UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

NORTHERN AND CENTRAL DIVISIONS

STANDARD OPERATING PROCEDURES

BEFORE TRIAL

1) Please read the local rules and be sure out-of-state counsel do so when you are local counsel. Be sure that local counsel sign all pleadings. That rule is violated often. Be sure, if you are local counsel, that *pro hac vice* applicants understand the need to have a sales tax license and to collect and pay such taxes on all services performed in S.D.

2) Read the order setting the date of trial and other deadlines. Do not go past any deadline without a motion to extend the time and an order granting it.

3) If seeking assistance in a criminal case as to an investigator or expert, submit the necessary CJA form. Do not file a motion or a brief unless there is something unusual about your request. I have no authority to authorize more than $2,400 in fees for any such person; any request for more must go to the Eighth Circuit for ADVANCE APPROVAL. Do not permit your investigator or expert to go over the monetary limit and then expect that person to be paid. Seek authorization in advance or they will not be paid.

4) If representing a criminal defendant, do not subpoena witnesses for the first trial day but rather for the day and time you will actually need them. If you are late asking for the subpoenas, the Marshals will probably be unable to serve them in time.

5) I encourage counsel to stipulate to the foundation of all medical records so that it is not necessary to call the custodian of the records to lay the foundation.

6) I also appreciate, in criminal cases involving Native Americans, stipulations as to Indian country and the fact that the defendant is an Indian in cases involving such matters. Otherwise, we are wasting time. If there is a genuine issue as to either of these questions, that is, of course, another matter.

7) Handle discovery informally, as much as possible. Do not and do not allow your client to make life difficult for opposing counsel without a very good reason to do so. The lawyer, not the client, controls professional courtesy. Counsel who bring discovery disputes to the Court do so at peril to one or both counsel or to the clients. If it appears that one side has acted unreasonably or is acting improperly, the responsible

person will be sanctioned accordingly. I will not permit counsel to practice law or clients to conduct themselves as though this were some notorious jurisdiction in a metropolitan area. Again, if you are local counsel, be sure that out-of-state attorneys understand this.

8) Although the Rules of Civil Procedure permit you to do so, please do not file written discovery motions without my prior approval. The federal rules already require a party with a discovery dispute to first try to resolve it with opposing counsel. If that good faith effort is unsuccessful, both counsel should mail a letter to me, explaining the dispute and your efforts to solve it informally. After receiving these letters, the Court may schedule and initiate a prompt telephonic informal discussion between the Court and both counsel. If we are unable to resolve the dispute informally, counsel will simply file a motion with necessary supporting documents.

9) If there are Form 35 disputes, I will not "split the difference." I will select the one proposal I find to be most reasonable.

10) In the very rare instance when a dispute arises during a deposition, please try to reach me by telephone and I will rule as soon as my bench schedule permits.

11) Although you are not required to do so, I would appreciate it if, before filing motions to dismiss, to remand, to strike, to change venue, or for summary judgment, the movant would send a letter of no more than two pages to the opposing attorney, explaining the nature of the motion and citing legal authorities in support of the motion. Do not send a copy of this letter to the Court or file the same. The attorneys are to then discuss the legal basis for the motion, exchange authorities and discuss anticipated discovery to try to resolve the matter without briefing. If these efforts are unsuccessful, you may ultimately file the motion.

12) Please do not designate a motion as one to dismiss under Fed.R.Civ.P. §12(b)(6) that is in essence a motion for summary judgment. Do not file a summary judgment motion which you know will be denied because some essential factual claim is in dispute. I will generally not permit a party to gain any advantage by filing a Rule 12(b)(6) motion that refers to matters outside the pleadings (whether by attaching affidavits or by some other method) in the hope that it will be treated as a motion for summary judgment. Be sure you are not premature in filing a motion for summary judgment without considering the use of requests for admissions and other economical discovery devices designed to reveal whether any material facts are actually and in good faith in dispute. A summary judgment motion is certainly appropriate if the motion is grounded on a legal theory which makes any factual dispute not material.

13) If you are filing a motion for summary judgment or opposing one, do not submit entire deposition transcripts. Submit only pages and portions of documents that

are relevant with the relevant material highlighted. As one circuit has said: "Judges are not like pigs, hunting for truffles buried in briefs." United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) (quoted with approval in United States v. Gurley, 434 F.3d 1064 (8th Cir. 2006). This rule applies to any other motions as well.

14) Follow the briefing time schedules and the page limitations set forth in the Local Rules for the District of South Dakota. The local rules apply to all cases brought before the District Court.

15) U.S. Magistrate Judges have volunteered to be available, depending on time constraints, to conduct mediation sessions if the parties desire and request it. I do not order such sessions unless all parties agree. Remember, these are excellent free services available to you and your clients. These judges have excellent skills.

16) Too often litigants are unaware of the efficiencies to be gained by having their civil cases tried before U. S. Magistrate Judges. Please be sure to inform your clients of this option and discuss it with opposing counsel. Any appeal may be taken directly to the Eighth Circuit or the parties may reserve the right to appeal to a U.S. District Judge (28 U.S.C.§ 636(c)(4) and Fed.R.Civ.P. 73).

17) Answers as to supplemental questionnaires from jury panel members are on file in Aberdeen (my chambers) and the clerk's office in Pierre. This is valuable information to assist you in selecting a jury and is not to be divulged to your client if you think there is any possibility the information may be used to invade the jurors' privacy.

18) Do not send facsimile transmissions to my chambers without advance authorization. Look at the rules adopted by the South Dakota Unified Judicial System and treat those as your course of conduct in federal court in the Central and Northern Divisions. Do not try to accomplish by a letter what should be addressed by a motion with supporting papers.

19) If you are asking for a written court order, you must submit a copy of the Order you want, in proper form, with a copy, of course, to all other parties. In submitting documents or writing to the Court, be sure to include the CIV. or CR. number as we do not maintain files by names.

20) If you are seeking to drop or add a party, proceed under Fed.R.Civ.P. §21. Too often, counsel try to add a party by amending the complaint. This is improper. Pleadings and Motions are dealt with under Part III of the Federal Rules. Parties are dealt with under Part IV of the Rules. You can certainly move to add a party under Rule 21 and, contingent upon such motion being granted, move for leave to serve and file an amended complaint.

21) At least three business days before trial, please consult with your clients and advise me and opposing counsel in writing of the names of family members, friends and others who may come to the trial as full or part-time spectators. Also, please advise us of any person known to you or to your client who may be seen during the trial with your client or one of your witnesses. If you learn during the trial that some person may attend, please bring this to the attention of opposing counsel and the Court at once.

22) At least three business days before trial, advise opposing counsel, the Clerk of Courts and me in writing of the names of any members of the jury panel who have any "connection" with the case, with partners, witnesses, lawyers, your spectators and anything else that you would want to know from your opponent. If it is clear that any such juror could be challenged for cause, such juror may be excused from reporting.

23) When you are serving documents on opposing counsel, please include the signed and dated certification of service at the end of the document so I do not have to wonder whether or not service was made by mail. There is no point in preparing and cluttering up the file with a separate proof of service document.

24) Please do not submit routine jury instructions that you know will likely be given. If you submit a pattern instruction and have changed it somewhat, please show the added material by underlining and the deleted material by strike-throughs.

DURING TRIAL

1) Do not ask leave of court to approach a witness or the clerk. You are not in general restricted to where you may stand or sit to question witnesses. If your view is blocked during examination by another attorney, you may move to see what is happening.

2) As often as possible, please have the clerk hand the exhibit to the witness to avoid wasting time with counsel walking from counsel table to the clerk's bench and then to the witness to hand the witness the exhibit.

3) When stating an objection, do not give a speech. State it briefly and in a manner as to state a legal objection. Do not try to prompt or warn a witness in the middle of cross examination by opposing counsel. Thus, for example, an objection to the effect that a question misstates the previous testimony or the record, is not a legal objection. It is an attempt to warn or prompt the witness and I will make it clear, if necessary, in the presence of the jury that it is improper to make such an objection. It is up to the witness and the fact finder to determine what was said earlier or what the record is.

4) Do not respond to any objection by opposing counsel unless I ask you to do so.

5) It is not necessary to stand when very briefly answering a simple question from the Court or in stating a very brief objection.

6) Be sure your client, all your witnesses and all your "spectator supporters" understand that they are to stand quietly in place at all times when the Court is coming and going from the courtroom. No one is to be wandering around or conducting some other business during such time frames. That is true also when the jury is entering or leaving the courtroom. This is not church where some people have the idea they may come and go at any time.

7) Your client may be present at all bench conferences. If the client is not present, I will assume the client does not wish to be present. There should rarely be a need for a bench conference since almost all serious evidentiary problems should have been resolved before the start of the jury trial. Plan ahead and anticipate so we are not wasting the jury's time.

8) Voir Dire. Each side is allowed approximately 15 minutes of *voir dire*. That should be sufficient, given the answers to supplemental questionnaires that will have been completed by all jurors and made available to you to copy and the *voir dire* questions that I will ask. If you think you need more time to conduct *voir dire*, let me know. Be careful to not ask questions already answered by virtue of the supplemental questionnaires. Ask questions of the entire panel, unless there is a reasonable ground for singling out an individual juror (examples: something on the jury questionnaire form, such as former employment if the juror has listed "retired", or juror raises hand in response to a general question, etc.) If there are specific questions you want me to ask and you do not want to ask, submit the written request before *voir dire* starts. You will be expected to identify to the jury panel the names and addresses of your prospective witnesses as well as your expected and possible spectators. We do not want some close friend or relative of a juror showing up as a "cheerleader" or "hand-holder" unless we all know about it in advance.

9) Do not offer to stipulate to something in the presence of the jury unless you have first discussed the possible stipulation with opposing counsel and have reached an agreement as to it.

10) I generally run jury trials until 6:00 p.m., recessing between 1:00 p.m. and 2:00 p.m. We need to be somewhat flexible depending on the flow of testimony.

11) Do not ask to publish exhibits to the jury unless you intend to continue questioning the witness on the stand.

12) All witnesses called to testify by any party will be subject to the control of the attorney who caused them to be subpoenaed or who secured their voluntary appearance.

Thus, do not inquire of the Court whether a witness may be excused. If opposing counsel wish to have any witness available for recall later (and have not made prior arrangements for the appearance of the witness through service of a subpoena or by voluntary agreement), it will be the responsibility of that attorney to make a request (when the witness steps down) that such witness remain in the environs of the Court for a reasonably short time to permit such attorney an opportunity to secure and serve a subpoena upon the witness and assume responsibility for per diem and other expenses as provided by governing rule or statute. Counsel are encouraged to anticipate these matters and to agree to assist one another with any witness appearance problems.

13) Please cooperate with opposing counsel. This includes briefing them as to witnesses you expect you will be calling the next day of trial. Also, be sure that opposing counsel have, in advance of making any reference to the exhibit, a copy of your exhibits (unless they are duplicates of what opposing counsel already would have). This copy for opposing counsel is to include the exhibit number assigned by the clerk so that each side and the Court know what you are talking about by exhibit number. I do not want counsel being required to spend time, with the jury and the Court waiting, looking at the exhibits of opposing counsel or trying to figure out what the number of the exhibit is.

14) The court reporter will not report the reading to the jury of the court's final instructions unless one of the attorneys requests in advance that this be done.

15) Sequestration of all witnesses, other than the case agent for the government, the defendant in a criminal trial, the parties in a civil case, and expert witnesses who must hear the testimony of other witnesses, will be automatic and you need not make such a motion. Please instruct your witnesses accordingly. Also, you are to instruct your witnesses to not discuss their testimony with other witnesses after leaving the stand and prior to the other witnesses testifying.

16) If you have any suggestions or complaints, do not hesitate to let me know.

Charles B. Kornmann
UNITED STATES DISTRICT JUDGE
January 30, 2013