IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRANCE WHITAKER,

Plaintiff,

v.

MR. BROADBENT and CO ZIMILICA,

Defendants.

TRIAL PREPARATION ORDER

Case No. 18-cv-1068-wmc

Pro se plaintiff Terrance Whitaker claims that defendant Zimilica violated his Eighth Amendment rights during an allegedly unlawful strip search and defendant Broadbent violated his First Amendment rights by issuing him a conduct report that subjected him to a disciplinary proceeding and 15 days of cell confinement in retaliation for his complaint about Zimilica's conduct. A jury trial is set for August 10, 2020, at 8:30 a.m., and the court will hold a telephonic final pretrial conference on July 31, 2020, at 10:00 a.m.

This order will describe how the court generally conducts a trial and explain to the parties what written materials they are to submit before trial. READ THIS ORDER NOW. Both sides must review the order very carefully. It contains important instructions and it may answer the parties' questions about the trial. All trials are complicated, so it is important to be prepared. By reading this order and following the instructions in it, the parties will increase their chances of having a smooth trial and presenting their evidence without interruptions for failing to follow trial procedures.

Several times in this order, the court refers to trial procedures. A copy of those procedures are included with this order.

A. Courtroom Behavior

The court expects that the parties will behave in a respectful manner throughout the course of trial. This means that the parties should not raise their voices, interrupt each other (or the judge) or argue with a witness.

If this is your first lawsuit, then it is understandable that you will make mistakes. If that happens, try not to get frustrated. Instead, listen carefully to the instructions the judge gives you and try again.

B. Proving Whitaker's Claims

At the trial, it will be Whitaker's job to prove his claims against defendants. Because Whitaker generally has the burden of proof, he presents his evidence first. To avoid having his case dismissed before defendants puts in their defense, Whitaker must present enough evidence to allow a reasonable jury to find that each legal element of his claims have been proven by a preponderance of the evidence.

To succeed on his Eighth Amendment claim against Zimilica, Whitaker must submit evidence that (1) he defendant conducted the search for the purpose of humiliating him; (2) the search was "calculated harassment" or "maliciously motivated" unrelated to institutional security and (3) the search caused him psychological pain. To succeed on his First Amendment claim against Broadbent, Whitaker must submit evidence that (1) he was engaged in a constitutionally protected activity; (2) he suffered a deprivation that would likely deter a person from engaging in the protected activity in the future; and (3) the protected activity was a motivating factor in defendants' decision to take retaliatory

action. Whitaker may prove these claims in various ways. For example, he can take the witness stand himself and testify about what happened. He is also entitled to call witnesses and present other forms of evidence. As this case has progressed, Whitaker should have been collecting the information necessary to prove his claims by following the Federal Rules of Civil Procedure. The rules explain the proper way to obtain documents and information that cannot be obtained through an informal request. When deciding what evidence to present to the jury at trial, Whitaker should remember a few things:

The jurors will know nothing about the case.

The jurors have never heard of this lawsuit before coming in for jury duty. They have not reviewed the complaint, the evidence or any of this court's orders. This means that it is Whitaker's job to provide the jury enough evidence and explanation to persuade the jury to enter a verdict in his favor. All the jury will know is what the parties present to them during the trial, along with the instructions provided by the court.

Remember that the jurors have probably never seen a prison and do not have extensive knowledge about how a prison works. It is up to plaintiff to provide evidence explaining the circumstances surrounding the events at issue at trial.

The parties must present *at trial* any evidence that they want the jury to consider.

If a particular piece of evidence is not introduced during trial, the jury may not consider it. This means that even if a piece of evidence was filed earlier in this case, the jury will not know about it unless one of the parties introduces it as evidence during the trial.

All factual evidence offered at trial must meet the requirements of the Federal Rules of Evidence.

Although it is impossible to predict which rules may be important in a particular trial, the most commonly cited rules are those relating to **relevance** (Rules 401 and 402), **unfair prejudice** (Rule 403), **character evidence** (Rules 404 and 608), **prior statements of witnesses** (Rule 613) and **hearsay** (Rules 801-807). If one party asks a question or offers an exhibit that violates these rules or some other Federal Rule of Evidence, then the other party may object and get a ruling from the court. The parties should review all of the Federal Rules of Evidence before trial so that they know how to present evidence properly and raise objections to evidence that does not comply with the rules. During trial, if a party raises an objection, the court may hold a side bar with the parties to resolve it outside the hearing of the jury.

The Federal Rules of Evidence limit the testimony of witnesses.

Witnesses may give testimony on any relevant matter when they have personal knowledge of that matter. In general, witnesses cannot testify about what someone else said outside the courtroom if the statement is being offered for the truth of the matter, because the accuracy of that statement cannot be tested by the opposing party. Those statements are called hearsay. There are a number of exceptions to this general rule against hearsay that are set out in Rules 803 and 804.

Documentary evidence will not be admissible unless the document is "authenticated."

Under Federal Rule of Evidence 901, a party who wishes to rely on a piece of evidence at trial must show that the evidence is what that party claims it to be. For

example, if you want to introduce a particular document, you may satisfy Rule 901 by calling a witness who has personal knowledge that your document is an accurate copy of the original. This is the most common method of satisfying Rule 901, but other methods are listed in the rule. Alternatively, the parties may stipulate, or agree, to the authenticity of a piece of evidence. *The court strongly encourages the parties to stipulate to the authenticity of documents before trial*, so that they won't have to argue about this at trial.

A party may not introduce affidavits into evidence or read from them at trial.

Affidavits are hearsay statements made outside the courtroom, as are statements that Whitaker made in a complaint or grievance. Because statements made in an affidavit, complaint, or grievance are hearsay, these documents cannot be introduced at trial to prove the truth of statements contained within them. Instead, the party must call the witness who wrote the document to testify at trial.

Affidavits and other written statements may be used *against* a witness in certain circumstances. If at trial a witness testifies to facts that are different from the facts the witness swore to in an affidavit or some other document, the party questioning that witness may use the witness's earlier statements to challenge the credibility (the believability) of the witness.

Orders or opinions from this court, from the court of appeals or from the Supreme Court are not evidence.

The parties may consult this court's orders and other case law in deciding how to prove their case, but they may not submit them as exhibits because they are not evidence.

If a party believes that a particular statement of the law is relevant and important to his case, he may include it as part of his proposed jury instructions.

C. Witnesses

The parties have a **July 2, 2020**, deadline for disclosing the names and addresses of their trial witnesses. A copy of the procedures for calling witnesses to trial is included in the set of procedures attached to this order.

Presenting Whitaker's testimony at trial

Whitaker is entitled to take the witness stand and present his own testimony at trial. Because this is a pro se trial, the presentation of Whitaker's testimony will be different from the testimony of other witnesses. For example, when presenting testimony of other witnesses, Whitaker would need to ask the witness questions about what happened. But when Whitaker takes the witness stand himself, he may present his testimony and explain what happened to him in a narrative form (without asking himself questions).

But the Federal Rules of Evidence will still apply. For example, Whitaker's testimony must be based on his own observations and experience. Defendants' counsel can also object during Whitaker's testimony, and when that happens, Whitaker should stop, wait for me to rule on the objection, and continue testifying only after my ruling. I will explain the procedures about objections in more detail below.

Calling incarcerated witnesses to testify at trial

The parties are reminded that if they wish to call an incarcerated witness to testify, they must serve and file **a petition for the issuance of writs of habeas corpus ad testificandum**, in other words, a motion requiring the person named in the petition to come to court to give testimony. The deadline for filing a petition is **July 13, 2020** (four weeks before trial). With the motion, a party must file supporting affidavits or declarations with the following information:

- a showing that the witness is willing to appear voluntarily;
- a description of the testimony the witness will give; and
- an explanation how the witness has personal knowledge of information relevant to a claim or defense. ("Relevant to" means that the information relates to and explains some part of a claim or defense.)

Also, if the party is calling more than one prisoner to testify about the same events, the party should explain why he needs each prisoner's testimony.

The parties should make all efforts to submit any petition as soon as possible so that the court will be able to issue any writs in time to ensure the witness's presence at trial. More details about calling prisoner witnesses are contained in the procedures for calling witnesses attached to this order.

The court will direct the Clerk of Court to issue a writ of habeas corpus ad testificandum for Whitaker's own attendance at trial.

Calling unincarcerated witnesses to testify at trial

If a party wishes to call a nonprisoner witness, they may ask the witness to testify voluntarily. If the witness will not agree, the party must subpoena the witness and pay the

required witness fees. The court does not have the authority to waive those fees, even if the party is proceeding in forma pauperis. More details about calling nonprisoner witnesses are contained in the procedures for calling witnesses that are attached to this order.

Calling defendants to testify at trial

Defendants are not required to be present at trial in the absence of a subpoena. However, in most cases, a defendant chooses to appear at trial on his own. To avoid uncertainty, the court will ask defendants to inform Whitaker and the court no later than **July 2, 2020**, whether each will attend each day of the trial without a subpoena. If a defendant does not agree to attend the trial, then Whitaker will have to follow the attached procedures for calling unincarcerated witnesses if he wants that defendant to testify.

D. Trial Materials and Motions

The parties must meet the following deadlines for the submission of pretrial materials:

Motions in limine: July 2, 2020

Response to motions in limine: July 17, 2020

Parties may file what are called "motions in limine" to get rulings from the court before trial about evidence that they believe should be admitted or excluded. "In limine" means at the threshold; in this instance, at the threshold of trial. For example, a party might file a motion in limine to exclude improper evidence that the party believes the other side may try to submit. Motions in limine are not intended to resolve disputes regarding all pieces of evidence because most evidentiary objections about individual documents can

be made during trial. But if there are disputes about evidence that could have a big impact on the course of trial, the parties may want to get a ruling from the court about this evidence before the trial begins.

Proposed voir dire questions, jury instructions and verdict forms:
July 2, 2020

Exhibit list and complete set of all of exhibits to be used at trial:
July 2, 2020

Objections to the other side's voir dire, instructions or verdict forms:
July 17, 2020

In addition to following the exhibit procedures, the parties should exchange copies of their trial exhibits *in advance* of trial. An early exchange makes each party think about what documents he will need to offer at trial in order to prove the elements of the claims, and then make sure that the documents have been "**authenticated**" if this is necessary. *See* **Federal Rules of Evidence 901 and 902.** Second, this will promote the efficient conduct of the trial by allowing each party to examine the opposing parties' exhibits in advance of trial so that objections to the admissibility of the documents may be taken up at the final pretrial conference outside the presence of the jury. The parties should be prepared to explain at the final pretrial conference their grounds for objecting to a particular exhibit.

Note well: The parties should keep the original copies of their exhibits in their possession so that they have them at the time of trial.

E. Final Pretrial Conference

I will hold a telephonic final pretrial conference on **July 31, 2020, at 10:00 a.m.** The purpose of that conference is to discuss issues that arise from the parties' pretrial submissions, the court's rulings on the motions in limine and any objections to trial exhibits. The court will also discuss how the trial will proceed, and will address questions the parties may have.

F. Trial Overview

1. Jury selection -- voir dire questions

The trial will begin with jury selection. The judge will ask all the potential jurors standard "voir dire" questions, which they must answer under oath. This is the parties' chance to watch and listen to the potential jurors while they are being questioned so that the parties can decide which persons to strike from the panel when the questioning is done.

The standard questions appear in the attachment to the preliminary pretrial conference order. The parties may add questions to the standard questions by submitting their proposed questions to the court and the opposing party by the deadline above.

Fourteen possible jurors will be called forward. When the judge has finished questioning these people, during a side bar, the judge will ask the parties whether they wish to ask any more questions and whether they believe that any of these 14 potential jurors cannot be fair and impartial. After that, each side will be allowed to remove three potential jurors from the list of fourteen. Whitaker will remove one name, then defendant will

remove one name, back and forth three times until six people are removed, leaving the eight people who will be the jury.

2. Opening statements

After the parties select the jury, Whitaker will give an opening statement describing his claims. An opening statement should give the jury an idea of what the case is about and what the jurors will see and hear from the witnesses and from the exhibits that Whitaker will offer into evidence. *The opening statement is not the time to give testimony*. What is said during opening statements is not evidence. Therefore, if one party begins to make comments that are more like testimony and the other party objects, then the judge will instruct the jury not to consider the statements that are like testimony.

Following Whitaker's opening statement, defense counsel is allowed to make a statement about defendants' case. If counsel wishes, they may choose to delay this opening statement until the beginning of defendants' case.

3. Presentation of evidence

After the parties have given their opening statements, Whitaker will present his case by submitting evidence. This is called Whitaker's "case in chief." Whitaker may provide his own testimony, call other witnesses and submit properly authenticated documents that comply with the Federal Rules of Evidence.

a. Questioning witnesses

If a party calls a witness to testify, the party must ask the witness questions that are relevant to the claim or claims being tried. This is called "direct examination." The party may not give his own testimony during direct examination and he may not argue with the witness if he believes that the witness has given incorrect or improper testimony. If the party believes that the witness has not answered the question, then the party may repeat the question or ask the question a different way.

The parties are reminded that witnesses other than experts are limited to testimony about their own observations. Therefore, the person questioning a witness should ask questions at the beginning about how the witness came to know the facts he is testifying about: Where was the witness at the time? Was the witness close enough to hear and see what was going on? What reason did the witness have to pay attention to what was going on?

When the party is finished asking the witness questions, it is the other side's turn to ask the witness questions. This is called "cross examination."

If a party believes that a witness is giving testimony that does not comply with the Federal Rules of Evidence, the party may raise an objection with the judge and tell the judge the reason for the objection. If the judge agrees with the objection, the objection will be "sustained" and the witness will not be allowed to answer the question. (If the witness has already answered the question, the court will tell the jury to disregard the witness's answer.) If the judge does not agree with the objection, the objection will be "overruled," or denied.

b. Submitting exhibits

If a party wishes to offer a document as evidence, he must include the document in his exhibit list. Before the document can be shown to the jury, the party must ask a witness who has personal knowledge of the document to explain what the document is. There is an exception to that rule if the other side agrees that the document is admissible.

c. Defendant's case and rebuttal evidence

After Whitaker has presented his case, defendant may move to dismiss Whitaker's case on the ground that Whitaker has failed to present enough evidence to allow a jury to find that each element of the claim has been proven by a preponderance of the evidence. This is called a motion for judgment as a matter of law. Fed. R. Civ. P. 50. If defendant asks the court to dismiss the case, Whitaker will be given an opportunity to explain why he believes there is enough evidence to allow the case to continue. If the court denies defendants' motion or defendants do not move to dismiss the case, defendants may present their evidence.

After defendants are finished presenting their evidence, Whitaker may present additional evidence to rebut defendants' case. Any testimony or other evidence presented during this phase of the trial is limited to responding to evidence introduced by defendants. Whitaker may not introduce new evidence simply because he failed to address a matter in his case in chief.

4. Instructions and Closing Arguments

After the parties are finished presenting evidence to the jury, the court will instruct the jury on the law governing their deliberations. Then, both sides will have an opportunity to give closing arguments. This is not a time to offer new testimony. The parties should focus on the evidence presented during the trial and explain to the jury why they believe the evidence supports their position. In a closing argument, a party may explain why he believes his witnesses are more credible, why his evidence should be given more weight and what inferences may be drawn from the evidence presented.

G. Damages

If the jury finds that Whitaker is entitled to a verdict in his favor, it may award compensatory damages in an amount that reasonably compensates Whitaker for the injuries or damages he suffered as a result of defendants' acts. It will be Whitaker's burden at trial to prove damages. If Whitaker proves his claim but he cannot prove compensable harm, then he will be entitled to "nominal damages" of $1. A plaintiff who is a prisoner at the time he files a lawsuit may recover damages for emotional harm only if he proves that he suffered a physical injury because of the defendants' conduct. 42 U.S.C. § 1997e(e).

To recover "punitive damages," Whitaker will have to prove that defendants acted with evil motive or intent or with reckless or callous indifference to his constitutional rights. If Whitaker satisfies the legal standard for punitive damages, the jury may, but is not required to, award these damages as a deterrent to each defendant.

H. Attire and Restraints

Incarcerated plaintiffs often file motions to appear at trial in street clothes rather than prison garb. Whitaker may wear street clothes, but it is his responsibility to arrange for that clothing. If Whitaker wishes to wear street clothes during trial, he should arrange for clothes to be available for him by asking a family member or friend to either mail or deliver clothing to the office of the Clerk of Court, 120 N. Henry Street, Room 320, Madison, WI 53703, so that the clerk's office receives the clothing no later than 8:00 a.m. on the first day of trial. Alternatively, Whitaker may ask jail officials to transfer his clothing to the clerk's office when they bring him to the courthouse for trial. Whether the jail officials would agree to do this is a matter within their discretion.

Whitaker should be aware that plaintiffs who are in custody frequently appear at jury trials in this court in their prison uniforms, which is unlikely to create unfair prejudice because the juries are well aware of the plaintiff's incarceration. If, however, an inmate plaintiff has access to street clothes and asks to wear them, then the court will honor that request so that the plaintiff may present himself as neutrally as possible during trial.

Restraints, particularly visible restraints, are rarely necessary in prisoner trials in this court. But I will take input from the parties on what they believe is necessary for Whitaker and any incarcerated witness who is asked to testify. Should restraints be necessary, a stun belt is often appropriate.

ORDER

IT IS ORDERED that:

1. The clerk of court is directed to issue a writ of habeas corpus ad testificandum for the attendance of plaintiff Terrance Whitaker at trial beginning on **August 10, 2020**. Plaintiff should arrive at the courthouse no later than 8:00 a.m.

2. The clerk of court is directed to send a copy of this order and the trial procedures applicable to Judge Conley to plaintiff Whitaker.

3. NOT LATER THAN **July 13, 2020**, the parties are to file and serve any additional motions for the issuance of subpoenas or writs of habeas corpus ad testificandum, together with supporting affidavits or declarations revealing the witness's willingness to appear voluntarily.

4. NOT LATER THAN **July 2, 2020**, the parties are to file and serve any motions in limine they wish to bring. RESPONSES to these motions are due **July 17, 2020**.

5. NOT LATER THAN **July 2, 2020**, the parties are to file and serve: (a) proposed questions for voir dire examination; (b) a proposed form of special verdict; (c) proposed jury instructions; and (d) a copy of all exhibits and an exhibit list. The parties should not submit copies of the standard voir dire questions and jury instructions attached to the magistrate judge's preliminary pretrial conference order. OBJECTIONS are due on **July 17, 2020**.

6. The court may refuse to entertain special verdict forms or jury instructions not submitted on time, unless they concern a matter that came up unexpectedly at trial.

7. Defendants are to inform plaintiff and the court by **July 2, 2020**, whether they will attend each day of trial without a subpoena.

8. The court will hold a telephonic final pretrial conference on **July 31, 2020, at 10:00 a.m**. Defendant is responsible for initiating the call to the court.

Entered this 6th day of April, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

PRO SE LITIGANTS' PROCEDURES FOR CALLING WITNESSES

At trial, plaintiff will have to be ready to prove facts supporting his claims against the defendant. One way to offer proof is through the testimony of witnesses who have personal knowledge about the matter being tried. If a party wants witnesses to be present and available to testify on the day of trial, the party must follow the procedures explained below. ("Party" means either a plaintiff or a defendant.) These procedures must be followed whether the witness is:

1. A defendant to be called to testify by a plaintiff; or
2. A plaintiff to be called to testify by a defendant; or
3. A person not a party to the lawsuit to be called to testify by either a plaintiff or a defendant.

I. PROCEDURES FOR OBTAINING ATTENDANCE OF INCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

An incarcerated witness who tells a party that he is willing to attend trial to give testimony cannot come to court unless the court orders his custodian to let him come. The court must issue an order known as a writ of habeas corpus ad testificandum. This court will not issue such a writ unless the party can establish to the court's satisfaction that

1. The witness has agreed to attend voluntarily; and
2. The witness has actual knowledge of facts directly related to the issue to be tried.

A witness's willingness to come to court as a witness can be shown in one of two ways:

1. The party can serve and file an affidavit or declaration declaring under penalty of perjury that the witness told the party that he or she is willing to testify voluntarily, that is, without being subpoenaed. The party must say in the affidavit or declaration when and where the witness informed the party of this willingness;
   OR
2. The party can serve and file an affidavit or declaration in which the witness declares under penalty of perjury that he or she is willing to testify without being subpoenaed.

The witness's actual knowledge of relevant facts may be shown in one of two ways.

1. The party can declare under penalty of perjury that the witness has relevant information about the party's claim. However, this can be done only if the

party knows first-hand that the witness saw or heard something that will help him prove his case. For example, if the trial is about an incident that happened in or around a plaintiff's cell and, at the time, the plaintiff saw that a cellmate was present and witnessed the incident, the plaintiff may tell the court in an affidavit or declaration what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred;

OR

2. The party can serve and file an affidavit or declaration in which the witness tells the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred.

Not later than four weeks before trial, a party planning to use the testimony of an incarcerated witness who has agreed to come to trial must serve and file a written motion for a court order requiring the witness to be brought to court at the time of trial. The motion must

1. State the name and address of the witness; and
2. Come with an affidavit or declaration described above to show that the witness is willing to testify and that the witness has first-hand knowledge of facts directly related to the issue to be tried.

When the court rules on the motion, it will say who must be brought to court and will direct the clerk of court to prepare the necessary writ of habeas corpus ad testificandum.

II. PROCEDURE FOR OBTAINING THE ATTENDANCE OF INCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If an incarcerated witness refuses to attend trial, TWO separate procedures are required. The court will have to issue a writ of habeas corpus ad testificandum telling the warden to bring the witness to trial and the party must serve the witness with a subpoena.

Not later than four weeks before trial, the party seeking the testimony of an incarcerated witness who refuses to testify voluntarily must file a motion asking the court to issue a writ of habeas corpus ad testificandum and asking the court to provide the party with a subpoena form. (All requests from subpoenas from pro se litigants will be sent to the judge for review before the clerk will issue them.)

The motion for a writ of habeas corpus ad testificandum will not be granted unless the party submits an affidavit or declaration

1. Giving the name and address of the witness; and
2. Declaring under penalty of perjury that the witness has relevant information about the party's claim. As noted above, this can be done only if the party

knows first-hand that the witness saw or heard something that will help him prove his case. In the affidavit or declaration, the party must tell the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or to hear what occurred.

The request for a subpoena form will not be granted unless the party satisfies the court in his affidavit or declaration that

1. The witness refuses to testify voluntarily;
2. The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or
3. The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court.

If the court grants the party's request for a subpoena for an incarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the Marshal. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the Marshal at least two weeks in advance of trial, the Marshal may not have enough time to serve the subpoena on the party's witness.

III. UNINCARCERTAED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

It is the responsibility of the party who has asked an unincarcerated witness to come to court to tell the witness of the time and date of trial. No action need be sought or obtained from the court.

IV. UNINCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily, no later than four weeks before trial, the party must serve and file a request for a subpoena form. All parties who want to subpoena an unincarcerated witness, even parties proceeding in forma pauperis, must be prepared to tender an appropriate sum of money to the witness at the time the subpoena is served. The appropriate sum of money is a daily witness fee and the witness's mileage costs. In addition, if the witness's attendance is required for more than one trial day, an allowance for a room and meals must be paid. The current rates for daily witness fees, mileage costs and room and meals may be obtained either by writing the clerk of court at 120 North Henry Street, Madison, Wisconsin, 53703, or calling the office of the clerk at (608) 264-5156.

Before the court will grant a request for a subpoena form for an unincarcerated witness, the party must satisfy the court by affidavit or declaration under penalty of perjury that

1. The witness refuses to testify voluntarily;
2. The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or
3. The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court; and
4. The party is prepared to tender to the Marshal or other individual serving the subpoena a check or money order made payable to the witness in an amount necessary to cover the daily witness fee and the witness's mileage, as well as costs for room and meals if the witness's appearance at trial will require an overnight stay.

If the court grants the party's request for a subpoena for an unincarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the Marshal, together with the necessary check or money order. The address of the United States Marshal is 120 North Henry Street, Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the Marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

V. SUMMARY

The chart below may assist in referring you to the section of this paper which sets forth the appropriate procedure for securing the testimony of witnesses in your case.

WITNESSES			
INCARCERATED		UNINCARCERATED	
VOLUNTARY	INVOLUNTARY	VOLUNTARY	INVOLUNTARY
• A court order that the witness be brought to court is required. • Papers are due 4 weeks before trial.	• A court order that the witness be brought to court and a subpoena are required. • A motion must be served and filed 4 weeks before trial. • Subpoena forms must be completed 2 weeks before trial.	• Nothing need be sought or obtained from the court.	• Pro se parties must obtain an order granting issuance of a subpoena. • Papers are due 4 weeks before trial. • Completed forms and fees are due 2 weeks before trial.

CURRENT SUBPOENA RATES (as of April 2020)
Daily Witness Fee: $40
Mileage: $0.575
Room and Meals (per diem): $192

PROCEDURES FOR TRIAL EXHIBITS

Before trial, the parties are to label all exhibits that may be offered at trial. Before the start of trial, the parties are to provide the deputy clerk with a list of all exhibits that may be offered into evidence at trial. Counsel are to retain the original exhibits following trial.

1. Each party is to submit a list of their exhibits. Please use the trial exhibit form attached to this procedure. The party should state to whom the exhibits belong, the number of each exhibit and a brief description.
2. Each party is to provide the court with the original exhibit list and a copy of each exhibit in electronic form that may be offered for the judge's use.
3. As a general rule, the plaintiff should use exhibit numbers 1 – 500, and the defendant should use exhibit numbers 501 and up.
4. Each party is to maintain custody of his or her own exhibits throughout the trial.
5. At the end of trial, each party is to retain all exhibits that become a part of the record. It is each party's responsibility to maintain their own exhibits and to make arrangements with the clerk's office for inclusion of the exhibits in the appeal record, if there is an appeal.
6. Each party should be aware that once reference is made to an exhibit or document at trial, the exhibit or document becomes part of the record, even though the exhibit or document might not be formally offered or received into evidence.

Any questions concerning these instructions may be directed to the clerk's office at (608) 264-5156.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EXHIBIT LIST OF _____
[Plaintiff/Defendant]

CASE NAME: _____

_____

CASE NUMBER: _____

DATE	EXHIBIT NO.	WITNESS	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS