CHAPTER 1

SCHEDULING ORDERS

SECTION 1: INTRODUCTION

This chapter will address the law and use of scheduling orders in Tennessee civil cases.

Why start a book titled "Tennessee Law of Civil Trial" with the topic of scheduling orders? Because one of your goals as a trial lawyer is to favorably resolve your client's case as economically, efficiently, and promptly as reasonably possible under all of the circumstances. If suit must be filed, accomplishing these goals often depends on getting – and keeping – a trial date. An appropriate scheduling order is the best way to bring cases to an economical, efficient, and prompt conclusion.

Some lawyers attempt to avoid the entry of scheduling orders because, by definition, a scheduling order includes a series of deadlines for one or all of the parties, and thus one or all of the lawyers, in the case. Deadlines create stress, and many lawyers prefer to allow the case to naturally progress through the litigation process without being tied down to completing a certain task by a certain date. Although every reader of this book can see the benefit of avoiding stress, the lack of scheduling orders tends to (a) increase the length of time the case remains a part of the litigants' lives; (b) increase the length of time the case is on the court's docket; (c) increase the likelihood of a continuance of the trial date because inevitably someone will say that an opponent did not do what was needed to be done in a timely manner, claim actual or feigned prejudice, and obtain a postponement of the trial date; and (d) may actually increase stress for those who, because of client pressure or otherwise, are actively working to bring the case to an end.

Trial dates drive case resolution, by settlement or trial. A scheduling order guides the parties through the trial preparation process and reduces the need for continuances. Unless prohibited by local rule or practice, most cases on a court's docket for more than six months should have a scheduling order (with a trial date) in place.

SECTION 2: THE LAW OF SCHEDULING ORDERS GENERALLY

A scheduling order is a court order designed to manage the flow of a case from the date it is entered through the beginning of trial. The court may enter the order on its own motion, or either party may seek one by motion. As indicated above, it is a tool that advances the just, speedy and efficient resolution of disputes.

Scheduling orders are addressed in Rule 16.01 of the Tennessee Rules of Civil Procedure. The rule states as follows:

> (1) In any action, the court may in its discretion, or upon motion of any party, conduct a conference with the attorneys for the parties and any unrepresented parties, in person or by telephone, mail, or other suitable means, and thereafter enter a scheduling order that limits the time:
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> (A) to join other parties and to amend the pleadings;

(B) to file and hear motions; and
(C) to complete discovery.

(2) The scheduling order also may include:
(A) the date or dates for conferences before trial, a final pretrial conference, and trial;
(B) provisions for the discovery of electronically-stored information
(C) any agreements the parties reach for asserting claims of privilege or of protection as to trial-preparation material after production, or in reference to electronically stored information; and
(D) any other matters appropriate in the circumstances of the case.

(3) In deciding the content of any scheduling order, the court shall give consideration to minimizing the time that jurors are not directly involved in the trial or deliberations. A schedule once ordered shall not be modified except by leave of the judge upon a showing of good cause.

Thus, trial judges may enter (and modify) scheduling orders pursuant to the authority given them under Rule 16 of the Tennessee Rules of Civil Procedure. Scheduling orders may also be entered into by agreement of counsel, later approved by the Court, or may be sought by the motion of one or more parties to the litigation. It is of course preferable for the parties to reach an agreement on a scheduling order, but a motion and hearing may be necessary.

The imposition of a scheduling order, the matters addressed in it, and the deadlines established are left to the discretion of the trial judge.[1] A judge's rulings on scheduling orders will be reversed only for an abuse of discretion, a high hurdle on appeal. Generally, an abuse of discretion is only found when the judge's decision is illogical, based on an incorrect legal standard, or when it causes an injustice to the complaining party.[2]

The scheduling order becomes the roadmap that governs the course of the case, but TENN. R. CIV. P. 16.01 makes it clear that it is not inflexible. A party can seek relief from the scheduling order if they are able to show "good cause" for a modification. The case law recognizes the broad discretion given the trial judge. For example, in one case, the testimony of lay witnesses has been excluded for failure to identify the witnesses within the time constraints set forth in a scheduling order.[3] In another, one plaintiff was prevented from identifying additional expert witnesses after the disclosure deadline passed.[4] The Court of Appeals also affirmed a trial court's decision to permit an expert to testify, even though he was deposed later than the date set by the scheduling order.[5]

That said, trial courts have been found to have abused the discretion granted to them in enforcing scheduling orders. For example, the Court of Appeals held that the trial court abused its discretion by dismissing plaintiff's claim on the basis that the plaintiff failed to comply with a discovery

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1 *Waters v. Coker*, 2008 WL 4072104 (Tenn. Ct. App. Aug. 28, 2008).
2 *Williams v. Baptist Memorial Hospital*, 193 S.W.3d 545, 551 (Tenn. 2006).
3 *Brandy Hills Estates, LLC v. Reeves*, 237 SW 3d 307, 316 (Tenn. Ct. App. 2007).
4 *Ambrose v. Butsak*, No. M2006-01131-COA-R3-CV, 2008 WL 1901207 (Tenn. Ct. App. April 30, 2008).
5 *Waters v. Coker*, No. M2007-01867-COA-RM-CV, 2008 WL 4072104 (Tenn. Ct. App. Aug. 28, 2008).

order deadline to produce experts for depositions.[6] Plaintiff had reasonable grounds for needing additional time and the expert in question would have been available within the timeline originally established by the court in its scheduling order.[7]

The law aside, it is desirable for counsel to work together to set deadlines in scheduling orders and modify them as necessary. For example, it is hard to demonstrate prejudice when you receive otherwise complete expert witness disclosures from your opponent two days after a deadline. This is particularly true when your adversary has called or written you and advised that a brief extension would be appreciated. It is a professional courtesy to voluntarily extend a fact discovery deadline when opposing counsel or a witness is ill.[8]

If you need an extension of time to complete a task subject to a deadline in a scheduling order, it is best to ask permission rather than forgiveness. If you are going to ask for an extension on one deadline, you should work with your opponent to adjust other deadlines so that he or she is not prejudiced by your request for an extension. Trial judges should (and almost always do) allow the parties some flexibility in meeting pretrial deadlines when the parties reach a private agreement to do so.[9] Of course, moving trial dates and other dates that require involvement by the judge (*e.g.*, deadlines for filing motions for summary judgment) should be done only by permission of the court.

Thus, as with most things in litigation, professionalism in addressing scheduling order issues goes a long way in reducing expense and stress. In the event that an agreement cannot be reached on extending a deadline in a scheduling order and it is still necessary to do so, a motion to extend the applicable deadline should be filed before the deadline expires. If the request for an extension is made after the original time has elapsed, the party requesting the enlargement must demonstrate that its failure to meet the deadline was due to excusable neglect and that the opposing party has not been prejudiced by the delay.[10]

SECTION 3: TOPICS ADDRESSED IN SCHEDULING ORDERS

TENN. R. CIV. P. 16.01 provides some guidance on what topics can be addressed in a scheduling order, but the list is not meant to be exclusive. Indeed, the initial Advisory Commission Comment to TENN. R. CIV. P. 16 explains that: "[T]he rule introduces into state practice the familiar pretrial procedures used in the federal courts. The use of the procedure lies within the discretion of the court."

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6 *Pegues v. Illinois Central Railroad Company*, 288 S.W.3d 350 (Tenn. Ct. App. 2008) (Plaintiff had reasonable grounds for needing additional time and the expert in question would have been available within the timeline originally established by the court in its scheduling order).

7 *Pegues v. Illinois Central Railroad Company*, 288 S.W.3d 350 (Tenn. Ct. App. 2008).

8 Readers are encouraged to read the Code of Pretrial and Trial Conduct (the "Code") published by the American College of Trial Lawyers. The College is regarded as the leading trial lawyer organization in North America; Fellows of the College are invited to join after a long, rigorous screening process. Those who wish to be considered for membership are advised to conduct themselves in accordance with the Code. A complete copy of the Code may be found in Appendix L.

9 *But see Kenyon v. Handal*, 122 S.W.3d 743, 753 (Tenn. Ct. App. 2003) (only trial courts may grant relief from deadlines imposed by the Tennessee Rules of Civil Procedure; opposing counsel's acquiescence does not, by itself, provide sufficient basis for missing a deadline).

10 *Id.* at 756.

Thus, the topics addressed frequently depend on (a) the nature of the case; (b) the complexity of the case; (c) the number of parties to the case; and (d) the experience and sophistication of the lawyers and the judge. Other things being equal, a scheduling order will be more detailed and cover more topics as the case complexity and / or the amount in controversy increases.

Here is a non-exclusive list of the matters that may be addressed in a scheduling order:

1. *A deadline to amend the pleadings.* The pleadings frame the issues in the case, and thus it is important to have a date for the pleadings to be "closed," remembering of course that any deadline in a scheduling order can be extended for good cause shown. Typically, the deadline established should be late enough in the course of litigation to allow a diligent party an opportunity to do discovery and amend a pleading accordingly but not so late so as to result in the change of the trial date or cause discovery to be re-opened or repeated.

Since one must usually file a motion to amend pleadings, it is preferable for the order to make it clear that the deadline indicated in the scheduling order is (a) the date a motion must be filed; (b) the date that leave to amend is granted; or (c) the date the amended pleading is actually filed with the clerk. An ambiguous deadline will lead to unnecessary stress and expensive motion practice. It is recommended that the parties ask the court to establish a deadline for filing the motion to amend, since the parties cannot control when such motion might actually be heard or when an appropriate order will be entered.

Once again, there will be circumstances that arise from time to time that will constitute "good cause" for allowing an amendment of a pleading, even though the deadline established by the scheduling order has expired. In exercising its discretion in determining whether to grant a motion to amend a scheduling order to allow a party to amend a pleading, it is suggested that, in addition to looking at why the deadline was missed, the court should consider the same factors that it would consider in determining whether to grant a motion to amend in the absence of a scheduling order, namely: (1) whether undue delay will occur as a result of the proposed amendment; (2) whether the opposing party has sufficient notice; (3) whether the moving party is acting in bad faith; (4) whether the moving party has failed to cure deficiencies in previous amendments; (5) whether the opposing party will suffer undue prejudice; (6) the circumstances giving rise to the proposed amendment; and (7) the futility of the amendment. Of these factors, the most important is the proposed amendment's potential prejudicial effect on the opposing party.[11]

2. *A deadline for the completion of fact discovery.* A deadline for completion of fact discovery is often broken down into deadlines for fact discovery and deadlines for expert witness disclosures and depositions. Sometimes there are separate deadlines for service of written discovery. What is appropriate depends on the case, but once again, clarity in establishing dates and what must be accomplished by that date is important. For example, does a deadline that fact discovery be complete by a certain date mean that interrogatories can be submitted on that date or must they be served thirty days or more earlier so that the answers are due no

[11] *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 384 (Tenn. Ct. App. 2006); *Hardcastle v. Harris*, 170 S.W.3d 67, 81 (Tenn. Ct. App. 2004) (the reason for the delay is mentioned expressly in this decision).

later than that date? Anxiety and disputes about the answer to this question can be avoided by being more precise in the drafting process.

Another controversy that can arise with such provisions is whether the deadlines apply to medical examinations pursuant to TENN. R. CIV. P. 35 and requests to admit pursuant to TENN. R. CIV. P. 36. While both of these rules are discovery devices and thus should fall within discovery deadlines generally, it makes sense to address them specifically to avoid any confusion as the case progresses.

3. *Dates for adding other parties or, in cases that invoke the law of comparative fault, asserting fault of others.* In some instances, it is possible that the initial parties in the case will seek to add additional parties. A realistic period of time should be permitted to allow the fact investigation reasonably necessary to permit this decision to be made, but that time period must be consistent with the goal of the just, speedy and inexpensive resolution of the case. In a perfect world, discovery would be structured in such a way as to flush out as soon as reasonably possible the facts necessary to allow a party plaintiff or defendant to make an informed judgment about whether one or more other parties should be added in the litigation.

For example, a defendant in a case where comparative fault applies may want to consider alleging fault against a non-party in an amended answer. The defendant should be granted a reasonable period of time to investigate the facts, including depositions as appropriate, so that a determination can be made whether such allegation would be supported by the facts and would be wise from a strategic standpoint. However, there should be a date established by which the defendant must make a decision as to whether he, she or it is going to allege the fault of a party or non-party, because doing so (or not doing so) influences trial dates, settlement, and the expense of the proceeding.[12] Exactly when the deadline should be set depends on the nature of the case and the circumstances. [13]

4. *Discovery of electronically-stored information.* This is a topic usually addressed, if at all, in commercial litigation matters. Detailed discussion of this issue is left to other texts.

5. *Limits on duplicate discovery.* It is appropriate for the parties to agree or for a judge to order multiple parties not serve that duplicative written discovery to another party. This may be accomplished by a provision in the scheduling order mandating cooperation in creating a single set of discovery from all parties aligned on one side of the "v", or a set of core discovery served by one party with the other parties granted the right to serve additional discovery on

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[12] Rule 3.2 of the Tennessee Rules of Professional Conduct provides that "[a] lawyer shall make reasonable efforts to expedite litigation." The Comment to that rule appropriately notes that "[d]ilatory practices bring the administration of justice into disrepute." When a defendant in a comparative fault case alleges fault against a non-party, a special statute often (but not always) applies to allow the plaintiff the right to add the non-party as a party defendant notwithstanding the expiration of the statute of limitations. TENN. CODE ANN. § 20-1-119.

[13] For example, TENN. CODE ANN. § 20-1-119 does permit a plaintiff in a comparative fault case to add a non-party as a party defendant notwithstanding the expiration of the statute of limitations but does not extend a statute of repose. The setting of a deadline for alleging the fault of nonparties should require a defendant to declare and plead any fault against a non-party well before the expiration of the statute of repose so that the plaintiff can determine whether or not to add the non-party as a party defendant.

non-duplicative matters. If the parties decide or the judge orders a limitation on duplicative written discovery, it is appropriate to include language in the scheduling order that makes it clear that the answering party has a duty to supplement responses to that discovery under TENN. R. CIV. P. 26.05, even if the party serving that discovery is no longer a party to the case. This provision is necessary to allow each party to rely on discovery responses given to discovery served by a co-party.

6. *Expert witness disclosure deadline.* This deadline ensures the timely exchange of expert witness disclosures under Rule 26.

It is not uncommon for scheduling orders in simple cases to require that the plaintiff serve expert witness disclosures before the defendant is required to do so. This is not unwise; normally, the plaintiff has the burden of proof on the issues. It makes sense to require the party with the burden of proof on an issue to disclose experts first. A full and fair disclosure gives the opposing party a clearer understanding of the plaintiff's theory of the case, and thus the opposing party's expert can better address the issues in his or her own disclosure.

In more complex cases, however, it is not uncommon for the plaintiff to have the burden of proof on some issues and one or more defendants to have the burden of proof on other issues. For example, assume that Plaintiff sues Hospital A in a health care liability action. Defendant alleges in its answer that Plaintiff's injuries were caused by the negligence of an earlier facility that treated Plaintiff, Hospital B. Under the law of comparative fault, Plaintiff can add Hospital B as a party defendant but Hospital A will have the burden of proving the case against Hospital B. Thus, Hospital A will have the burden of calling expert witnesses to establish that Hospital B negligently caused or contributed to cause Plaintiff's injuries.

In this type of situation and other situations involving the pleading of an affirmative defense that must or may involve expert testimony, the party that has the burden of proof should be required to disclose expert testimony before the party that does not. Thus, it is better practice to set disclosure deadlines based on who has the burden of proof on an issue and not simply looking to whether a party is a plaintiff or a defendant. Doing so gives all parties – plaintiffs, defendants, and co-defendants alleged to be at fault by another defendant – a level playing field on expert disclosures. Disclosures of experts by a party without the burden of proof on the issue can take place 30 to 45 days later.

Sometimes a scheduling order will require that a defendant's expert disclosures be delayed until after the plaintiff's experts have been deposed. It is difficult to understand why such a provision would ever be a part of a scheduling order – doing so only builds months of delay into the pretrial process.

The alleged rationale for delaying a defendant's expert disclosures is that expert disclosure of the plaintiff is presumptively presumed to be so poor that the defendant cannot gain a true understanding of the nature and extent of the proposed testimony without a deposition of the expert and thus cannot know how to disclose experts without the benefit of a deposition of the expert. However, there are other, sufficient remedies for poor expert disclosures that do not require delaying a case based on the assumption that a plaintiff's expert disclosure will be inadequate. Moreover, to the extent that expert depositions are taken (the law does not require depositions of experts), it makes sense for each deponent to have a clear understanding of the

proposed testimony of the opposing expert so that he or she can comment on the opposing expert's testimony at his or her deposition (if any).[14]

There are several types of measures and sanctions available to judges who believe that a party has not given full and fair expert witness disclosures,[15] and a judge who consistently and uniformly uses them to punish those who violate the rule concerning expert disclosures will see an improvement in the quality of expert witness disclosures and a halt to motion practice on the subject. Unfortunately, there are some lawyers who will do as little as they can get away with concerning expert disclosures (and other matters), and these lawyers know which judges will enforce the rules of civil procedure and which judges will not. The lawyers (and their clients) harmed by such conduct also know which judges will enforce the rules and which will not, and thus will not spend the time or money seeking enforcement of the rules from judges who have a history of not enforcing them. This situation emboldens the rule-violators.

7. *Expert witness deposition deadline.* If depositions of experts are to be taken, a deadline for doing so should be established. If the court or the parties are not certain whether depositions of experts will be taken, it is prudent to include a deadline for expert depositions in the event that the decision is made to do so.

It is good practice to require each party to provide, at the time of the disclosure of the expert, several dates that the party's expert can be deposed. Doing so increases the likelihood that the depositions can be put on the books of busy trial lawyers sooner rather than later, thus speeding up the resolution of the case.

8. *Medical deposition deadline.* It is prudent to set a deadline to take medical depositions of treating physicians or other providers that will be used at the trial of personal injury or wrongful death cases. Ordinarily, this deadline is set relatively close to the trial date so as to delay the significant expense of these depositions until the parties have had sufficient opportunity to have realistic settlement discussions.

9. *Proof deposition deadline.* If it is anticipated that depositions are going to be used at trial in lieu of live testimony, there should be a reasonable cut-off date for those depositions to be taken. Of course, from time-to-time the unexpected unavailability of a witness may arise at the last minute or even during the trial itself, but the "good cause" provision of Rule 16 protects all parties from harm in such situations.

10. *A deadline for filing and hearing of motions.* It is not uncommon for scheduling orders to include a deadline for filing summary judgment motions, especially where the issue is not

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[14] In some jurisdictions there are actually two rounds of depositions of plaintiff's experts: one based on the original disclosure, and a second deposition after the plaintiff's expert has a chance to see (and wants to comment on) the defendant's expert disclosure or expert deposition. This archaic practice is a tremendous waste of time and money, and should be relegated to the ash heap of history.

[15] For example, a judge who finds on a motion to compel that an expert witness disclosure is inadequate can issue an order requiring a more complete disclosure. The judge can also exclude testimony from the expert on those issues that were not properly disclosed. Alternatively, the judge can allow the adverse party two opportunities to depose the offending party's expert, the second deposition at the cost (including attorney's fees) of the offending party.

addressed in the local rules of court. Deadlines for motions to compel answers to discovery can also addressed in scheduling orders, and if so, it is prudent to set such a deadline shortly after the date for closing fact discovery (because some depositions may be taken or a deadline for responding to written discovery may be near the end of the fact discovery deadline).

11. *Dates for mediation, pretrial conferences, and trial.* Some scheduling orders address each of these issues, and some address none of them. The complexity of the case may require multiple scheduling orders, with a trial date being set only after some amount of discovery has been accomplished.

In ordinary cases, it is almost always a mistake to delay setting a trial date until discovery is complete. This method of docket management forces the parties to incur all of the costs of the discovery phase of litigation and then put the case on the back burner until the court can hear the trial. This is particularly a problem for lawyers (and thus the clients of lawyers) who have cases in multiple judicial circuits, some of which permit cases to be set for trial relatively early in the litigation process and others who insist that discovery be complete before a trial date is set.

Waiting to set a trial date until discovery is complete can also be very problematic in cases where the facts are constantly changing even in the midst of litigation. In those situations, it is virtually impossible to completely conclude discovery because as soon as it appears that you have, some new relevant issue or fact comes to light, the parties move to amend their pleadings, and the litigation starts all over again.

For example, in a divorce/child custody case, it is not uncommon for one party to want to drag out the proceedings. Sometimes one party is waiting for the other to commit some act that will prejudice the other in the eyes of the court (*i.e.* get a DUI, violate a restraining order, fail to pay pendent lite support, etc.). Sometimes he or she wants extra time to clean up their act (or at least appear to) before the judge sees them at trial. Sometimes one party lucks out and gets more pendent lite child support/alimony than they would likely be awarded at trial. He or she knows the money will probably be reduced or even eliminated if they actually go through with the divorce, and therefore takes steps to drag out the proceedings so that the money flow will continue. If you delay setting trial in these cases until discovery is complete, it may be almost impossible to set a trial date because there will always be some new information that needs to be "discovered" before trial can be set.

The parties need to know that the judge expects the scheduling order to be followed – it is, after all, a scheduling order, not a scheduling suggestion. A reasonable scheduling order that the parties know will be enforced by the trial judge (absent a showing of good cause) greatly increases the likelihood that the deadlines will be met and reduces the likelihood of a continuance. If the judge actually enforces the deadlines in the order, he or she will quickly see that motions to continue trial dates will rarely occur without good reason. Scheduling orders and firm trial dates are an essential part of docket management.

A date for mediation (or a deadline by which mediation should be completed) may be set in the scheduling order. The court has the power to order the parties to mediation, whether the

parties believe that mediation is appropriate or not.[16] The trial judge cannot, however, order "binding mediation."[17]

There are occasionally squabbles about what date should be selected for trial and the extent to which the schedule of any one lawyer should impact the trial date. Some lawyers maintain an enormous caseload, load up their calendars with trial or deposition dates, and then announce they are unable to appear for a trial in a given case for fifteen, eighteen, or even twenty months out because of prior "commitments" even though the case reasonably could be ready for trial in six months.

Trial judges should not permit this to occur. While the civil justice system should reasonably accommodate the schedules of lawyers, it should not allow a lawyer who accepts too much work to force everyone to wait until he or she can try the case on his or her schedule. When a judge allows this to occur, the judge is punishing the other litigants who have a right to have their cases tried on a timely basis.

Let me hasten to add that I am not suggesting judges should force lawyers to cancel scheduled vacations, etc. just to accommodate trial dates requested by opposing counsel. But a lawyer who does not have availability to schedule a trial date for twelve or more months simply has too much to do, and he or she should not be permitted to grind the progression of a case to a halt simply because of his or her schedule.

Finally, a scheduling order may set a date for a final pretrial conference. This topic is discussed in Chapter 2.

12. *Identification of witnesses and exhibits.* If the scheduling order sets a trial date, it may include deadlines for exchange of witnesses and exhibits. This subject may also be addressed in the local rules of court and it is prudent either to incorporate the local rules on these subjects into the scheduling order by reference or, if different deadlines will apply, to provide that the scheduling order takes precedence over any local rules to the contrary.

13. *Motions in limine.* If a trial date is set in the scheduling order and if the case is such that it is reasonable to assume that motions *in limine* will be filed, it makes sense to establish deadlines for (a) filing motions *in limine*; (b) filing responses to motions *in limine*; and (c) setting a hearing date for the motions. Typically, the hearing date for motions will be the same date as the final pretrial conference. Except in complicated cases, motions *in limine* should be heard no more than a week before trial if at all possible. Why? Practically speaking, the parties do not fully explore potential motions until the trial date draws near, and forcing the parties to develop such motions too early will increase litigation expense (because the parties will work up the case earlier and then be forced to prepare again as the trial draws near).

14. *Designation of Testimony to Be Used at Trial.* It is possible that one or more depositions will be used in a party's case-in-chief at trial. If so, it makes sense for the party using the deposition to designate which portions of which depositions will be used at trial, and to have counter-designations made by the adverse party. Of course, some of the deposition testimony may

[16] TENN. SUP. CT. R. 31 (3)(b).
[17] *Team Design v. Gottlieb*, 104 S.W.3d 512, 524 (Tenn. Ct. App. 2002).

have been taken subject to an objection, and thus there should be a process in place for resolving any of those objections.

The deadlines put in place for addressing these issues should take into account the need (if any) to edit any videotaped deposition for use at trial. Such work can usually be done within a week without paying "expedited charges" from the editing service.

Judge Thomas W. Brothers of the Sixth Circuit Court for the 20th Judicial District of Tennessee (Davidson County) has an excellent method to ease the process of deposition designations and ruling on objections to proposed testimony.[18] Judge Brothers has lawyers submit deposition testimony to the court using an Excel spreadsheet. If the entire deposition is being offered into evidence, the objecting party notes the specific objection by page and line and the basis (using the Tennessee Rule of Evidence rule number if possible). Judge Brothers then reads the deposition testimony to which an objection is raised, and rules on the objection. If an "x" is placed in the "Sustained" column, the entire line becomes red and the parties know that testimony on the indicated pages and lines has been excluded. If an "x" is placed in the "Overruled" column, the entire line becomes green and the testimony is admissible. The use of colors helps the reader readily identify what portions of the depositions need to be redacted.[19]

Judge Brothers does not ordinarily permit oral argument on every objection raised to deposition testimony. Instead, he reads the objection and rules. He then shares his work product (the Excel spreadsheet containing his rulings highlighted with the appropriate colors) with the lawyers, and gives them the right to address any ruling on a particular portion of testimony with which they disagree.

If a party proposes to introduce only a portion of the deposition, that is noted on the Excel spreadsheet so that he can consider the objection in the context of what testimony is being offered.

As indicated, this is a very efficient method of addressing objections to deposition testimony.

15. *Jury instructions*. Most scheduling orders that set a trial date will include a deadline for filing proposed jury instructions. This deadline should be set before the final pretrial conference but, like a motion *in limine* deadline, not so early as to impose extra litigation costs on the parties.

Appendix B includes several sample scheduling orders for several different types of cases.

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[18] This method is used when there are multiple depositions and a significant number of objections that need attention of the court. If there is a single deposition or a couple of depositions with just a dozen or so objections, Judge Brothers follows the more traditional approach to handling designations and objections.

[19] A black-and-white copy of a sample spreadsheet is contained in Appendix A.

SECTION 4: CONCLUSION

It is important to seek a scheduling order early in the case, establish reasonable deadlines at the outset, and then calendar those deadlines to avoid missing one. Also, as stated earlier, if it looks like a required matter cannot be completed within the applicable deadline, it will be to your advantage to file for relief before the deadline has passed. A party seeking to establish "good cause" to modify a scheduling order will be more likely to succeed if it has otherwise complied with the scheduling order and can demonstrate that the opposing party will not suffer any undue prejudice by extending the deadline.

Because a scheduling order helps the parties guide the case to a speedy resolution, a strong argument can be made that one should be entered in every case, although the lack of resources in many of our judicial circuits makes it difficult for the courts to be engaged in active case management and thus initiate the imposition of scheduling orders. However, the courts should readily grant any party's request for a reasonable scheduling order, and should impose reasonable deadlines to move the case forward to resolution, by motion, settlement or trial. Consistent judicial enforcement of those deadlines, in the absence of a showing of good cause or a lack of prejudice, will encourage appropriate conduct by the lawyers for the litigants, reducing bickering and the need for motion practice.

APPENDIX A – SAMPLE DEPOSITION DESIGNATION SPREADSHEET

17C1234	Smith v Jones							
	Objecting Party	Designation Start	Designation End	Objection Start	Objection End	Description/Basis of Objection	Sustained	Overruled
Deposition Name & Date				DEPOSITION OF DR. X, 11/4/18				
	PLAINTIFF							
				p. 26 line 20	p. 27 line 1	Expert test. cannot be based on speculation		x
				p. 35 line 13	p. 13 line 15	Expert test. cannot be based on speculation	x	
				p. 35 line 23	p. 35 line 25	Expert test. cannot be based on speculation	x	
				p. 36 line 1	p. 36 line 25	Expert test. cannot be based on speculation	x	
				p. 37 line 1	p. 37 line 25	Expert test. cannot be based on speculation	x	
				p. 38 line 1	p. 38 line 7	Expert test. cannot be based on speculation	x	
				p. 61 line 13	p. 61 line 14	Abortion is not relevant and prejudicial	x	
				p. 68 line 13	p. 69 line 9	Finances not at issue or relevant	x	
				p. 84 line 25		Abortion is not relevant and prejudicial	x	
				p. 161 line 21	p. 161 line 22	Abortion is not relevant and prejudicial	x	
	DEFENDANT							
				p. 98 line 12	p. 98 line 17	calls for speculation	x	
				p. 99 line 23	p. 100 line 3	irrelevant; violates Rule 411	x	
				p. 100 line 5	p. 100 line 10	vague, irrelevant, misleading		x
				p. 100 line 12	p. 100 line 18	irrelevant; violates Rule 403		x
				p. 101 line 6	p. 101 line 19	speculative, confusing, irrelevant under 403		x
				p. 103 line 17	p. 103 line 24	argumentative, irrelevant, violates 402/403	x	
				p. 114 line 23	p. 115 line 6	irrelevant, violate 402/403		x
				p. 116 line 4	p. 117 line 7	irrelevant, prejudicial given P's previous abuse		x
				p. 118 line 17	p. 118 line 25	ambiguous, irrelevant, Q was rephrased	x	
				p. 119 line 2	p. 119 line 10	misleading; T. Blair is not a physician	x	
				p. 119 line 15	p. 119 line 23	speculative; calls for facts not in evidence	x	
				p. 120 line 16	p. 121 line 7	irrelevant and prejudicial	x	
				p. 129 line 12	p. 129 line 20	vague; argumentative; mischaracterizes testimony		x
				p. 130 line 1	p. 130 line 19	argumentative; asked and answered		x
				p. 132 line 5	p. 132 line 21	argumentative; asked and answered		x
				p. 133 line 10	p. 133 line 20	argumentative; vague; irrelevant; speculation	x	
				p. 134 line 20	p. 135 line 3	speculation; irrelevant		x
				p. 135 line 18	p. 136 line 8	asked and answered		x
				p. 150 line 9	p. 150 line 13	calls for speculation		x
				p. 152 line 13	p. 152 line 22	asked and answered	x	
				p. 153 line 11	p. 154 line 6	asked and answered	x	
				p. 155 line 10	p. 155 line 24	speculative; argumentative; asked & answered		x
				p. 158 line 11	p. 158 line 25	prejudicial; violates 411		x
				p. 159 line 1	p. 162 line 16	prejudicial; unfair to attempt to suggest D is causing pain by not settling	x	
				p. 165 line 2	p. 165 line 8	not offered within reasonable degree of medical certainty		x
Deposition Name & Date				DEPOSITION OF DR. Y, 12/8/18				
	PLAINTIFF							
				p. 54 line 11	p. 54 line 23	Expert test. cannot be based on speculation	x	
				p. 58 line 1	p. 58 line 4	Abortion is not relevant and prejudicial	x	
				p. 64 line 25		Abortion is not relevant and prejudicial	x	
				p. 69 line 18		Abortion is not relevant and prejudicial	x	
				p. 71 line 24		Abortion is not relevant and prejudicial	x	
	DEFENDANT							
				p. 14 line 25	p. 15 line 16	leading and speculative	x	
				p. 15 line 23	p. 16 line 2	leading and speculative	x	
				p. 16 line 6	p. 16 line 11	leading and speculative	x	
				p. 24 line 13	p. 26 line 17	seeks rule 26 testimony from treating DR	x	
				p. 27 line 9	p. 28 line 11	leading and speculative; outside treatment of P	x	
				28/12	29/12			x
				29/13	32/1		x	
				32/2	p. 32 line 9			x
				77/8	77/11		x	
				78/4	78/17		x	
				p. 79 line 12	p. 79 line 21	speculative; vague; seeks rule 26 testimony	x	
				p. 80 line 8	p. 80 line 16	leading; speculative; vague; seeks rule 26 testimony	x	
				p. 82 line 14	p. 83 line 17	speculative; vague; seeks rule 26 opinions from treating physician	x	