly or by not objecting on venue grounds when a transfer is sought.

(2) What factors do you consider when transferring a case from a general session to the BLS sua sponte?

Salinger, J.: I apply the same factors in considering whether a sua sponte transfer to the BLS is appropriate. In addition, if a case in the BLS is closely related to one pending in another session, it may make a lot of sense to transfer the other case to the BLS so that they can be managed in the same session.

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[1] Links to html and pdf versions of Administrative Directive 24-1, and to a fillable pdf version of the BLS civil action cover sheet, are available at https://www.mass.gov/superior-court-business-litigation-session .

Case Management and General Issues

(1) Do you use a customized Rule 16 case management conference notice or the standard notice to appear? What, if anything, do you instruct the parties to file in connection with a Rule 16 case management conference beyond what is in the standard notice to appear?

Salinger, J.: No. The standard notice has been working for me. But please file your Rule 16 submission in advance. If you are filing something electronically, it can take up to a few days for it to appear on the docket and become available to judges and court staff. And BLS judges are very busy. If you submit things just before a conference or hearing, we will not have time to review and think about it in advance.

Krupp, J.: I usually use the standard notice. If, in reviewing the status of a case, it appears that there has been no action in the case, or the case has somehow fallen between the cracks, I will issue a customized order to schedule a Rule 16 conference or a status conference as seems appropriate.

Kazanjian, J.: The standard notice is fine.

Squires-Lee, J.: The standard notice is fine.

(2) Do you have any requirements or preferences for who must appear for the case management conference? If so, what are they?

Salinger, J.: A lawyer appearing at a case management conference must have the authority and all information needed to agree on a case schedule and any other case management issues that need to be resolved.

Krupp, J.: No, but the lawyer appearing must have authority to address all issues that may come up during the Rule 16 conference.

Kazanjian, J.: The lawyer who appears before me must have the authority to handle any issue that may come up.

Squires-Lee, J.: I agree. A myriad of both substantive and procedural decisions must be made at a Rule 16 conference and the lawyers who appear must have the authority to address the issues and bind the parties.

(3) Do you have any requirements or preferences for setting tracking order deadlines? If so, what are they?

Salinger, J.: In a typical case, I aim to set deadlines for completing all fact discovery, expert disclosures (if needed) and expert depositions (if appropriate), and a date for a further scheduling conference to discuss what comes next. I do not automatically set dates for summary judgment motions, because in most cases the parties cannot tell at the outset whether there is any reasonable likelihood

that the case can be resolved by summary judgment. But I will set additional or more detailed deadlines if doing so will help the parties move the case along.

I will generally not set a trial date until after all fact discovery and expert disclosures are complete, summary judgment motions have decided or skipped, and the parties are appearing at a final pre-trial conference after having prepared a joint final pre-trial memorandum.

Krupp, J.: I aim to set a schedule that will work for all parties given their other commitments, but that will not have to be extended. The parties should think about and propose dates assuming that the dates will not be extended for convenience. At an initial Rule 16 conference, I will set dates for the close of fact discovery and for another Rule 16 conference 30-60 days before the close of fact discovery. I may set other interim dates depending on the needs of the case. At a Rule 16 conference towards the end of discovery, I will set dates for Rule 56 briefing, if applicable; a final pretrial conference; and sometimes trial, particularly in multi-party cases or cases requiring the coordination of many lawyers, the availability of expert witnesses, speedy trial rights, or other extenuating circumstances.

Kazanjian, J.: I generally seek to schedule deadlines for fact and expert discovery. I will set Rule 56 deadlines when there is a real likelihood that Rule 56 motions are going to be filed. I will sometimes set a hearing date for the Rule 56 motion that will become Final Pre-Trial Conference if no motion is filed. I also will set interim status dates if that would be useful for advancing the case.

Squires-Lee, J.: I will set deadlines that work for the case, the parties, the lawyers, and the issues. One of the benefits of the BLS is the ability to have close case management from the judges, so I agree that setting deadlines one step at a time and scheduling further case management conferences can facilitate efficiency. For example, I can foresee setting a deadline for fact discovery followed by a Rule 16 conference to address expert disclosures and discovery, if any, and summary judgment deadlines.

(4) Do you conduct rule 16 conferences via videoconference or in the courtroom?

Salinger, J.: I think that Rule 16 conferences work well by video conference. Superior Court Standing Order 1-22 identifies matters that presumptively are to be held by video conference in civil actions, including scheduling and case management conferences.

Please let the session clerk know if you have a new case, or a case that was newly transferred to the BLS, that is ready for and needs an initial BLS scheduling conference. And please let the clerk know if you have an older case that would benefit from a status or scheduling conference to address new issues or changed circumstances.

Krupp, J.: Mostly by videoconference. An initial Rule 16 conference is usually perfect for using a videoconference. A Rule 16 conference held well into the case may be better in person. There are situations where it is clear to me that the parties are not conferring sufficiently before filing motions or are not getting along. In those instances, I am more inclined to see the parties in person. For case-specific or personal reasons, the lawyers may ask that a Rule 16 conference be held in person or by videoconference. Absent a good reason, I am likely to agree to such requests.

Kazanjian, J.: While I have a strong preference for in-person hearings, I usually conduct Rule 16 conferences by videoconference. However, in order to conduct a hearing by videoconference, the attorneys need to have adequate technology that allows the court to see and hear counsel during the conference. The attorneys must also have adequate familiarity with operating the technology and must present in a professional manner as if we are in court. I will not conduct hearings of any kind by telephone only. If you would prefer to appear in person for a Rule 16 conference, please let the clerk know and I will be happy to accommodate that.

Squires-Lee, J.: Initial Rule 16 conferences are well suited to video conference.

(5) Do you ever phase or bifurcate discovery? If so, when and how?

Salinger, J.: Yes. Sometimes all parties agree on phasing discovery. In other cases a party may convince me that is the most efficient way to proceed. If early resolution of a key issue will significantly streamline a case or facilitate settlement talks, discovery about that issue can readily be separated from other discovery, and doing so will not unduly delay resolution of the dispute if full discovery ends up being needed, then phasing of discovery makes good sense.

Krupp, J.: Yes. Bifurcation of discovery makes sense to contain costs and allow the parties to focus their efforts on a single issue that could substantially narrow or resolve the case.

Kazanjian, J.: I consider bifurcation of discovery as an excellent way to contain costs and narrow the issues. I encourage the parties to be creative in this regard.

Squires-Lee, J.: Absolutely. There are many cases in which discovery on a potentially viable dispositive issue, for example, should proceed first and can significantly streamline the case. If counsel believe bifurcated discovery may be appropriate for whatever reason they should not hesitate to raise at the initial Rule 16 conference.

(6) Are there situations under which you do not grant a motion for a confidentiality order or to file papers under seal, even if the parties agree? Do you have any specific requirements for granting confidentiality orders and/or motions to file papers under seal?

Salinger, J.: Agreement of the parties is never sufficient to justify impounding documents filed in court.[2] I will always deny a motion to impound something based solely on the parties' agreement that they want to keep something secret. Under Massachusetts law, I may impound a document only if a party shows there is good cause to do so.

Necessary Showing. A party seeking impoundment must explain the nature of the information they seek to protect and why the private interest in keeping that information confidential outweighs the strong public interest in being able to access judicial records.[3] It is not enough merely to assert that the party keeps the information secret; counsel should describe the nature of the information so that the judge will understand why maintaining confidentiality is important. If a motion to impound does not attempt to make this showing, I will deny it without prejudice and give the parties a second chance.

Redacted Versions. Where only part of a document is subject to impoundment, you should submit a redacted version that will be available to the public.

Hearing, or No Hearing. The general rule is that judges must hold a hearing on a motion to impound. But no hearing is required if "the reason for impoundment is to protect trade secrets or other confidential research, development, or business information."[4] This exception applies almost every time a motion to impound is filed in the BLS. When it does apply, it is a helpful to note in an impoundment motion that no hearing is required because the request falls within the scope of this exception.

Impoundment vs. Sealing. Finally, parties that want to limit public access to a document filed in a Massachusetts state court should seek "impoundment"

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[2] See Mass. R. Impound. Proc. 7(a) (agreement of the parties "shall not, in itself, be sufficient to constitute good cause" for impoundment). The impoundment rules are available at https://www.mass.gov/trial-court-rules/trial-court-rule-viii-uniform-rules-on-impoundment-procedure .

[3] See, e.g., *Boston Private Wealth LLC* v. *Cummings*, "Memorandum and Order Requiring Further Showing in Support of Request for Impoundment as well as Redacted Copy of Brief," Suffolk Sup. Ct. civ. action no. 1584CV01532-BLS (Mass. Super. Feb. 2, 2016) (Salinger, J.). This decision is available through the Social Law Library's Business Litigation Session research database.

[4] Mass. R. Impound. Proc. 7(e).

rather than to have the materials accepted "under seal." The Supreme Judicial Court says that although these terms are "closely related and often used interchangeably," they are in fact "meaningfully different."[5] When documents are "impounded," they are kept separate from the rest of the case file and are not available for public inspection, but they may be viewed by the parties. In contrast, "[a] document is normally ordered 'sealed' when it is intended that only the court have access to the document, unless the court specifically orders limited disclosure."[6] And the SJC has suggested that judges should be more hesitant to seal documents than to impound part of a case file.[7] So, unless a party is trying to keep other parties from seeing something filed with the court, they should request "impoundment" rather than "sealing," and make sure they comply with the Uniform Rules on Impoundment Procedure.

Krupp, J.: I generally allow motions for entry of a confidentiality order to govern discovery, although I look at the proposed orders carefully to see whether they purport to impose obligations on the court, or unduly authorize disclosures under an "attorneys' eyes only" designation. See Formal Guidance of the Business Litigation Sessions Regarding Confidentiality Agreements (Jan. 2, 2008).[8]

As a practical matter, it is difficult for me to assess whether a particular document or information is confidential without adequate explanation from counsel. The parties should not assume that motions to impound, even if unopposed, will be granted absent an adequate explanation.

Kazanjian, J.: I agree with Judge Salinger on motions to impound or seal. I am likely to allow a motion for the entry of a confidentiality order if the parties agree and it does not contradict or violate the laws/rules regarding impoundment and sealing.

Squires-Lee, J.: I agree with Judge Salinger. I will allow an agreed-upon motion for a confidentiality order that complies with the law described above and will closely examine motions to impound alleged confidential information.

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5 See *Pixley* v. *Commonwealth*, 453 Mass. 827, 836 n.12 (2009); accord *Commonwealth* v. *George W. Prescott Pub. Co., LLC*, 463 Mass. 258, 262 n.7 (2012).

6 *Id.*

7 See *Commonwealth* v. *Pon*, 469 Mass. 296, 312 n.23 (2014).

8 All BLS Formal Guidance documents are available at https://www.mass.gov/lists/superior-court-business-litigation-session-procedural-orders-and-formal-guidance .

(7) Do you have any guidance about the types of documents by category that you will impound pursuant to the Trial Court's Uniform Rules on Impoundment Procedure and any documents by category that you are unlikely to impound?

Salinger, J.: In BLS cases, most successful requests for impoundment are carefully limited to trade secrets or other confidential research, development, or business information. I rarely am convinced to impound other categories of documents.

Krupp, J.: I will usually order impoundment of the information listed in Rule 7(e) of the Uniform Rules of Impoundment Procedure, and confidential personal information on adequate explanation and justification.

Kazanjian, J.: Trade secret and confidential business information as well as any personal identifying information such as social security numbers, telephone numbers and the like.

Squires-Lee, J.: Trade secret information, confidential business information, private personal information, human resources information about named non-party individuals, medical information.

(8) With respect to confidentiality / protective orders, what is your view about documents identified as Attorneys' Eyes Only?

Salinger, J.: A category of "Attorneys' Eyes Only" documents is a bad idea. Counsel should not draft or agree to a proposed protective order that can be used to keep anyone other attorneys handling the litigation from seeing certain key documents. Where a party is a business entity, it may be appropriate to limit which client representatives or categories of client representatives may see certain, narrow kinds of documents. But a lawyer cannot prepare and try a case if only they, and not their clients, are permitted to see certain things.

Krupp, J.: I will allow the parties to agree to an "Attorneys' Eyes Only" designation, but believe that such a designation should be used extremely sparingly for the reasons Judge Salinger has listed. Although I have seen parties agree to a variety of formulations of when an "Attorneys' Eyes Only" designation may be used, I often think of an "Attorneys' Eyes Only" designation being limited to documents where there is a substantial likelihood that the disclosing party will suffer irreparable harm if the document is disclosed to the receiving party's client. With that said, because (thankfully!) I am rarely asked to decide challenges to confidentiality designations, it is difficult for me to assess how often "Attorneys' Eyes Only" designations are used and whether they actually create a practical impediment to lawyers advising their clients.

Kazanjian, J.: I agree with Judges, Salinger, Krupp and Squires-Lee. Consider being specific about the individuals the attorney needs or wants to assist in reviewing documents.

Squires-Lee, J.: In the vast majority of cases, the highest degree of confidentiality must include certain, perhaps identified and agreed-upon, client representatives to insure attorneys are able to consult with their clients and obtain the necessary information to advise their clients.

(9) What is your preference with regard to courtesy copies of pleadings, motions, and memoranda?

Salinger, J.: I have one answer for electronically-filed documents, and a different one for filings made in paper form.

The BLS judges recently issued a Formal Guidance, available on our website, that asks for courtesy copies of any electronically-filed papers that need immediate attention, electronically-filed memoranda longer than twenty pages, and electronically-filed papers with exhibits or attachments that exceed twenty pages in total. It explains that both paper and digital courtesy copies of these categories of electronically-filed documents are useful.[9]

Courtesy copies should be clearly marked as courtesy copies.

When documents are filed in paper form, I do not need or want courtesy paper copies. Courtesy electronic copies of voluminous exhibits that were filed in paper form, either on storage device or through accessible cloud storage, are very helpful.

Krupp, J.: Please see Formal Guidance. I do not need a courtesy copy of documents filed in paper form. If a courtesy copy is filed, it should be clearly marked as a courtesy copy.

Kazanjian, J.: Please see Formal Guidance. I also do not need a courtesy copy of documents filed in paper form.

Squires-Lee, J.: I agree with Judge Salinger. Courtesy copies of proposed findings of fact and rulings of law in cases tried to the Court, submitted in advance of the trial and in word format, not as a pdf, also will be extremely helpful.

(10) How can the parties and lawyers better use Superior Court Rule 20 to streamline and expedite their case?

Salinger, J.: Superior Court Rule 20 allows and encourages parties to propose, and ideally agree upon, case management rules that will allow for faster and less expensive resolution of their dispute. Parties can craft ground rules that will let a BLS case move forward with the speed and cost savings associated with arbitration, while letting the case be managed and perhaps be decided by an

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[9] All BLS Formal Guidance documents are available at https://www.mass.gov/lists/superior-court-business-litigation-session-procedural-orders-and-formal-guidance .

experienced Superior Court judge—at no extra cost to the parties—who will be able to give the case the attention it deserves (because of the smaller caseloads in the BLS sessions) and apply well understood law and rules of evidence. I especially encourage the parties to consider agreeing to the following.

Reasonable Discovery Limits. Discovery in high-stakes civil disputes keeps metastasizing. I see more and more requests limits to be imposed after the opposing party has noticed dozens of depositions or demanded responses to hundreds of requests for admission. I encourage counsel to propose reasonable limits on depositions, interrogatories, and requests for admission in the initial case scheduling order.

Waiving Findings of Fact in Bench Trials. When a case is being tried without a jury, try to convince your client and all other parties to waive the default rule requiring a judge to make detailed findings of fact, and agree instead to submit detailed special questions for the judge to answer. Your clients will avoid the cost of having you prepare proposed findings of fact and rulings of law, and get a much faster decision from the judge.

I am happy to have the equivalent of a jury charge conference, and to prepare (with the parties' input) written instructions to myself, to make clear how I will instruct myself on the governing law.

I am also happy to go beyond the short kinds of verdict slips that we typically submit to juries, which often just ask is there liability (yes or no) and, if so, what dollar compensation is appropriate. Some parties have asked me also to answer long sets of special questions about detailed factual issues that may not be dispositive, but might help guide may thinking about the ultimate questions in the case.

If we have the equivalent of a jury charge conference and I answer all the special questions that you and your client think are important, that should address any concern that your client will inadvertently lose the opportunity to have a legal error corrected on appeal by waiving detailed findings.

Krupp, J.: Rule 20 encourages parties to think outside the box. What do the parties need for the particular case? Is there one key deposition needed on each side and then a stay of discovery while the parties engage in mediation? Is the case so contentious that the parties need scheduled hearings on discovery disputes every 60 days? Will a modified presentation of discovery disputes through the exchange of short letters to the court be sufficient to frame most of the discovery disputes?

In my view, Rule 20 provides a non-exclusive list of discussion topics for the initial Rule 16 conference, interim status conferences, and the final pretrial conference. What the parties want/need at the beginning of the case may be

different from their assessment after they have taken four depositions, or after the grant of part of a summary judgment motion. The option to tailor the court's handling of a case to the unique needs of the case should always be on the table.

I also echo Judge Salinger's encouragement for the waiver of detailed findings and rulings after a jury-waived trial, and for the presentation of expert testimony through affidavits (even if only in lieu of, or as a supplement to, direct examination) at a jury-waived trial, under Rule 20(2)(h). These are innovations that streamline the trial process and result in faster, equally reliable results.

Kazanjian, J.: I encourage Rule 20 conferences for all the reasons outline by my colleagues. I have found bench trials with waivers of detailed findings to be a very efficient and effective way to resolve disputes.

Squires-Lee, J.: Superior Court Rule 20 is underutilized and should be considered a case management tool by all counsel. I encourage the discussion of appropriate discovery limitations at the initial Rule 16 conference. I encourage the use of Superior Court Rule 20 to forego written findings and rulings of law in bench trials and, like Judge Salinger, will require counsel to file a joint statement, or competing statements if they are unable to agree, of the applicable law. The verdict I issue on the factual special questions presented will make clear the law I applied.

(11) Do you have any other case management tips or preferences for BLS cases?

Salinger, J.: Do not hesitate to ask the session clerk (after speaking with opposing counsel, of course) to schedule a case management conference if one would be helpful. We aim to have an initial scheduling conference soon after a case is filed in or transferred to the BLS. If the case needs immediate attention, or if several months go by and no Rule 16 conference has been scheduled, ask the clerk for help. And if something arises in the middle of a case that can most efficiently be resolved through a conference without formal motion practice, let me clerk know and will schedule a time to meet on the record.

I agree with Judges Krupp and Kazanjian on the importance of conferring with other parties before presenting an issue to the court.

Krupp, J.: The key to an effective Rule 16 conference is communication between counsel in advance. It is usually obvious to the court when the parties have conferred in an effort to agree to a workable schedule and when they have not.

We try to be flexible and available. If you think your case could benefit from a conference with the court, please contact the session clerk and we will likely schedule a conference. In BLS, we have the flexibility to see the parties quickly

on disputed matters. Often a status conference can save the parties hours of work on motions and cross-motions.

Kazanjian, J.: It is very important that the parties confer before presenting the issues to the court. If I do not feel that you have made a good faith effort to resolve an issue, I may require further consultation. I urge you to go beyond just sending emails to each other. It is often more productive to have a real conversation with opposing counsel before presenting matters to the court, and to think seriously about ways you are willing to compromise on issues.

Squires-Lee, J.: I agree with all my colleagues.

DISCOVERY

General

(1) Do you generally permit extensions of the tracking order when the parties jointly request an extension? If so, under what circumstances do you not permit an agreed-upon extension of a tracking order?

Salinger, J.: I will generally allow requests to modify a tracking order where the parties have a good reason for seeking the change, the revision seems reasonable, and it will not require any change in a trial date. It is always easier for me to allow a joint request than one that is bitterly opposed.

Krupp, J.: I try to set an initial schedule that will not require an extension. I will grant extensions for good cause. I am less inclined to grant an extension that appears to be based on a lack of diligence by a party or counsel.

Once trial dates are set in the BLS, the time is held for the particular case and, at least close to trial, it is difficult to find another case that can be slotted in for trial. I rarely allow motions to reschedule trials, particularly when they are filed close to the trial date. I will only continue a trial for very good cause.

Kazanjian, J.: I will generally allow joint motions for extensions of tracking orders when it is the first time and with a showing of good cause but there must be a specific reason stated in the motion that warrants the extension. The parties should early on try to develop a realistic view on the time it will take to complete discovery.

Squires-Lee, J.: I will allow the first such motion if for good cause. Any further motions will require a Rule 16 conference. If the parties are having difficulty meeting the discovery deadlines established at the start of the case, they should ask the clerk to schedule a Rule 16 conference. Thereafter, when a revised schedule is established, I will not allow further extensions unless there is a showing of **unforeseen** good cause.

(2) Do you generally grant permission to parties to serve in excess of thirty interrogatories? If not, under what circumstances do you grant permission?

Salinger, J.: I do not recall anyone ever asking for more than thirty interrogatories. And I'm not sure why doing so would ever be a good idea.

Krupp, J.: Only if a good reason is shown.

Kazanjian, J.: I suppose I might allow such a motion but only in very rare circumstances.

Squires-Lee, J.: I cannot imagine a good reason for doing so.

Electronically Stored Information

(1) Do you require parties to confer regarding a plan addressing discovery of electronically stored information?

Salinger, J.: Yes, absolutely. The parties should confer and agree how to make the discovery process work for all concerned. Where the parties are using search terms to find potentially responsive electronic documents or information, the parties will need to plan for in build in an iterative process. Search terms that produce millions of hits are too broad. Those that file to turn up much of anything are too narrow. Working through the mechanics of ESI discovery needs to be a cooperative process.

Krupp, J.: Yes.

Kazanjian, J.: Yes.

Squires-Lee, J.: Yes.

(2) Do you have a standard order or established guidelines for the discovery of electronically stored information and/or for specific aspects of the list set forth in Rule 26(f)(3)? Do you generally include anything in addition to the list set forth in Rule 26(f)(3)?

Salinger, J.: I do not have a standard order or guidelines for discovery of electronically stored information. Parties have generally been able to agree upon the standards and parameters that make sense for that case.

Krupp, J.: No.

Kazanjian, J.: No.

Squires-Lee, J.: No. But, like Judge Salinger, I expect the parties to be able to work together in good faith to establish parameters that make sense.

(3) What do you consider in issuing an order for allocating expenses for discovery of electronically stored information?

Salinger, J.: Like Judge Krupp, I have trouble recalling this issue coming before me.

Krupp, J.: I have rarely been presented with the issue.

Kazanjian, J.: I would consider the breadth of the request and the burden it would impose on the responding party. I would also consider proportionality issues, such as the cost to respond to the request versus the amount in dispute.

Squires-Lee, J.: It depends on the issues in the case, whether the responding party is a named party or not a party to the case, the scope of the electronic discovery sought, and the burden on the responding party.

Expert Discovery

(1) Do you require plaintiffs to disclose their expert reports before defendants do, or do you require the parties to make the disclosures simultaneously?

Salinger, J.: If plaintiffs are the only parties with a burden of proof at trial, I usually require them to make their expert disclosures first, with rebuttal disclosure of defendants' experts to follow. If there are counterclaims or if for some other reason defendants also have a burden of proof, I usually require simultaneously initial and rebuttal expert disclosures.

Krupp, J.: In a case where the parties have equal knowledge of the issues, e.g. a case that turns on contract interpretation, or in cases where both sides are bringing claims, simultaneous initial expert disclosures make sense, followed by simultaneous rebuttal expert disclosures. Otherwise, plaintiff will ordinarily make its expert disclosure first followed by defendant's disclosures.

Kazanjian, J.: I follow the same practice as Judge Krupp.

Squires-Lee, J.: Same practice as my colleagues. Generally, staggered expert disclosure makes sense. Sometimes, it does not.

(2) How detailed do you require expert disclosures to be?

Salinger, J.: Detailed enough to give the opposing parties fair notice of the subject matter on which any expert is expected to testify at trial, the substance of their expected opinions and other testimony, the grounds for each of the expert's opinions, and the nature and basis for the witness's expertise. There should be no surprises about the scope of an expert's testimony.

Krupp, J.: Expert disclosures should describe in detail the expert's qualifications, opinions and bases for those opinions. Any party calling an expert must understand that opinions and the bases for those opinions that are not fairly disclosed in the expert disclosures, including the expert's report(s), are likely to be excluded at trial.

Kazanjian, J.: Expert disclosures must describe the expert's opinion in sufficient detail to give the opposing party fair notice of the opinion and the basis for the opinion, and a fair opportunity to cross-examine. I will exclude testimony that

goes beyond a fair reading of the substance of the disclosure if I feel that the opposing party is prejudiced.

Squires-Lee, J.: I agree with all of my colleagues. Trial is never by ambush and the disclosures must be sufficient to provide a fair opportunity to understand the nature and basis of the opinion and prepare for cross-examination.

(3) Do you usually permit expert depositions? What are your considerations in determining whether an expert may be deposed?

Salinger, J.: Parties usually reach agreement as to whether they want to depose expert witnesses. If there is a dispute, the party seeking to depose an expert must show that doing so is needed to obtain information to cross-examine the expert and will likely streamline the presentation of the case at trial.

Krupp, J.: The parties can, and often do, agree to expert depositions. Obviously, a potentially unavailable expert may be deposed to preserve the expert's testimony at trial. Expert depositions are also useful if the expert disclosures are ambiguous or not comprehensive, to mitigate prejudice if the expert is disclosed late, where the proposed expert testimony is novel, if there is a meaningful challenge to an expert's qualifications, or when a deposition may help to resolve the case.

Kazanjian, J.: My hope is that the parties can reach agreement about whether expert depositions would be warranted either to clarify issues or preserve testimony. I am not opposed to ordering expert depositions if it would serve to narrow or expedite issues.

Squires-Lee, J.: I agree with Judge Kazanjian.

Discovery Disputes

(1) Do you ordinarily hold hearings on discovery motions? If so, under what circumstances do you decide discovery motions without a hearing? If not, under what circumstances do you hold a hearing?

Salinger, J.: Yes, I usually hold a hearing on discovery motions. But sometimes the issues are clear enough on the papers that a hearing does not seem useful.

Krupp, J.: About half the time I hold hearings on discovery motions. I am more likely to hold a hearing where there are multiple issues, the issues appear particularly complex, where I perceive that the parties have not adequately conferred about the issue, or where it appears the lawyers' relationship is interfering with their ability to resolve the discovery dispute.

Kazanjian, J.: Yes. I usually hold a hearing on discovery motions. In my experience, it is rare that the issues can be decided on the papers. These hearings are almost

always in person and the parties should try to narrow the issues prior to the hearing.

Squires-Lee, J.: I will hold a hearing if I need information from counsel not provided in the papers. If I can rule on a discovery motion on the papers, I will do so.

(2) Do you permit parties to request an expedited decision or hearing on a discovery dispute without the need for motion practice and, if so, how?

Salinger, J.: If the parties have diligently conferred, and narrowed a discovery dispute to a simple question that they are confident I can resolve without formal motion practice, they should explain the issue in a short (2- to 3-page) joint letter that explains each party's position and asks for a conference to discuss the issue with me. I'm happy to have those kinds of discussions. If it turns out that I need more information, we can always turn to more formal motion practice.

Krupp, J.: Yes. In appropriate cases, at the initial Rule 16 conference I have begun to schedule a status conference 30-60 days before the end of discovery – and more frequently if the parties believe it necessary – to address the status of discovery. The purpose of these conferences is to hear the parties on any discovery disputes that the parties have been unable to resolve after good faith discussions under Superior Court Rule 9C, which disputes are framed for the court in brief letters submitted shortly before the conference. Often, I am able to resolve the dispute or give the parties enough of my thinking about the dispute to permit them to resolve it. This process does not prevent the parties from filing more formal discovery motions under Superior Court Rule 9A, but it provides a streamlined option for addressing most discovery matters.

Kazanjian, J.: I follow the practice outlined by Judge Krupp. However, in order for the court to provide an expedited decision on a discovery matter, the issue must be precisely framed and capable of discussion in the short letter permitted.

Squires-Lee, J.: I have not done so in the time standards sessions, but would engage in the process described by Judge Salinger.

(3) Under what circumstances, if any, have you imposed, or are you likely to impose, sanctions in discovery disputes? What form have these sanctions taken?

Salinger, J.: Routine disputes about the scope of discovery do not justify a request for sanctions. But I have sanctioned parties for deliberate destruction or attempted destruction of relevant evidence. For example, I dismissed the counterclaims of a defendant that intentionally destroyed important financial records, and ordered a different party that tried to delete electronic files after litigation began to pay all costs incurred to the files.

Krupp, J.: Sanctions are appropriate for failure to abide by a prior court order, or for conduct during discovery for which there is no good faith basis (e.g. interposing

obstacles to discovery of clearly discoverable evidence; behavior that disrupts a deposition; failing to prepare a Rule 30(b)(6) witness so that the Rule 30(b)(6) deposition is a waste of time, etc.). Sanctions most often include the attorneys' fees and costs of the injured party, but I have also dismissed cases, and substantially curtailed arguments that could be advanced at trial, as sanctions in appropriate situations.

Kazanjian, J.: I do not think sanctions are appropriate in the ordinary discovery dispute. It would require something more egregious in my view, such as failing to follow a court order, or intentionally destroying or hiding information. Sanctions might be warranted for repeated violations of discovery rules. I am not of the view that every instance of professional discourteousness needs to be presented and dealt with by the court. It is your reputation in the legal community that is at stake when you do not act in a professional and courteous manner towards other attorneys.

Squires-Lee, J.: I will impose sanctions for deliberate discovery abuses including, without limitation, (i) failing to comply with a court order, (ii) inappropriate, uncivil, and unprofessional behavior at a deposition that interferes with the pursuit of discoverable information (such as repetitive, lengthy, speaking objections and / or conferring with a witness on answers to questions), (iii) intentional obfuscation of discoverable material short of spoliation, (iv) failing to prepare a Rule 30(b)(6) deponent, and (iv) any other conduct intended to impede the administration of justice.

(4) What level of detail do you require or prefer for parties' statements pursuant to Superior Court Rule 30A(3)(c) regarding the scope of the search for responsive documents? Are there occasions in which you have ordered a party to serve a revised statement?

Salinger, J.: Parties need to document all the physical and electronic locations where responsive documents might be found, and either certify that they have all been searched or explaining which have not been searched and why. Parties can usually resolve disputes over the adequacy of a Rule 30A(3)(c) statement.

Krupp, J.: I have rarely been presented with the issue.

Kazanjian, J.: It depends largely on the circumstances and the complexity of the production. The responding party should provide enough detail and specificity for opposing counsel to evaluate whether the responding party has adequately complied with its obligations.

Squires-Lee, J.: It depends on the case, but the intent of the rule is to require a description that enables the other side to understand fully the scope of the search conducted.

(5) How do you address emergency calls during depositions? How do you prefer parties to handle disputes that arise during a deposition?

Salinger, J.: I agree with Judge Kazanjian that this should be a rare thing. And, in my experience, it has been. Parties need to work cooperatively to resolve disputes about the scope and conduct of a deposition, ideally well before the deposition. If court assistance is needed to get a deposition completed, the parties should finish what they can, suspend the deposition, and then serve and file an appropriate motion or request a court conference. An emergency call to the court in the middle of a deposition would only be appropriate if it would not be possible to suspend the deposition and restart it after a court ruling.

Krupp, J.: I have rarely been presented with the issue. In almost all instances, the deposition can be halted, a transcript prepared, and the issue presented to the court by motion under Superior Court Rule 9A. If a party believes an emergency call to the court is necessary, they may contact the session clerk to schedule an emergency hearing.

Kazanjian, J.: This should be a rare occurrence. The parties should be able to work cooperatively to resolve disputes during depositions. If there is an emergency, the parties should contact the clerk to see if a judge is available.

Squires-Lee, J.: I agree this is and should be very rare. In most circumstances, including bad faith conduct, the aggrieved party should make the record clear, finish the deposition if possible or suspend the deposition if not, and file a motion under 9A. An emergency call to the clerk would be appropriate only in rare circumstances, such as the trial deposition of an elderly or ill witness.

MOTION PRACTICE.

(1) Do you have any policy or practice regarding granting motions for leave to file memoranda in excess of the specified page lengths?

Salinger, J.: I generally grant requests for a **reasonable** number of extra pages. But many lengthy legal memoranda would be more effective if they were pared down to their essence. In most cases, if a party can effectively presented their position in 25 pages, then with proper editing it should be able to do so in 20 pages or less.

Krupp, J.: I disfavor motions for additional pages. I will grant them in particularly complicated cases where a good reason is shown.

Kazanjian, J.: I rarely allow such motions. If a party feels the need to file additional pages, they should move to do so before serving or filing the memorandum. I will allow the motion only if there is a specific reason why additional pages are necessary. I encourage parties to be concise and focused in their written filings.

Squires-Lee, J.: I will not grant such a motion unless it is filed in advance and will entertain a motion to strike the extra pages filed without such a motion.

(2) Do you ordinarily hold hearings on dispositive motions? If so, under what circumstances do you decide motions without a hearing? If not, under what circumstances do you hold a hearing?

Salinger, J.: I always have hearings on contested dispositive motions in BLS cases.

Krupp, J.: I hold hearings on motions that carry a presumptive right to a hearing under Superior Court Rule 9A(c)(3), unless the motion is assented-to or unopposed.

Kazanjian, J.: I always have hearings on dispositive motions.

Squires-Lee, J.: Always.

(3) Are you willing to stay discovery during the pendency of a motion to dismiss? If so, what factors do you consider?

Salinger, J.: If a motion to dismiss may well dispose of the case, I will generally allow a motion to stay discovery until I can decide the motion to dismiss. A plaintiff would have to make a strong showing of unfair prejudice to convince me not to stay discovery for a short time until I can decide whether the case will survive the motion to dismiss. Best practice when seeking a stay of discovery is to file a separate motion seeking that relief. Do not just include that request in your motion to dismiss papers. If you do, the judge may not see the stay request until preparing for a hearing on the motion to dismiss.

Krupp, J.: Whether to stay discovery depends on the reasons for and the strength of the motion to dismiss, how long I think it will take me to decide the potentially dispositive motion, the nature of the dispute, the potentially fleeting nature of the information sought to be discovered, and the burden of discovery. In appropriate cases, I will stay discovery, or allow only certain discovery to proceed, pending a Rule 12 motion.

Kazanjian, J.: I am willing to stay discovery pending a ruling on a Rule 12 motion.

Squires-Lee, J.: I will consider the arguments. Sometimes it is appropriate to stay discovery pending a Rule 12 decision.

(4) Do you generally allow parties to file partially dispositive motions? What factors do you consider most important in deciding?

Salinger, J.: Partially dispositive motions make good sense when, if allowed, they would materially narrow the scope of discovery, facilitate settlement discussions, or simplify any trial. In my experience, counsel who seek leave to file a partially dispositive motion usually present good reasons for doing so, and therefore I generally allow those requests.

Krupp, J.: In my experience, the bar seems to understand the concerns addressed in the Procedural Order of the Business Litigation Session Regarding Partially Dispositive Motions (Mar. 1, 2019). As a result, I have allowed most requests.

Kazanjian, J.: I would generally allow the filing of motions for partial summary judgment. It is my view that a motion for partial summary judgment can help narrow the issues and facilitate settlement.

Squires-Lee, J.: I agree with my colleagues.

(5) How do you prefer parties cite to facts and exhibits in the summary judgment brief or memorandum? For example, should parties cite only to the statement of facts or also to the specific supporting material?

Salinger, J.: Each time a motion or memorandum refers to part of the record, the reference should include the exhibit number and a specific page and (where appropriate) section reference, so that I can immediately turn to the supporting evidence. Citations to deposition transcripts are more helpful when they point me to specific line numbers. Citations to written agreements are more helpful when the point me to specific section number. I like to see this in all memoranda that refer to supporting exhibits or affidavits, not just in summary judgment briefs. A memorandum supporting or opposing a motion for summary judgment should cite to the statement of facts to show that something is not in dispute or is hotly contested. But I would like to see a direct and specific cite to the supporting record evidence as well.

Krupp, J.: When reading a memorandum, I want to be able to find the key factual support for a statement as quickly and easily as possible. This is not a one size fits all answer. In some cases, the parties might number each page of the record appendix and cite to the page number (e.g. RA 37). Sometimes, for context, it is helpful in the memorandum for the reader to know that the authority isn't just at some page in the record appendix, but that it comes from an opposing party's own deposition (e.g. Ex. 17 - Def. Dep. 72:12). The citation form that you choose should be clearly explained and easily decipherable. I read the statement of material facts to get a picture of the nature of the case and the parties' disputes, and I refer to it later to access the record while I am writing. In the brief or memorandum, I find that clear citation to the record is more helpful.

Kazanjian, J.: I agree with Judges Salinger, Krupp, and Squires-Lee.

Squires-Lee, J.: The Joint Appendix must comply with revised Superior Court Rule 9A(b)(5)(v)(A) and include an appendix and consecutively numbered pages. The purpose of the rule change was to insure the Court's ability to quickly find cited material. Therefore, you should simply cite to the page number of the Joint Appendix and need not identify the source (i.e., affidavit of Ms. X) unless relevant to your argument.

(6) How do you prefer parties to respond to Rule 9A(b)(5) statements that do not comply with the rule? For example, do you prefer motions to strike or objections in the response or something else?

Salinger, J.: If a non-moving party disputes a material fact without citing contrary evidence, or cites evidence that does not actually create a factual dispute, the moving party should point that out in their reply brief. I will deem those facts to be admitted for the purposes of the summary judgment motion. A motion to strike for non-compliance with Rule 9A is generally not necessary.

Other violations of Rule 9A(b)(5)—like inserting commentary about relevance or materiality, or trying to characterize a written document—undermine the credibility of the violator.

Also, remember that creating a Rule 9A(b)(5) statement of material facts is an act of advocacy, not an exercise in creating a voluminous and sterile record. Leave out all the immaterial background facts and focus on what matters for the purpose of the summary judgment motions.

Krupp, J.: When objections to a party's non-compliance with Rule 9A(b)(5) appear in the statement of undisputed facts, it is distracting, usually quite repetitive, and makes it difficult to read and effectively use the statement of undisputed facts. I prefer a failure to comply with Rule 9A(b)(5) to be first discussed between the parties and, if it cannot be resolved by agreement, then a motion should be filed. The motion, of course, must demonstrate compliance with Superior Court Rule 9C, so conferring about a party's non-compliance with Rule 9A(b)(5) is necessary. Such a conference should occur as soon as the non-compliance is recognized to give the non-complying party an opportunity to bring their papers into compliance.

Kazanjian, J.: I am not in favor of motions to strike. The parties should work together prior to filing the motion at producing a Rule 9A(b)(5) statement of facts. If they cannot resolve the issues, than the parties should point out the deficiencies in their memoranda and ask the court to either disregard certain facts or deem certain facts admitted. I will make the appropriate rulings based on those arguments.

Squires-Lee, J.: I agree with all my colleagues. In particular, I would emphasize that a dispute of fact without citation to admissible evidence will be deemed admitted.

(7) When, if ever, do you permit sur-replies? If you permit them, do you place any limitations on them?

Salinger, J.: Rarely. The few times I have allowed a sur-reply it was to respond to an important point or significant authority raised for the first time in a reply memorandum, and limited to just a few pages.

Krupp, J.: Sur-replies may be useful to address a point raised for the first time in a reply, but I rarely allow many pages for a surreply. When faced with a new argument in a reply brief, the party opposing a motion should think about whether the new argument really requires a surreply or whether it may be reasonably addressed at the time of argument.

Kazanjian, J.: I only allow very short sur-replies when there is a new issue raised in a reply.

Squires-Lee, J.: Rarely and, like Judge Kazanjian, only to respond to a new issue raised in a reply and limited to three pages.

(8) Do you impose specific time limits for argument at a hearing?

Salinger, J.: I do not set specific time limits for motion hearings, but will ask questions to focus counsel on the issues that I most need help on. Parties can expect that I have read and thought about the papers. During oral argument counsel should focus on the key reasons why I should rule in their client's favor. Do not come to court planning to repeat everything in your written submissions. If someone is taking an unreasonable amount of time to present their client's arguments, I will let them know.

Krupp, J.: Generally, no. Sometimes I will set a time limit if the press of other matters requires it. I have also rescheduled arguments, or continued argument to a second day, if the press of other business does not allow sufficient time to hear the parties on key points.

Kazanjian, J.: I generally do not set time limits. I find the arguments to be useful and interesting. It is an opportunity for counsel to educate the court about the case and issues. I welcome that opportunity. I will try to focus counsel on the key points if their argument is not otherwise focused.

Squires-Lee, J.: No but the parties should expect that I have read the papers and will be familiar with the issues so they should not begin with first principles.

(9) Do you have any policy or preference with respect to having multiple attorneys argue on behalf of a single party during a hearing?

Salinger, J.: When different lawyers will address different issues or different motions, or when a more senior lawyer wants to be able to support a more junior colleague by adding something important, I am happy to hear from more than one lawyer representing the same party. But a tag-team approach, where a second lawyer will try to tag in and add something whenever they think it may help their client's cause, is not effective advocacy and should be avoided.

Krupp, J.: I am fine with multiple attorneys arguing for a single party. When more than one attorney will argue for a party, it is helpful to me to know from the beginning of the argument who will address particular points.

Kazanjian, J.: I am fine with multiple attorneys arguing as long each particular issue is handled by a single attorney. I am not in favor of the tag-team approach described above by Judge Salinger.

Squires-Lee, J.: I welcome argument from multiple attorneys, with notice regarding which lawyer will address which issues.

(10) Do you have any policy or preference with respect to associates handling just part of a hearing on a motion?

Salinger, J.: The BLS judges strongly supporting letting associates play an active role in court. We recently issued a Formal Guidance, available on our website, emphasizing our strong preference that associates be given opportunities to handle parts or all of motion hearings and other court proceedings, including trials. This policy statement says:

> We welcome and encourage active participation by less senior attorneys in all court proceedings.[10] To facilitate this, we will let two or more lawyers handle different parts of a hearing, give a supervising attorney time to confer with and provide guidance to a less senior colleague during a court proceeding, and permit a more senior attorney to add something after a less senior colleague finishes arguing a motion. The BLS judges will accommodate other reasonable requests that would allow less experienced counsel to play an active role in a court proceeding.

Krupp, J.: I am comfortable with – and appreciate! – associates handling any part of a motion hearing.

Kazanjian, J.: I encourage the participation of associates.

Squires-Lee, J.: I wholeheartedly support associates being given the opportunity to argue and play an active role in court including handling part of an argument.

(11) Do you allow/require supplemental briefing after a hearing? If so, under what circumstances?

Salinger, J.: If I raise an issue during a motion hearing that no party had anticipated or addressed, I will let the parties submit short supplemental briefing limited to that new issue. Otherwise, I rarely welcome yet more briefing after a hearing.

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[10] This is the policy of the entire Superior Court, not just BLS judges. See the Superior Court Policy Statement Regarding Less Experienced Counsel (Dec. 1, 2017) at: https://mass.gov/news/superior-court-policy-statement-re-newer-attorneys .

Parties should never submit additional briefing or letters after a hearing without leave of court.

Krupp, J.: Yes, but only on my request and only if a potentially outcome-determinative issue was not adequately briefed by the parties.

Kazanjian, J.: I will rarely allow supplemental briefing, and only when there has been an issue raised that was not covered in the brief's filed in advance of the hearing.

Squires-Lee, J.: Almost never and only upon my request. I will, however, allow a party to respond to a discussion of an allegedly controlling or persuasive case that was not raised in the papers or discussed prior to the hearing.

(12) When do you prefer *Daubert-Lanigan* motions be brought?

Salinger, J.: As early as possible. Some *Lanigan* motions challenge the expertise of a particular witness and, if allowed, can be cured by hiring a new expert. Such a motion needs to be resolved early enough that a party could, if need be, find a new expert. Other *Lanigan* motions, if allowed, could require a party to alter their trial strategy. It would be unfair for that to be sprung just before trial.

Parties need to identify any *Lanigan* motion in the joint pretrial memorandum and ask that it be scheduled for a hearing well in advance of trial. The Superior Court's "Notice to Appear for Final Pre-Trial Conference" requires this, and says that "[f]ailure to inform the court in the pre-trial memorandum of a party's intent to file a *Daubert-Lanigan* motion may, in the discretion of the court, constitute a waiver of the motion."

Krupp, J.: *Daubert-Lanigan* motions should be brought as early as possible so the logistics of having the motion heard may be addressed. *Daubert-Lanigan* motions usually should be resolved by the trial judge. Judges generally serve in BLS for six-month assignments, rotating at the end of June and the end of December. If a trial is scheduled for March, it should not be difficult to schedule a *Daubert-Lanigan* motion with the trial judge in January. But if trial is scheduled for July, *Daubert-Lanigan* may have to be scheduled much earlier, or arrangements may have to be made to get the matter before the trial judge.

Kazanjian, J.: I concur with Judges Salinger and Krupp on this issue.

Squires-Lee, J.: I agree with Judges Salinger and Krupp.

(13) Under what circumstances do you permit an evidentiary hearing in connection with a *Daubert-Lanigan* motion?

Salinger, J.: Most *Lanigan* motions in BLS cases do not need an evidentiary hearing because they are based on the written expert disclosures and do not turn on any facts that are in dispute. If a party thinks I will need to make findings of fact

in order to decide a *Lanigan* motion, they should explain what kind of evidentiary hearing is needed in their joint pretrial memorandum and when we are setting a schedule for filing and hearing the motion.

Krupp, J.: Novel expert opinions on topics that are not routinely presented in court often require an evidentiary hearing.

Kazanjian, J.: Whenever it is necessary for me to make findings of fact in order to resolve the issue.

Squires-Lee, J.: When necessary.

(14) Do you have any preferred practices for parties' seeking preliminary injunctions or any other preliminary relief? In what circumstances, if any, will you grant preliminary relief ex parte?

Salinger, J.: Here are a few thoughts about motions for preliminary relief.

Emergency Filings. If your client needs the court to act on an emergency basis, the motion itself should explain the nature of the emergency and the specific time frame within which a court decision is needed. It is a big help to know whether a particular emergency needs to be resolved today, two days from now, or two weeks from now. I have received truly emergency TRO motions in the morning, held a hearing at 2pm that afternoon, and issued decisions later that day or first thing the next morning. But sometimes a hearing in a week and a decision a week later is all your client really needs.

Proposed Orders. Though I do not need a proposed form of order for every motion, please include a proposed form of order as an attachment to any motion seeking a preliminary injunction or other complex court order. And remember that, under Mass. R. Civ. P. 65(d), a preliminary injunction must be self-contained and may not refer to other documents.

Ex Parte Relief. I will almost never grant preliminary relief without giving the other side a chance to be heard. I am mindful of the constitutional due process constraints on granting ex parte relief, and the fact that I almost always learn things from the opposition to such a motion that affect my decision.

Opposition Papers. Please get them to me in advance if at all possible. If you are scrambling to pull together a written opposition and supporting affidavit for a hearing in a day or two, please aim to get me your papers at least an hour before the start of the hearing.

Evidentiary Hearings. Parties do not often ask for an evidentiary hearing on a motion for preliminary relief, because they are able and prefer to present all necessary evidence through affidavits and exhibits. But if you think you need a short evidentiary hearing, confer with opposing counsel and then request one

through the session clerk. For example, if a moving party has obtained a very short order of notice, the opposing party may wish to present 20 minutes of direct testimony rather than scramble to prepare and file an affidavit. Or, if key facts are contested, it may be helpful to arrange a short evidentiary hearing with limited time for each side to present evidence and cross-examine the opposing witness. Though a judge may resolve factual disputes and make credibility determinations based on affidavits, there can be real value to giving the judge a chance to hear from a key witness or two.

Pre-Hearing Discovery. Sometimes a very short period of focused discovery, followed by supplemental briefing, is the best way to let the judge make an informed decision on a motion for preliminary relief.

Krupp, J.: I do not have particular preferred practices. Papers related to preliminary relief should contain all facts upon which the party wants the court to rely. Those facts should be presented by affidavit or otherwise in a form the court may consider. Lawyers should not assume an evidentiary hearing will be allowed. In addition, memoranda of law should focus on the likelihood of success on the merits *and* why the harm that will befall the movant without the injunction will truly be irreparable. Without both, you are unlikely to prevail on a request for a preliminary injunction. Ex parte injunctive relief will be granted only if notice is reasonably likely to render the relief unavailable, or if truly irreparable harm will occur in the interim.

Kazanjian, J.: I will rarely allow ex parte relief. If you are seeking ex parte relief, you must clearly state how you meet the legal requirements. In all cases, it is helpful if the moving party is specific about what they are seeking the court to order. In that regard, I prefer to have a proposed order in advance.

Squires-Lee, J.: I agree with all my colleagues. In addition, although lawyers should not assume there will be an evidentiary hearing, they likewise should not assume that evidence will not be taken.

(15) Do you conduct hearings on dispositive motions via videoconference or in the courtroom? Will you entertain joint requests made by the parties to hold a hearing via videoconference or in the courtroom?

Salinger, J.: I prefer to have hearings on dispositive motions in person. We can broadcast the in-person hearing by video conference so that clients and other interest parties may listen in and observe. But I will conduct such hearings by video conference if I am convinced there is a good reason to do so.

Here are a few tips for appearing in court by video.

- Make sure in advance that you have an adequate internet connection, you can be heard, and you can be seen (confirm that your camera is centered on

your face and upper torso, avoid backlighting, and make sure that your face is well lit).

- Look at your camera when speaking, and position your camera so that if you look at my image or opposing counsel's image you are looking close to the camera. It can be distracting if appears that counsel is talking to someone off camera rather than to their video audience.
- Resist the temptation to read from a script on your screen. Doing so will be obvious and make your presentation less effective. If you were in a courtroom for a motion hearing, you would want to be engaged in conversation with the judge, not reading from a prepared text. Do the same thing during a video appearance.
- If appearing before me by video conference, you should conduct yourself and dress the same way that you would if appearing in my courtroom.

Krupp, J.: I prefer to hear dispositive motions in person, but I understand that videoconferences mitigate health risks for those who are particularly vulnerable, save travel costs, and provide interested parties (e.g., clients, adjusters, associated lawyers, members of the public, etc.) an opportunity to observe the proceedings. Lawyers who prefer a hearing in the courtroom or by videoconference in a particular case should inform the court in their request for a hearing and/or should so indicate to the Assistant Clerk assigned to the session. The request should be made sufficiently in advance so that the court can decide the issue and other participants can adjust accordingly.

Kazanjian, J.: I have a strong preference for in-person hearings and am not likely to conduct hearings on dispositive motions by videoconference unless the parties have a good reason for it. If you are seeking a hearing by videoconference, please reach out to the clerk in advance.

Squires-Lee, J.: I prefer in person hearings for dispositive motions but am willing to be flexible when necessary. Counsel should raise the need for a hearing by video promptly with the clerk. I will also allow a hearing to be argued by counsel in person and broadcast for clients and others to be able to observe.

(16) Do you have any other tips or preferences for preparing and filing motion papers?

Salinger, J.: Here are a few other practices that I find to be very helpful. Plus one that is required by the Superior Court rules but not always followed.

The Motion Itself. All motions should specify the relief sought, in a form that would make sense if a judge were to endorse the motion itself as "allowed." The judge must be able to tell on the face of the motion what relief the moving party is seeking; please do not hide this important information in the supporting memorandum.

All motions should also briefly summarize, in a sentence or two, the key reason why the motion should be allowed. The summary should be case-specific. Stating that "this motion for summary judgment should be granted because undisputed material facts show the defendant is entitled to judgment as a matter of law" says nothing that judge could not figure out from the title "motion for summary judgment." But if a motion says that summary judgment should be granted because the facts show that all claims are time-barred, or that the defendant did not owe a duty of care as a matter of law, it will have done a good job of getting the judge oriented for the details to follow in the supporting memorandum.

Introductions to Memoranda. As they say in the newspaper business, don't bury your lede. Please include a brief introduction to each memorandum of law, ideally in a paragraph or two that explains the party's key arguments—and does so without merely repeating the motion itself. Just as opening statements at trial help the jury and judge absorb and understand the evidence to follow, so a clear opening to a legal memorandum will allow the judge to appreciate the significance of each point developed thereafter.

Tables of Contents. Please include tables of contents in any memorandum or request for findings that exceeds ten pages, and for any tabbed set of exhibits. I find tables of contents to be very helpful. In a memorandum they serve as an additional summary of the party's key points. In any large document or set of materials they help me find things quickly when working on a written decision. If a party submits a substantive memorandum that does not have a table of contents, I sigh and feel disappointed that counsel did not read this guidance in the BLS Bench Notes.

Document Title on First Page: If there is no way to make your case caption fit onto one page, please make sure that the document title still appears on the first page. It is very hard to work with a set of motion papers that all have an identical cover page without any visible document title.

Single Sets of Exhibits. Please coordinate with opposing counsel to ensure that the court receives only one copy of each exhibit, and that each exhibit number is used only once. This may mean the parties should coordinate in advance to prepare and cite to a single set of exhibits (for example, when there are going to be cross-motions for summary judgment) or that the responding party only adds exhibits that the moving party has not yet compiled, and identifies any additional exhibits beginning with the next number or letter in the sequence used by the moving party.

Page Numbers and Tabs. Any document longer than one page should have page numbers. Bates numbers on exhibits can be an effective way to identify specific parts of a record. Any paper attachments or exhibits should have tabs.

Oppositions. Though a motion must be supported by a separate memorandum, an opposition to a motion is a single document (perhaps supported by affidavits and exhibits). Please do not file an opposition plus a memorandum in support of the opposition; the opposition itself should be a memorandum that explains why the motion should not be allowed.

Thumb drives or Discs. If you provide copies of exhibits, courtesy copies of memoranda, or anything else on some portable storage medium, please label the thumb drive, disc, or other item with a short case name, docket number, and an indication of the contents. Unlabeled thumb drives or other devices have a way of getting separated from your carefully labeled envelope or sleeve. Also, if everything copied on a thumb drive is one the public record, and none of it has been impounded, there is no need to password-protect the drive.

Hyperlinks. I recently received a thumb drive with electronic copies of a set of voluminous exhibits, with a table of contents formatted with clickable links that would open each exhibit. Other parties have filed legal memoranda or post-trial requests for findings of fact and rulings of law that contain embedded hyperlinks to case law, statutes, and exhibits. These kinds of filings can be expensive and are not appropriate in most cases. But where the nature of the controversy justifies the cost of producing such a filing, such hyperlinked electronic filings can be very helpful to the judge.

Rule 9C Conferences. This Superior Court rule requires that counsel must confer to narrow areas of disagreement before filing any kind of motion. I expect that counsel will do so, and ask me to address only those issues that cannot be resolved despite diligent efforts by all parties.

Finally, I agree with my colleagues, Cicero, and Clemens.

Krupp, J.: Three small points:

First, the aphorism ascribed to many including Cicero and Mark Twain – "If I had more time, I would have written a shorter letter." – applies equally to legal writing. Even though it may take more time, trim your writing to only what is necessary. Many a brief that I receive could benefit from considerable editing. If you can write a memorandum in 12 pages, do not write it in 20.

Second, cross-motions that mirror the motion (or restate the arguments in the opposition) are unnecessary. For example, if a party files a motion to compel production of certain discovery, it generally is not necessary to file a cross-motion for a protective order from the same discovery.

Third, I strongly agree with Judge Squires-Lee that the zealous lawyer does not have to be aggressive, condescending, and derisive to the opposing party or opposing counsel to advance a legal argument. When a lack of civility creeps into a lawyer's legal writing, it undermines the credibility of that lawyer.

Kazanjian, J.: Short, concise and organized is the key. Like my colleagues, I am not interested in hearing attacks on opposing counsel or reading back and forth emails that are contentious and unprofessional. I encourage parties to focus on the issue they are asking the court to resolve.

Squires-Lee, J.: The best papers are clear, cogent, concise, and logical. They also never contain ad hominem or other inappropriate, unprofessional argument. Litigation can be contentious. Legal writing should not reflect that contentiousness but be professional and persuasive. I agree with the substantive comments of my colleagues as well.

(17) Do you have any other tips or preferences for motion hearings?

Salinger, J.: The most helpful oral argument on a substantive motion is a conversation between the lawyer and the judge, not a prepared lecture delivered to a passive audience. My goal is to make sure that I understand each party's position by the end of the hearing. I will have read and thought about the motion papers in advance. So get to the point. Make your opening count. Use the hearing to highlight the key points you need me to focus on, respond to the opposing party's best arguments, and answer my questions about things that are troubling me or that I need to learn more about. And don't forget to make clear what your client wants me to do.

Krupp, J.: I prefer to get to the heart of a matter quickly during argument and to focus on the arguments that matter most to each side's position. I will often ask a party if they have a case for the proposition they are arguing, or what case best supports their position. It is helpful if the lawyers have prepared for such questions.

Kazanjian, J.: I usually try to focus the hearing on the key issues. I may ask a lot of question to make sure that I am understanding your arguments. I appreciate lively (but respectful) debate.

Squires-Lee, J.: Oral argument can be powerful advocacy. I enjoy good oral argument. I will have read the papers and will have focused questions for you. I always want to hear about key controlling or persuasive cases. Keep in mind that rehearsed speeches are less helpful than intelligent, respectful discussion and debate.

PRETRIAL

(1) After the initial case management conference, do you generally schedule any further conferences (*e.g.*, status conference near or shortly after the close of fact discovery)?

Salinger, J.: During the initial case management conference, I typically will schedule another conference at the point when parties should know whether they will be seeking summary judgment. Sometimes that is at the end of fact discovery, and sometimes it comes after expert disclosures are complete.

Krupp, J.: Yes. I will generally set a second Rule 16 conference or status conference 30-60 days before the end of fact discovery. The circumstances of a particular case may also warrant other case management conferences before trial (e.g., after a mediation, a stay of proceedings, an interlocutory appeal, the addition of a new party, a change in counsel, a material amendment of a pleading, etc.).

Kazanjian, J.: Yes. Judge Krupp and I follow the same practices in BLS1.

Squires-Lee, J.: I expect I will schedule a next date after the fact discovery cut-off that we collectively decide on at the Rule 16 conference.

(2) When do you typically schedule the final pretrial conference?

Salinger, J.: We want to have the final pretrial conference as soon as all other pretrial work on the case is complete. If there is not going to be any summary judgment motion, that should be right after fact and expert discovery is complete. If one or more parties seek summary judgment, the final pretrial conference should take place soon after those motions are decided.

If your case is ready for a final pretrial conference that has not yet been scheduled, contact the session clerk (after speaking with opposing counsel, of course) and ask for one.

Krupp, J.: The final pretrial conference should be held, and trial scheduled, as soon as the case is ready for trial. If a summary judgment motion is not definite, I will sometimes set a final pretrial conference date at the Rule 16 conference, and will schedule the summary judgment motion to be heard on the date set for, and either in lieu of or in addition to, the final pretrial conference.

Kazanjian, J.: I follow the same practice as Judge Krupp in BLS1.

Squires-Lee, J.: I agree with Judge Salinger.

(3) At what point in the process do you set the trial date?

Salinger, J.: I will usually not set the trial date until discovery is complete and any summary judgment motions have been decided. The next event will be a final pre-trial conference, requiring submission of a joint pretrial memorandum in advance; that is when I will set the trial date.

In the BLS we give everyone a firm trial date, and do not schedule multiple trials at the same time. That system would break down if we set a trial date before we know whether the case is heading for trial.

Krupp, J.: I usually set the trial date at the final pretrial conference. In cases that are particularly cumbersome to schedule (e.g., cases that involve many parties, many out-of-state witnesses, many lawyers, speedy trial act issues, or a number of difficult-to-schedule expert witnesses, etc.), I will set the trial date at the case management conference. Often the duration of trial at that stage is a rough estimate, which must then be refined at the final pretrial conference.

Kazanjian, J.: I will generally set the trial date at the final pretrial conference. However, sometimes it is helpful to schedule a trial date earlier in the case.

Squires-Lee, J.: I expect to follow the procedure Judge Salinger detailed in BLS2.

(4) What information do you require parties to provide at pretrial conferences? Do you have a form or order regarding filings for the pretrial conference? What degree of evidentiary detail do you prefer or require in the pretrial memorandum?

Salinger, J.: I use the standard final pretrial conference order. Please make clear what claims and counterclaims are to be tried, and what issues you will need me or the jury to decide at the end of the trial. If it is a jury case, the joint description of the dispute to be read to the jury should be short and easy to absorb, providing only enough information for jurors to figure out whether they can approach the case with an open mind and be fair to both sides. As I discuss below, don't forget to flag any choice of law issues as well as affirmative defenses that must be resolved at trial. In the summary of anticipated evidence, I want just enough detail to give me a rough idea of what the trial will be about. Like Judge Kazanjian, I like to read the joint pre-trial memo before the final pretrial conference.

Krupp, J.: I use the standard form. I read the joint pretrial memorandum for several specific purposes. I want the parties to have prepared a robust description of the case to be read to the jury. Preparing this statement requires collaboration. It should contain facts about the case, and a description of each party's respective arguments, in order to help the parties and the court detect relevant juror bias. When I receive a joint pretrial memorandum in which the parties have not been able to agree to a joint statement of the case, it loudly signals a problem between counsel. I want a real witness list, not a list of the 100 names of people who appear in the discovery. I want to know what work has to be done by the parties and the court in order to get the case to trial (e.g., pending motions, issues with experts, witness availability issues, anticipated motions to narrow the issues to be tried, counts that will be dismissed, etc.). And I am looking for a meaningful estimate of the duration of trial.

Kazanjian, J.: I urge counsel to spend time in advance working together on the joint pretrial memorandum. It should represent counsel's best effort to resolve any disputed issues. You really should be able to agree on a statement of the case. The statement of the case is not the place for partisan advocacy. You should present a realistic witness list. I like to read the joint pretrial memo before the conference, so please do not wait to file it until you get to court. While it is important to flag issues, do not use the memorandum as a substitute for motions in limine.

Squires-Lee, J.: The joint pretrial memorandum should be fulsome and enable any judge to understand the case, the issues, the evidence, and the forthcoming trial upon review. It should attach all expert disclosures, so everything is in one place. A joint case description and realistic witness list is required. I too expect information about any outstanding issues to get the case ready for trial.

(5) Do you follow the standard pretrial schedule form or do you have a different preference or practice for pretrial scheduling? How far ahead of trial will you schedule motions in limine and request the submission of jury instructions, exhibit lists, verdict forms, and other pretrial items?

Salinger, J.: I always like to have a final trial conference, usually a week or two before trial. If you have unusually complex or difficult motions in limine that will take some time to decide, I will want to receive and hear argument on those motions further in advance of trial; in such a case, coordinate with opposing counsel and ask for a scheduling conference so we can work out a plan to get that done.

I will want to receive all voir dire requests, motions in limine with any opposition or other response, and proposed special verdict forms at least a few days before the final trial conference. The sooner that you can get me proposed jury instructions, the better.

Parties should confer before preparing and serving motions in limine, as required by Superior Court Rule 9C, to narrow areas of disagreement. I often receive motions in limine to exclude evidence that the opposing party does not intend to offer, or to impose some other restriction or requirement that the other side also thinks is a good idea. That is not a good use of anyone's time.

Also, I want all motions in limine to be filed together with any opposition or other response. The parties may want to agree on shorter response times for motions in limine than are specified in Superior Court Rule 9A, but there is no motion-in-limine-exception from the procedural requirements in Rule 9A.

Krupp, J.: I use the standard pretrial schedule form.

At the final pretrial conference, I will usually schedule a final trial conference a week or more before trial, depending on the anticipated issues; and will

schedule the filing of motions in limine and motions related to voir dire a week or two before the final trial conference. Motions for voir dire should address whether a party is requesting a precharge to the prospective jurors during jury selection, or to the impaneled jurors before opening statements. In other sessions, I have allowed motions in limine to be filed directly, without complying with Superior Court Rule 9A, provided the motions are served on opposing counsel sufficiently in advance of the final trial conference so counsel can determine whether to oppose the motion. Increasingly in BLS cases, I have been ordering motions in limine and motions related to voir dire to be filed pursuant to Superior Court Rule 9A.

In cases involving thorny legal issues, I appreciate receiving jury instructions and the parties' proposed verdict form early, although an early submission of instructions often must be supplemented or revised during the trial.

Kazanjian, J.: I will schedule a final trial conference a week or two before the scheduled trial date. I usually do that at the final pretrial conference. I will also inquire at the final pretrial conference if you intend to file any evidentiary or complex motions in limine, such as Daubert motions. You need to be prepared at the final pretrial conference to alert the court about any such motions. I will schedule a hearing for those motions in advance of the final trial conference. Motions in limine should be filed a week before the final trial conference. They should be filed pursuant to Superior Court Rule 9A. Parties should also file requests regarding voir dire, jury instructions and proposed verdict slips the week before the final trial conference.

Squires-Lee, J.: Final trial conference should be a week or two before trial. I expect all motions in limine, proposed jury instructions, requests for lawyer conducted voir dire, and agreed-to or competing special verdict forms a week in advance of the final trial conference with all motions in limine served and filed under Rule 9A or a shorter, agreed-upon timeframe, and Rule 9C.

(6) Do you typically encourage the parties to pursue ADR? If you do so, when and how do you typically do it?

Salinger, J.: I encourage mediation, not arbitration.

I regularly ask counsel what they are doing to help their clients resolve their dispute, and encourage mediation if that seems helpful.

Historically, when some parties think of ADR they have in mind private arbitration, believing that it can reduce costs and lead to a fairly quick and final decision. With agreement of the parties, however, a BLS bench trial can offer all the benefits of arbitration without losing the benefits of appearing before a Superior Court judge who is assigned to sit in the BLS.

Some corporate counsel are replacing arbitration clauses in commercial contracts with provisions that require any dispute to be resolved in the BLS with specified limits on discovery, a waiver of any right to a jury, a waiver of any right to detailed factual findings with an agreement that the judge will decide the case by answering special questions agreed-to by the parties, and perhaps even a limitation on appellate rights. Other attorneys handling a dispute with a contract mandating arbitration are proposing that both sides instead agree to file the case in the BLS.

If the parties want to streamline the litigation process in order to achieve benefits of ADR while adjudicating their dispute in the BLS, I am happy to work with them to do so.

Krupp, J.: I generally ask the lawyers at a Rule 16 conference and at a final pretrial conference whether they have discussed resolving the case, including through the use of ADR. In situations where I will not preside over a case at trial, I have conducted judicial mediations in cases that are close to trial.

Kazanjian, J.: I encourage mediation and will ask at the Rule 16 conference and final pretrial conference whether you have made efforts to resolve the case.

Squires-Lee, J.: I ask whether the parties have or intend to mediate at the final pretrial conference. I do not necessarily encourage it, but I always make clear that delays in scheduling mediation will not delay the trial.

(7) Typically, will you stay proceedings if the parties pursue ADR?

Salinger, J.: Yes, so long as it is not on the eve of trial.

Krupp, J.: Yes, but generally I will not continue a trial to allow ADR.

Kazanjian, J.: Yes, but not on the eve of trial. I will not necessarily continue a final pretrial conference based on a last-minute representation that the parties have decided to mediate the case. If you seek a continuance or stay of any kind due to a decision to mediate, please note the date of the mediation in your motion and the name of the mediator that has agreed to work with you.

Squires-Lee, J.: It depends. There is normally enough time between the final pretrial conference and the final trial conference and trial for the parties to pursue mediation without moving the trial date.

(8) Do you have any other tips or preferences for pretrial practice?

Salinger, J.: Here are a few more suggestions.

Contract Interpretation. If you are trying a case that turns on the meaning of a contract, you should raise any disputes or questions about contract interpretation before trial. Sometimes these issues are best resolved on a motion for summary judgment long before trial. But if they have not been, you

may need to file a motion in limine asking the Court to decide whether particular provisions are ambiguous and will need to be construed by the factfinder at trial, or are unambiguous and will need to be explained by the judge to the jury or themselves. And, of course, if the judge concludes that a disputed contract provision is unambiguous you need to know before trial how the judge construes the contract. You do not want to discover in the middle of a trial that your theory of the case is inconsistent with the judge's interpretation of your client's contract.

Choice of Law. I prefer to know well before trial if the law of some other jurisdiction will govern part or all of the issues at trial. If there is a dispute as to choice of law, please raise it in a motion in limine and make sure that motion gets heard more than a few days before trial. If there is agreement that some other jurisdiction's law governs, please make that clear in the joint pre-trial memorandum and flag it for me during our final trial conference.

Affirmative Defenses. Similarly, if any affirmative defenses as to which the defendant has the burden proof will have to be decided at trial, note them in the joint pre-trial memo and remind me of them during the final trial conference.

Krupp, J.: No.

Kazanjian, J.: Prepare your case with the laws of evidence in mind. Do not wait until you are in the middle of trial and the other side objects to start thinking about how the evidence you are seeking to admit is admissible.

Squires-Lee, J.: I agree with Judge Salinger. In addition, the parties should discuss their proposed evidence to streamline the trial. Agreement on exhibits is encouraged. The parties should review all applicable evidentiary rules in advance of trial.

TRIALS

(1) Do you hold any type of trial or any aspect of trial via videoconference (*e.g.,* out-of-state witness)?

Salinger, J.: I have held two complete bench trials by video conference, once during the height of the COVID-19 pandemic and once because one of the attorneys became sick with COVID on the eve of trial. I hope never to have to conduct an entire trial by video conference again.

That said, I am open to conducting parts of a trial by video hookup where necessary or appropriate, for example if a witness lives far away and will testify for a very short time, or cannot reasonably attend in person.

Krupp, J.: I have not held a trial by videoconference. I have had witnesses testify in evidentiary proceedings (e.g., a civil trial, various hearings) by videoconference. I would consider allowing a witness to testify by videoconference, particularly where all parties agree. It is often cheaper and easier for all concerned to allow such testimony by videoconference rather than require the parties to take a video deposition to preserve trial testimony of a witness who is otherwise unavailable.

Kazanjian, J.: I am unlikely to do a full trial by videoconference. I have had individual witnesses testify by video conference and would consider that if the parties agree and there is a good reason to proceed that way.

Squires-Lee, J.: I have tried one bench trial by videoconference but during the height of the pandemic. I agree generally with Judge Kazanjian's approach.

(2) Do you typically schedule full-day or half-day trials? Does the schedule differ between jury and bench trials?

Salinger, J.: I usually try BLS cases from 9am to 1pm, whether it is a jury trial or a bench trial. I will go into the afternoon if necessary to accommodate a witness's scheduling constraints. But generally, while on trial I need the time after 1pm to attend to other cases, by holding hearings and working on decisions.

A small quibble: a 9am to 1pm schedule is 2/3 of a 9-4 schedule, after subtracting a short morning break from both and a lunch break from the latter. So, if you refer to a 9-1 schedule as calling for half-days, I may protest.

Krupp, J.: Jury and bench trials are generally held from 9 a.m. to 1 p.m. Over the course of a week, I can and generally will find one or two days when the trial day can go until 4 p.m. Such scheduling issues are usually known and discussed by the time of the final trial conference.

Kazanjian, J.: I usually try cases from 9am -1pm and reserve the afternoons for other business.

Squires-Lee, J.: I try cases from 9 am – 1 pm with some flexibility as required.

(3) Do you set time limits for trials? If so, under what circumstances and what are they?

Salinger, J.: I have only set time limits for trials a few times, when I was concerned that counsel would fail to complete the trial by the time that they promised me and the jury unless I set and enforced explicit time limits. It has always worked quite well. I keep a running tally of time used and can tell the parties at the end of each trial day where they stand. In each case the parties did not come close to using all their allotted time.

Krupp, J.: I have not had to set time limits over a party's objection. At the final trial conference, I talk about each side's case in detail, including how long their

direct examination will be of key witnesses. I then come up with an estimate of the duration of the trial. I usually tell the prospective jurors how long I expect the case will take based on my discussion with the lawyers. I update the jurors daily about whether we are on schedule. No one wants to upset the jurors' expectations.

In one case all parties requested that I give each side a set number of hours and hold them to that amount of time. In that instance, I kept time, periodically updated the parties about how much time they had each used, and let the jury know that each side had been given a total amount of time. The process worked well for the court and the jury, but I believe it put considerable stress on the lawyers, who had to keep the time limit in mind when deciding whether and how to question particular witnesses.

Kazanjian, J.: I have never had to set time limits at a trial. I have limited the length of any filings during trial (e.g., nothing more than 5 pages) so that we do not get bogged down trying to resolve issues. I expect counsel to try to move the case along efficiently for the sake of maintaining the jurors' attention.

Squires-Lee, J.: No, but I may be persuaded in the right situation.

(4) In general, how do you conduct jury voir dire? Do you allow counsel to ask questions on voir dire?

Salinger, J.: I have always welcomed attorney-conducted voir dire.

If we are using individual voir dire, I will ask a set of questions to the entire venire and then ask additional questions to each prospective juror individually. If I have not excused the juror for cause, I will then let the lawyers follow up on answers to my questions, ask about anything in or missing from the written juror questionnaire, and ask questions on any additional topics that I have approved in advance during the final trial conference.

If we are using panel voir dire, I will conduct more limited questioning of jurors to determine whether they seem able to sit on the jury. Some of that questioning will be done individually, and I let the lawyers follow up on those answers during the individual questioning. But most of the questioning by counsel will take place when they speak with each panel of prospective jurors.

Under either method, I am not a fan of supplemental written juror questionnaires.

Lawyers need to read, understand, and follow Superior Court Rule 6, which governs jury selection; pay particular attention to the provision listing lines of

questioning that are improper.[11] In addition, avoid any question the fair answer to which would be, "It depends on what the evidence shows."

Please remember that individual voir dire is not an opportunity to learn everything about what makes each prospective juror tick. Trial lawyers' training and instinct in conducting depositions is to learn everything possible, leaving no stone unturned. Voir dire is very different. You will want to pose just a few short, open-ended questions that focus on your key criteria for selecting jurors and that are aimed at getting each prospective juror to provide a narrative answer.

Also, do not expect or demand that prospective jurors answer voir dire questions with lawyerly precision. Normal humans may say "I think so" or "I guess," but their tone and manner make clear they mean "Yes." If a potential juror says "I think I can be fair" in a firm and declarative tone, do not insist that they add, "By that I meant I can definitely, without reservation, be completely fair to both sides." If you try to pin down every prospective juror, the way you might with an adverse witness during a deposition, you will annoy them and may not accomplish much else.

Please be aware that the Superior Court now has official model jury empanelment scripts that judges may use or adapt as they see fit.[12]

Krupp, J.: I permit panel voir dire, attorney-conducted voir dire at the sidebar, or attorney-conducted voir dire in other formats. I have used supplemental juror questionnaires as another way of assessing juror bias. Having presided over more than two dozen cases in which panel voir dire was used, I have been persuaded that panel voir dire is an incredibly powerful tool to detect juror bias and to assess the suitability of jurors for a particular case. It has been under-used since it was adopted as an option in Massachusetts.

Kazanjian, J.: I permit attorney conducted individual voir dire and panel voir dire. If the parties opt for panel voir dire, I will limit the questions that are asked of each juror during the individual voir dire stage. I will also give you a time limit for the panel portion of panel voir dire. I have used supplemental questionnaires in certain types of cases. Counsel sometimes need to be reminded that the goal of voir dire is to select a fair and impartial jury, not to interrogate each potential jury the way you would depose an adverse party.

Squires-Lee, J.: Same as Judge Kazanjian.

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[11] See https://www.mass.gov/superior-court-rules/superior-court-rule-6-jury-selection .

[12] Available at https://www.mass.gov/guides/superior-court-model-jury-instructions .

(5) Do you have a process for the sequence in which counsel exercise peremptory challenges?

Salinger, J.: I usually alternate between opposing parties, changing each time we seat a juror. Plaintiffs exercise challenges first when we are filling odd-numbered seats, and defendants go first when we are filling even-numbered seats. That makes it easier for me to keep track of who goes first.

Krupp, J.: With attorney-conducted voir dire at the sidebar, I usually require attorneys to exercise their peremptory challenges after we see each juror. In that context, we alternate the order of exercising peremptory challenges after each juror. With panel voir dire, after the attorney questioning of the first panel, I will require plaintiff to exercise its peremptory challenges until content, and then have defendant exercise its peremptory challenges until content, with no back strikes. The order is reversed with respect to the second panel.

Kazanjian, J.: With individual voir dire, I generally require counsel to exercise preemptory challenges after each juror is found indifferent. I will alternate who goes first. With panel voir dire, each party must exercise peremptory challenges on the seated panel. The remaining jurors are seated and the parties may not back strike.

Squires-Lee, J.: Same as Judge Kazanjian.

(6) Do you exclude witnesses or exhibits that are not listed in the pretrial memorandum, either sua sponte or by motion of the party?

Salinger, J.: I will exclude an undisclosed witness or exhibit if the opposing party can show they are unfairly prejudiced by the surprise. I do not do so sua sponte.

Krupp, J.: When it comes to exhibits, I do not police compliance with the pretrial memorandum. If a lawyer objects to an exhibit, prejudice is the principal concern. Was the exhibit produced in discovery? Was it the subject of questioning during a deposition? Is it being introduced as part of witness' direct examination (i.e. was using it foreseeable), or during cross-examination or unexpected impeachment of a witness? The answers to these questions are relevant. As for a new witness, I am more likely to question the lawyer sua sponte, particularly if I have carefully reviewed each party's anticipated witnesses in advance. If you expect to call a witness or introduce an exhibit that was not previously disclosed, it is best to alert opposing counsel and the court as early as possible.

Kazanjian, J.: I will judge the situation based on fundamental fairness.

Squires-Lee, J.: Same as Judge Kazanjian.

(7) Do you strictly limit the scope of expert testimony at trial to matters explicitly disclosed in expert reports, either sua sponte or by motion of the party, or do you permit an expert to testify on matters related to but not specifically described in the reports?

Salinger, J.: I will bar an expert witness from testifying about matters not specifically disclosed if the opposing party can show they are unfairly prejudiced by the surprise. I do not do so sua sponte.

Krupp, J.: I generally limit an expert's testimony to matters contained in the expert disclosures, but I rely on the opposing party to bring issues to my attention.

Kazanjian, J.: I will bar an expert witness from testifying about matters not specifically disclosed if the opposing party can show they are unfairly prejudiced by the testimony. I do not do so sua sponte.

Squires-Lee, J.: Same as Judge Kazanjian.

(8) What do you prefer that attorneys include or not include in proposed jury instructions?

Salinger, J.: Please be aware that the Superior Court now has a growing body of official model jury instructions, including model versions of the instructions that apply in every case; judges may use or adapt these models as they see fit.[13] We welcome lawyers' feedback on the model instructions. As the introduction to these models on the Superior Court website notes:

> These Model Jury Instructions have been drafted by a committee of Superior Court judges. They are designed to be legally accurate and easy for jurors to understand and for judges and practitioners to use. The instructions will be revised regularly to keep current with developments in statutory and case law. They are published here in both PDF and searchable Microsoft Word format, and are accompanied by a Table of Contents organized by topic.
>
> These Model Jury Instructions are intended to be just that—models. Judges have broad discretion and inherent authority to decide how to instruct a jury, whether it is by adapting these models, crafting their own instructions, or starting with some other model.
>
> * * *
>
> The Superior Court welcomes input regarding these instructions. Please forward your comments or suggestions to Superior Court Legal Counsel Alex Philipson at alex.philipson@jud.state.ma.us.

[13] Available at https://www.mass.gov/guides/superior-court-model-jury-instructions .

Counsel should read and think about these models before drafting their own proposed jury instructions.

My aim in every case is to craft jury instructions focused on the particular special questions that we need the jury to answer. So I would like the parties to propose a jury verdict slip as early as possible, ideally before trial. I also welcome proposed jury questions tailored to the case and the questions we will put to the jury.

I do not need the parties to give me copies of model instructions that I already have access to. Nor do I need proposed forms of all the general instructions that I deliver in every case; I tend not to look at those at all.

Krupp, J.: A party's proposed jury instructions should focus on the core legal issues in the case. In the usual case, I do not need general instructions or proposed instructions about how the jury should handle its deliberations.

I will usually provide counsel with a draft set of instructions one or two days before charging the jury, followed by a charge conference. It is quite useful if counsel is prepared at or before the charge conference to provide specific suggested changes to the language in my draft instructions.

Kazanjian, J.: I do not need any general instructions from the parties. Please provide the court with your proposed instructions on the substantive claims before the Final Trial Conference. I will also hear your requests for additional instructions as the trial progresses. I will usually follow model instructions (MCLE or Superior Court) unless there is a reason to deviate, or the instructions can be made clearer. I will provide counsel with a draft set of instructions so that we can have a meaningful discussion at the charge conference. I expect counsel to read the draft before the charge conference and to be ready to suggest any alternative language.

Squires-Lee, J.: Counsel should focus on the specific substantive instructions they are requesting or areas which the model (MCLE or Superior Court) instructions do not address. I will give counsel a fairly complete set of instructions towards the latter half of the trial and schedule a charge conference before the Plaintiff rests. The charge conference is the opportunity to address what I have proposed.

(9) What process do you use in charging the jury?

Salinger, J.: I provide counsel with a draft of my instructions well before the end of trial, give them a chance to review and think about my draft, and then conduct a jury charge conference in which I ask counsel to tell me what changes they would like me to consider making to my draft.

Then, when I charge the jury, I will provide every juror with a copy of my final written instructions and invite them to read along if that will help them absorb and understand what I am saying. My experience and some academic research suggest that this has a dramatically positive impact on juror understanding of the jury instructions. Each juror then has their own copy of the instructions that they can refer to during the jury's deliberations.

I split my charge by delivering my substantive instructions about the special questions before closing arguments, pausing for closing arguments, and then delivering my general instructions about how to evaluate evidence and jury deliberations. I closely follow the Superior Court's new "Civil Jury Instruction Template,"[14] pausing for closing arguments just before the "Role of the Jury" section.

Krupp, J.: I usually charge the jury from the well of the courtroom. I give each juror a copy of my instructions. I allow the jurors to mark up the draft as I go through the instructions and take their copy with them into the jury deliberation room. I ordinarily do not split my charge, but I have done so on the parties' request.

Kazanjian, J.: I always split my charge, giving the substantive instructions on the claims before closings. I will provide counsel with the final version of the charge so they can follow along while I charge the jury. I provide the jury with a copy of my instructions to use during their deliberations. I will consult with counsel before providing the copy to the jury to see if my oral instructions deviated in any way from the written instructions.

Squires-Lee, J.: I always split my charge with the substantive instructions followed by closing argument followed by general instructions. I do so because social science research shows that human beings cannot listen for more than a half hour or so before needing a break. I will give counsel a written version to follow along and will give the deliberating jury a written version to use while they deliberate.

(10) Do you allow jurors to take notes during trial?

Salinger, J.: Yes, always.

Krupp, J.: Yes. Usually we pass out notebooks after the opening statements.

Kazanjian, J.: Yes, always.

Squires-Lee, J.: Yes, always.

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[14] Available at https://www.mass.gov/guides/superior-court-model-jury-instructions#-civil-instruction-scripts-(empanelment,-precharge,-final-charge)- .

(11) Do you permit parties to provide jurors with notebooks of exhibits?

Salinger, J.: Yes. The parties should confer, try to reach agreement on the most effective way to present evidence in that particular case, and propose an appropriate process during the final trial conference.

Krupp, J.: Jurors do not want to be left out. They want to see what everyone else is talking about. Juror notebooks of some subset of all of the exhibits is a great way to allow the jurors to follow along. Blowing up exhibits, or projecting exhibits on a screen, is another excellent way of including the jurors. In a long trial, think about using mixed media to keep the jurors engaged.

Once a juror notebook is given to a juror, it belongs to the juror. The juror may highlight or make notes on the documents in the notebook. As a result, the juror notebook may not be "taken back" by the lawyers to add exhibits. Juror notebooks may be supplemented by providing additional pages with appropriate tabs for the jurors to insert into their notebooks.

Kazanjian, J.: Yes.

Squires-Lee, J.: Yes, and with the caveat described by Judge Krupp about adding to the notebooks.

(12) Do you allow jurors to submit questions during the presentation of evidence at trial?

Salinger, J.: No. I have done so twice at the request of all parties. The first time the jurors asked just a few questions that were very focused and quite helpful. The second time the jurors proposed long lists of questions, most of which I had to exclude; the process was time consuming, disruptive, and added no value. That experience left me skeptical about letting jurors try to take control of the presentation of evidence away from the lawyers.

Krupp, J.: No.

Kazanjian, J.: No.

Squires-Lee, J.: Yes, always. I instruct the jury in my pre-charge and in the final charge that their questions must comply with the rules of evidence so they should not be upset if their question is not asked, they cannot speculate about the answer, and they cannot give the answers to their questions disproportionate weight. I use the following procedure: after both sides have completed their examination of a witness – direct, cross, re-direct, re-cross – jurors can submit questions with their seat number identified. I review those questions with counsel at sidebar for compliance with the rules of evidence. I may change the questions slightly if I can do so without altering the intent. I then pose the acceptable questions to the witness and allow both sides follow up – limited to the questions posed by the jury.

I have found juror questions to be exceedingly insightful and they do not interfere with trial efficiency. Further, I believe allowing questions invests the jurors in the evidence presentation, focuses them on details they may have missed or view as important, and keeps them focused and engaged. Finally, we tell jurors that they are the judges of the facts. This gives them some ability to seek information they view as relevant and material. Obviously, the question is not asked if it seeks irrelevant, inadmissible, or prejudicial information.

(13) Do you allow the parties to determine the technology they want to use during trials? What happens when counsel cannot agree?

Salinger, J.: Yes. If counsel cannot agree, we should discuss it during the final trial conference, or earlier if need be. I agree with Judge Krupp that display technology used in the courtroom must be available to all parties. And I agree with Judge Kazanjian that counsel should do a practice run with evidence-display technology in the courtroom before trial.

Krupp, J.: Yes. Any technology brought into the courtroom by one party must be available to all parties. This may include providing the personnel necessary to operate the technology.

Kazanjian, J.: Yes. I encourage the use of technology. If you cannot agree, please raise that issue at the final trial conference and I will resolve it. I also urge parties to make arrangements with the clerk to practice the technology in the courtroom before trial.

Squires-Lee, J.: I agree with all my colleagues.

(14) Do you have any requirements, recommendations, or tips for lawyers in presenting, publishing, or handling a large number of exhibits (>100) at trial?

Salinger, J.: Here are a few tips about trial exhibits.

- ***Limit the number*** of exhibits that you offer at trial. Discovery in a BLS case will often unearth a large volume of emails and other documentation. There is no need to introduce all of that into evidence, however. Parties that introduce hundreds of exhibits usually ask the jury or judge to focus and decide the case based on a small subset of them. Which means most of the others probably did not have to be introduced into evidence.
- ***Summary Documents***. Summaries of voluminous financial, accounting, or other records are admissible into evidence.[15] A summary exhibit that is a

[15] Mass. Guide to Evid. § 1006; see also, e.g., *Commonwealth* v. *Bin*, 480 Mass. 665, 679–680 (2018); *Commonwealth* v. *Greenberg*, 339 Mass. 557, 581–582 (1959).

compilation of parts of many other exhibits may also be admissible.[16] Such summaries or compilations can be a very effective way to distill this kind of information; trial counsel should use them more often.

- ***Index***. If you expect there will be more than a handful of exhibits, the parties should keep a running index in a form that everyone agrees may be given to the jury or judge at the end of the trial. Each exhibit should be described or unidentified in a completely neutral way that will let the jurors or judge find an exhibit even if they failed to make note of the exhibit number.
- ***Electronic Exhibits***. If any of the exhibits in a jury trial are in electronic form (such as a spreadsheet in native Excel format, or a copy of a television advertisement) and will need to be accessed or played on an appropriate device for the jury to consider them while deliberating, the parties will need to provide a tablet or laptop that the jury may use to do so.

  I recently conducted a BLS jury trial in which we ended up with well over 200 exhibits, the official exhibits were in paper form, but all exhibits were presented to the jury electronically during the trial. The parties provided the deliberating jury with a clean laptop, electronic copies of all the exhibits, and a searchable electronic copy of the index. The jurors really appreciated being able to search the index and access the exhibits electronically. Their ability to do so probably shaved days off their deliberations.

Krupp, J.: BLS cases are often heavy document cases. Do not lose the jurors in the sea of documents. Think about ways to pare down the documents you need. If you must introduce many documents, work hard to keep the case interesting for the jurors. There are many software products available that allow a document to be projected on a screen, a portion to be highlighted, and then the highlighted portion to be blown up so it can be seen at a distance by the jurors. Making sure the jurors know which part of a document you are addressing is key to keeping the jurors engaged.

Kazanjian, J.: I agree with my colleagues. I urge lawyers to remember that they when they are trying a case to a jury, they are responsible for keeping the trial moving and not getting bogged down with unnecessary repetition or cumulative evidence. Remember that you can display the key evidence during your closing argument when you will try to tie your case together.

Squires-Lee, J.: I agree with Judge Salinger. In particular with his reminder that less is more and making it easy for the jury is better.

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[16] See *Commonwealth* v. *Chin*, 97 Mass. App. Ct. 188, 201–205 (2020) (compilation of surveillance video from different locations).

(15) Do you have any other tips or preferences for lawyers trying BLS cases?

Salinger, J.: Be polite and professional at all times. Civility is required. Nastiness and pettiness never produce effective trial advocacy.

Krupp, J.: No.

Kazanjian, J.: The goal should be to keep the jury's attention and to simplify the issues. This also applies to bench trials. It is more effective if you focus your case and the issues for the judge and jurors.

Squires-Lee, J.: Lawyers often lose focus on the people who matter – the jurors. Jurors pay very close attention to everything that happens in the Courtroom. Any incivility – to opposing counsel, co-counsel, the person running the technology, the clerk, the court officer, or the judge – is observed, digested, and judged. Jurors pay close attention and dislike repetition for its own sake. Their time is very valuable. They complain most about repetition. Lawyers need to make things easy for jurors – whether by making sure jurors can see an exhibit or are on the right page of an exhibit, by using summaries or chalks, by using goalposts or clear transitions, or just making sure that witnesses speak in plain English – lawyers need to make it easy for jurors to keep up and follow along.

MISCELLANEOUS

(1) Are there any other matters with regard to practice or procedure in your courtroom about which you would like to advise the attorneys who appear before you?

Salinger, J.: I do not want to hear and will not tolerate personal attacks on opposing counsel or parties, or any other kind of unprofessional conduct.

Krupp, J.: The current BLS1 courtroom (Courtroom 1309) was built for appellate argument. The acoustics leave much to be desired. Lawyers trying in Courtroom 1309 need to prepare for that situation, including familiarity with the location of the fixed microphones.

Kazanjian, J.: I expect counsel to conduct themselves professionally towards each other and towards the court.

Squires-Lee, J.: The Superior Court is the great trial court of general jurisdiction in the Commonwealth of Massachusetts. I expect everyone appearing before the Court to act with due regard for the solemn, important work of justice in which we are all engaged.

(2) Are there common deficiencies in practice that you regularly observe on which you would like to comment?

Salinger, J.: Do not let your client's dispute with the opposing party turn into personal animus toward opposing counsel. You can provide your client with diligent and aggressive representation on all matters of substance, without ever

being disagreeable and without getting into pointless fights over matters of procedure or minor things that will make no difference to the outcome. Be nice.

On a related note, please keep your advocacy focused on the substance of whatever it is your client needs me to decide. Arguments that amount to "But they've been bad!" are neither helpful nor effective advocacy.

Krupp, J.: The two most common deficiencies I have observed are the failure to confer adequately before filing motions and the lack of civility by some lawyers in written filings and even during in-person hearings. The two problems are often linked. Most discovery and scheduling motions can and should be resolved between counsel acting in good faith. And, like all judges I know, I find ad hominem attacks – often veiled as questioning the integrity or motives of the opposing party or its lawyer – to be distracting and counterproductive.

Kazanjian, J.: I have witnessed a real lack of understanding of the laws governing the admissibility of evidence, and a lack of preparation for evidentiary issues that get raised at trial. I encourage you to consult the Mass. Guide to Evidence when you prepare for trial and to have a copy with you during trial.

Also, the incivility that exists, particularly during the discovery phase of civil cases, is sometimes disheartening. Not every issue warrants a battle. In fact, very few do. I do not appreciate personal attacks on opposing counsel either in open court or in written filings. I will likely cut you off if you launch into a history of emailing, such as who did not respond to what. You should treat opposing counsel the way you wish to be treated. Unnecessary disagreements only serve to increase the costs of litigation, which is rarely in your client's interest.

Squires-Lee, J.: In my experience on the bench so far, lack of preparation, incivility, and lack of familiarity with the rules of evidence are the regular deficiencies I observe.

(3) Are there any other orders, policies, or practices that you follow about which you would like to advise the members of the bar? If so, please attach copies to your response.

Salinger, J.: No, thank you. It is a pleasure and a privilege to sit in the BLS. And I agree with my colleagues.

Krupp, J.: No. I will add that overall it is a pleasure to sit in the BLS. The quality of the written and oral advocacy is quite high. The issues before the BLS are frequently engaging, obviously important to the litigants, and sometimes impactful well beyond the parties to the case.

Kazanjian, J.: No, It is a pleasure and privilege for me as well to sit in the BLS.

Squires-Lee, J.: I am honored and privileged to be asked to sit in the BLS. I very much look forward to working with my colleagues and the BLS