



**FEDERAL PRACTICE INSTITUTE  
ISSUES FOR THE NEWER PRACTITIONER**

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**By Lisa M. Hall, Esq.  
Upton & Hatfield, LLP  
10 Centre Street  
P.O. Box 1090  
Concord, NH 03302-1090  
lhall@uptonhatfield.com**

## PRETRIAL ORGANIZATION

Much of the pretrial organization is delegated to the newer practitioner. Effective pretrial organization is the foundation for a successful trial presentation. Checklists can be effective tools to assist in organization and efficiency. Below is a checklist that includes the main pretrial activities, deadlines, and the person assigned to each task. Of course, you should reference the appropriate rules and court orders to ensure accurate deadlines.

Task	Due Date	Responsible Atty/PL	Comment
Schedule witness prep			
Refine evidence plan			
Pretrial statement , pretrial motions/MIL, voir dire, jury instructions, etc. due			LR 16.2(c)
<input type="checkbox"/> Pretrial Statement			Court Order or
▪ Incl statement re: use of JERS			LR 16.2(a)(6)
<input type="checkbox"/> Special Verdict form			by Order
<input type="checkbox"/> Jury Instructions			by Order
<input type="checkbox"/> Mtns in Limine			by Order
<input type="checkbox"/> If you want to use JERS but Def doesn't, file mtn requesting leave			LR 16.2 (b)(6) LR 83.16
Call USDC re: availability of jury questionnaires			LR 47.1
Draft opening			
Draft Closing			
Draft Mtn for JNOV at close of Def's case			
<input type="checkbox"/> Review Exhibits with objections			
<input type="checkbox"/> Update claim analysis			
<a href="#">Subpoena Witnesses</a>			
Pre-mark exhibits (ID/no ID)			Confer w/ opposing counsel. Date is approximate.
Objections to Def's pretrial materials due			Court Order
<b>Final Pretrial Conference</b>			Court Order
Has court ordered use of JERS at trial? If not, prepare exhibit books for jurors?			
Final Exhibit List, original marked exhibits, final Witness List due 7 days before trial (or sooner if by court order)			LR 83.14
Arrange to train on USDC technology, if necessary			LR 83.15 (no later than 5 days before trial)
If witness testimony by depo, pg/line counter-designations due 5 days before trial			LR 16.2(a)(4)
If witness testimony by depo, objections due 2 days before trial			LR 16.2(a)(4)
Jury costs may be assessed if case settles later than noon on _____	@ noon		LR 54.2
<b>Jury Selection &amp; Trial</b>			Court Order

Evidentiary and witness plans can assist in pretrial and trial organization by focusing on the essentials. The plans are simple and succinct checklists that form the basis for witness examination outlines. Both plans are most effective if started early in case development. For the plaintiff, an evidence outline is generally developed prior to drafting the complaint.

Below is a sample evidence plan for a plaintiff's claim of a *Product Design Defect*. The plan identifies the essential elements and the proof needed to establish it. An evidence plan is not as detailed as a witness examination outline. Rather, it sets forth the necessary factual proof and the witnesses and exhibits that will provide such proof.<sup>1</sup>

By focusing on the necessary elements and the required evidence, the evidence plan can assist in preparing witness outlines, motions in *limine*, a motion for directed verdict, an objection to the anticipated directed verdict, and post-trial motions.

Element of Claim	Facts to Elicit	Witness	Exhibit	Evidentiary Issue
<b>Product design created a defective condition unreasonably dangerous to the user</b>				
<b>Condition existed at the time of sale</b>				
<b>Product sold by a seller in the business of selling such products</b>				
<b>Use was foreseeable</b>				
<b>Condition caused injury to user or his property</b>				

A similar chart can be developed for each witness by identifying the witness, essential issues to cover or facts to elicit, and any exhibits to offer. The witness plan serves as a simple checklist to ensure that the witness's testimony supplies the essential elements and authentication of the intended exhibits.<sup>2</sup> Again, this chart aids the newer practitioner who may be assisting during trial and preparing for the trial and post-trial motions.

Witness	Essential Issues to Cover or Facts to elicit	Exhibits to offer

Another helpful tool is drafting canned evidentiary memoranda applicable to anticipated objections. The memoranda need only be one or two pages in length and ready for submission at side bar when the objection is argued. Even if not submitted, memoranda prepare and organize the relevant arguments. Also consider filing motions in *limine* to secure the admissibility of key evidence to which you anticipate an objection.

<sup>1</sup> Kent Sinclair, *Trial Handbook*, Third Edition (Practising Law Institute, Litigation Law Library)(2008)

<sup>2</sup> *Id.*

## Jury Evidence Recording System

On September 1, 2011, the New Hampshire Federal Court introduced the Jury Evidence Recording System (JERS) which allows jurors to review evidence (documentary, photo, or video exhibits) on a large plasma screen using a touch screen kiosk during their deliberations. JERS allows jurors to jointly view evidence multiple times, rewind videos, use a zoom tool, and review jury instructions.<sup>3</sup> Initially, JERS was infrequently used. However, the Court is increasingly ordering parties to use JERS and not allowing the old style “juror book” many practitioners would provide for each juror.

Local Rule [83.16](#) governs the use of JERS. A party’s civil pretrial statement must include his position regarding the use of JERS at trial.<sup>4</sup> Parties to a criminal trial must confer regarding the use of JERS and file statement confirming their conference and their position on the use of JERS at trial.<sup>5</sup> In both criminal and civil cases, a party desiring to use JERS can file a motion requesting leave to do so.<sup>6</sup>

If the Court orders JERS, the parties must submit their exhibits in both paper and electronic form to the Court and the opposing party.<sup>7</sup> The exhibits are due seven days before jury selection in civil cases and one day prior to the start of evidence in criminal matters.<sup>8</sup> JERS exhibits should be submitted to the Court on an external storage device such as a USB drive or a CD. If you use a USB storage device, it should be formatted to remove any extraneous data prior to saving any exhibits. In Windows, a USB drive can be formatted by:

- opening “My Computer” or “Computer” from the start menu;
- right-clicking on the USB drive icon located in the section “Devices with Removable Storage” and selecting “Format” from the pop-up window;
- checking the box “Quick Format” in the new window and starting the formatting process.

The Court will only accept certain file formats for JERS exhibits including: .pdf, .jpg, .bmp, .tif, .gif, .avi, .wmv, .mpg, .mp3, .wma, and .wav. The electronic exhibits should not have affixed exhibit stickers. The Court requires strict compliance with a specific naming convention for all JERS exhibits. All JERS exhibits must be named as follows:

**(exhibit number)-(exhibit part)\_(exhibit description).(file extension)**

Physical and bulky exhibits are identified in JERS by including a Notice of Physical Exhibit on the electronic storage device containing all other electronic exhibits. The Notice of Physical Exhibit should be named in accordance with the JERS naming convention.

Included in these materials are the Court’s standing order regarding JERS, JERS exhibit naming conventions, notice of physical exhibit, and JERS frequently asked questions.

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<sup>3</sup> <http://www.nhd.uscourts.gov/jury-evidence-recording-system-jers>

<sup>4</sup> [LR 16.2\(a\)\(6\)](#)

<sup>5</sup> [LCrR 16.1\(h\)](#)

<sup>6</sup> [LR 16.2\(a\)\(6\)](#); [LCrR 16.1\(h\)](#)

<sup>7</sup> [LR 83.16\(b\)](#)

<sup>8</sup> [LR 83.14\(a\)](#); [LCrR 16.1\(g\)](#)

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

**ORDER ON JURY EVIDENCE  
RECORDING SYSTEM (JERS)**

**ADM-1  
ORDER 11-4**

**ORDER**

Effective September 1, 2011, the court will make available a new method of presenting evidence to a deliberating jury using the Jury Evidence Recording System (JERS). The following procedures shall apply to all cases after the effective date of this order:

1. The parties shall indicate their respective positions on the use of JERS at trial as follows:

(a) Civil Cases: In the final pretrial statement filed pursuant to LR 16.2;

(b) Criminal Cases: Unless a party requires more advance notice, in a notice filed at least seven (7) days prior to trial.

2. The presiding judge will determine, either sua sponte or on request of the parties, whether JERS will be used in a particular jury trial. The below requirements apply only if the court orders or approves the use JERS in a specific case.

3. Unless otherwise ordered by the court, on the date established by the local rules for the submission of trial exhibits in civil (LR 83.13) and criminal (LCrR 16.1(g)) cases, the parties shall submit their exhibits conventionally (e.g. in paper format) as well as in electronic format that strictly conforms with naming and submission instructions on the court's website.

4. To the extent possible, the parties should endeavor to have an electronic copy of any unlisted exhibits that may be used to impeach a witness during trial.

5. Exhibits that cannot be reduced to electronic format, such as large physical exhibits, need not be submitted electronically for entry into JERS.

6. Before the jury begins to deliberate, the parties will confer with the courtroom deputy and will agree on the exhibits that will be released to the jury through JERS and what

restrictions, if any, may apply (e.g. audio only, video only). Any disagreement will be resolved by the presiding judge.

7. To maintain the integrity of the deliberation process, no court personnel will enter the jury room once deliberations have commenced without the court's permission. Any request by the jury for technical assistance will have to be made in writing and presented to the attorneys for their consideration and to the court for approval before any court staff member will be permitted to assist the jurors. In the event court staff must assist with a technical problem, jurors will be escorted to another room while court staff resolves the problem.

8. Unless ordered by the court, the use of JERS does not supersede the local rule requirements to produce exhibit lists and exhibits in paper format. LR 83.13 (civil cases); LCrR 16.1(g) (criminal cases).

SO ORDERED.

Dated: June 15, 2011

A handwritten signature in black ink, appearing to read "Steven J. McAuliffe", written over a horizontal line.

Steven J. McAuliffe  
Chief Judge



## **Jury Evidence Recording System (JERS)**

### **Exhibit Naming Conventions**

**Plaintiff(s)/Government:** (Exhibit name(s) begin with numerical characters)

General Format: **<exhibit number> - <exhibit part>\_<exhibit description>.<file extension>**

Examples:

- Documents: "1\_2009 Financial Statement.pdf" "2\_2010 Financial Statement.pdf"
- Pictures: "3\_Picture of Suspect.jpg" "3-a\_Picture Suspect Close Up.gif"
- Audio: "4\_Phone Conversation 1.mp3" "4-a\_Phone Conversation 2.wav"
- Video: "4-b\_Suspect in Store.wmv" "4-c\_Suspect carrying TV.mpg"

**Defendant(s):** (Exhibit name(s) begin with alpha characters)

General Format: **<exhibit number> - <exhibit part>\_<exhibit description>.<file extension>**

Examples:

- Documents: "A\_2009 Financial Statement.pdf" "B\_2010 Financial Statement.pdf"
- Pictures: "C\_Picture of Suspect.jpg" "C-1\_Picture Suspect Close Up.gif"
- Audio: "D\_Phone Conversation 1.mp3" "D-1\_Phone Conversation 2.wav"
- Video: "D-2\_Suspect in Store.wmv" "D-3\_Suspect carrying TV.mpg"

#### **PLEASE NOTE:**

- **All exhibits shall be described using neutral and non-adversarial terms. The exhibit description field is limited to 200 characters.**
- **For any exhibit that is marked for identification, do not include "(ID)" in the exhibit number or description of the JERS copy.**
- **While exhibit stickers are used for paper/physical exhibits, the electronic exhibits provided for use in JERS should not display the exhibit numbering stickers. The exhibit description given to the electronic version replaces the use of exhibit stickers.**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE**

Plaintiff(s)	)	
	)	
v.	)	Case No.: _____
	)	
Defendant(s)	)	
	)	

**Notice of Physical Exhibit**

PLEASE BE ADVISED that the exhibit named below is a physical exhibit and not available for viewing in JERS.

Party submitting Exhibit: \_\_\_\_\_

Exhibit No./Letter: \_\_\_\_\_

Description: \_\_\_\_\_

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**



**JERS FAQ**

Beginning September 1, 2011, the United States District Court for the District of New Hampshire will make available a new method of presenting evidence to a deliberating jury using the Jury Evidence Recording System (JERS). This system will allow deliberating jurors to review exhibits (documentary, photo, or video exhibits) on a large plasma screen using a touch screen kiosk. Using JERS, jurors can jointly view the evidence multiple times, rewind videos, use a zoom feature, or even review jury instructions.

**1. What is JERS?**

Jury Evidence Recording System (JERS) is a new courtroom technology system. This system, which was developed by the United States District Court for the Western District of North Carolina, allows deliberating jurors to review exhibits (documentary, photo, or video exhibits) on a large plasma screen using a touch screen kiosk. Using JERS, jurors can jointly view the evidence multiple times, rewind videos, use a zoom feature, or even review jury instructions.

**2. Will JERS be mandatory in every jury trial in this district?**

No, not at the present time. The parties will indicate their respective positions on the use of JERS as follows: (a) Civil Cases: In the final pretrial statement filed pursuant to LR 16.2, (b) Criminal Cases: Unless a party requests an earlier decision, in a notice filed within seven (7) days of the jury selection date. The presiding judge will determine, either sua sponte or on request of the parties, whether JERS will be used in a particular jury trial.

**3. What if one party does not want to use JERS?**

One party's (or both parties') objection does not preclude the use of JERS. The decision on whether the parties will be required to use JERS in a specific case will be determined by the presiding judge.

#### **4. If the court determines JERS should be used for a jury trial, when are the parties required to produce the exhibits in electronic format?**

Unless otherwise ordered by the court, the electronic exhibits should be submitted with the clerk's office on or before seven (7) days prior to jury selection in a civil case (LR 83.13) and one (1) day before the start of evidence in a criminal case (LCrR 16.1(g)). In a document extensive case, however, the court may well order the electronic exhibits be produced in advance of these deadlines.

#### **5. In what format must these electronic exhibits be produced?**

All exhibits that consist of documents, photographs, and videos, as well as any other evidence that can be reduced to an electronic file, shall be produced on a USB drive, DVD, or CD. Documents and photographs shall be in .pdf, .jpg, .bmp, .tif, or .gif format. Video and audio recordings shall be in .avi, .wmv, .mpg, .mp3, .wma, or .wav format. Each electronic exhibit shall be saved as a separate/independent file, named in the same order and using the same exhibit name as contained on the exhibit list, and submitted in the following format:

**<exhibit number> - <exhibit part>\_<exhibit description>.<file extension>.**

Examples:

- Plaintiff/Government: "1\_2010 Financial Statement.pdf", "2-A\_Camera Footage of Accident.wmv", "2-B\_Audio Recording of Confession.mp3".
- Defendant(s): "A\_2010 Financial Statement.pdf", "B-1\_Camera Footage of Accident.wmv", "B-2\_Audio Recording of 911 Call.mp3".

For additional information on how to properly name exhibits, see the JERS webpage in the "Courtroom Technology" section of the court's website at [www.nhd.uscourts.gov](http://www.nhd.uscourts.gov).

#### **6. What do we do with physical or bulky exhibits?**

Exhibits that cannot be reduced to electronic format, such as a car bumper or airplane wing, would simply be presented as physical exhibits and need not be submitted electronically.

#### **7. Can we capture newly presented evidence using the document camera?**

Yes, the courtroom deputy can capture newly presented evidence on the document camera. We are also able to capture video and audio live in the courtroom at the time it is played. Of course, the attorneys will be required to coordinate with the courtroom deputy regarding how to capture these new exhibits or videos.

**8. What if an exhibit is redacted or modified from the electronic version that was originally submitted prior to the commencement of trial?**

The party can create their new document/electronic file overnight or during lunch and email it to the courtroom deputy or they can bring it in on a disk or USB drive. If the exhibit needs to be entered immediately, the courtroom deputy can capture it on the document camera.

**9. Does JERS capture sound from the witness stand?**

No, only the sound from an admitted exhibit is available, such as from a video or audio clip.

**10. Who determines what ultimately is released to the jury?**

Prior to trial the courtroom deputy will upload all electronic exhibits into JERS. During the course of trial, the courtroom deputy will continue to track the admission of trial exhibits and the removal of any ID designation for admitted exhibits. Just as we do with paper exhibits, before the jury begins to deliberate the attorneys will confer with the courtroom deputy to agree on which exhibits will be released to the jury through JERS and what restrictions may apply (e.g. audio only, video only). Any disagreements between counsel in relation to exhibits will be addressed by the presiding judge.

**11. How will a jury use JERS during deliberations?**

Prior to the commencement of deliberations, the courtroom deputy (or courtroom technology specialist) will show the jurors a tutorial on how to use JERS. During deliberations jurors can review those exhibits on a large plasma screen using a touch screen kiosk. Using JERS, jurors can jointly view the evidence multiple times, rewind videos, use a zoom feature, or even review jury instructions.

**12. Are the documents text searchable using JERS?**

No, the PDF documents are not searchable, but jurors have several navigation options they can use to review documents or pictures.

**13. What if the jury has a problem using JERS during deliberations?**

To maintain the integrity of the deliberation process, no court personnel will enter the jury room once deliberations have started without the court's permission. Any request for technical assistance will have to be made in writing and given to the Court Security Officer for delivery to the courtroom deputy and the matter will be presented to the attorneys for their consideration and to the court for approval before any court staff member will attempt to assist the jurors. In the event court staff must assist with a technical problem, jurors would be escorted to another room while court staff fixes the problem.

**14. Can the court determine which exhibits the jury reviewed and can the jury access cable television, the internet or the Windows operating system from the touch screen kiosk?**

No.

**15. Do the parties still need to produce an exhibit list and paper exhibits if they are using JERS at trial?**

Yes, at least at this time. Pursuant to AP 3.5, all trial exhibits and exhibit lists must be filed conventionally in accordance with LR 83.13 and LCrR 16.1(g). The use of JERS does not alter those requirements. Unless otherwise ordered, the paper exhibits will also be given to the jury during deliberations.