



90 Days Before Trial

- Rule 26(a)(3)
 - The Duty of Candor
- Pretrial Order
- Jury Instructions

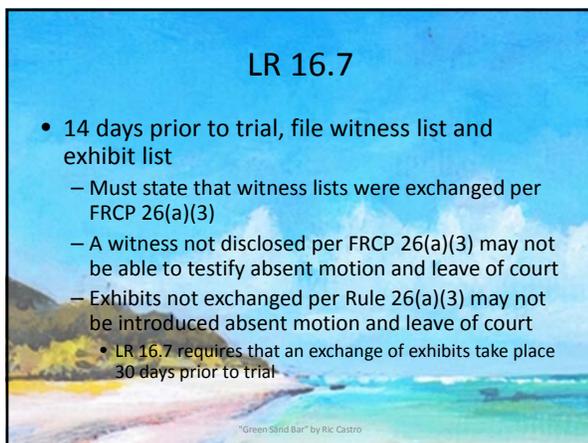
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Rule 26(a)(3) Disclosures

- 30 days prior to trial
 1. Name, Address, and telephone number of each witness
 2. Identify witnesses testifying by deposition
 3. Identification of each exhibit
- 14 days later: Objections
 - Waived if not made
- This is different and in addition to Rule 26(a)(1) initial disclosures

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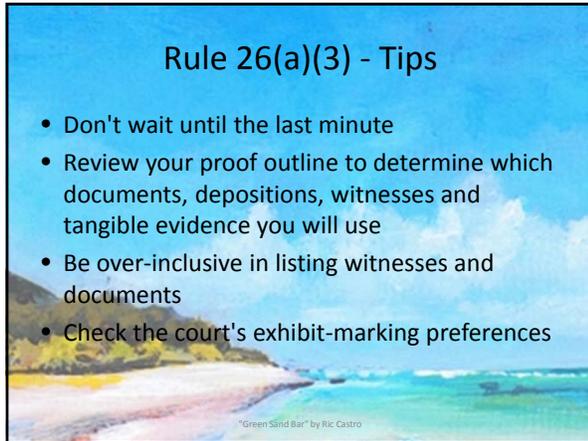
LR 16.7

- 14 days prior to trial, file witness list and exhibit list
 - Must state that witness lists were exchanged per FRCP 26(a)(3)
 - A witness not disclosed per FRCP 26(a)(3) may not be able to testify absent motion and leave of court
 - Exhibits not exchanged per Rule 26(a)(3) may not be introduced absent motion and leave of court
 - LR 16.7 requires that an exchange of exhibits take place 30 days prior to trial

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Rule 26(a)(3) - Tips

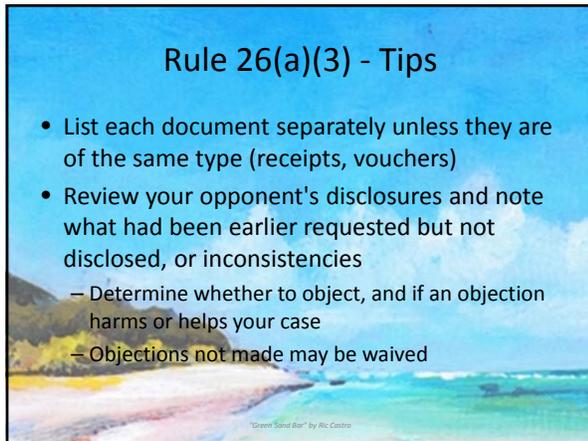
- Don't wait until the last minute
- Review your proof outline to determine which documents, depositions, witnesses and tangible evidence you will use
- Be over-inclusive in listing witnesses and documents
- Check the court's exhibit-marking preferences



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Rule 26(a)(3) - Tips

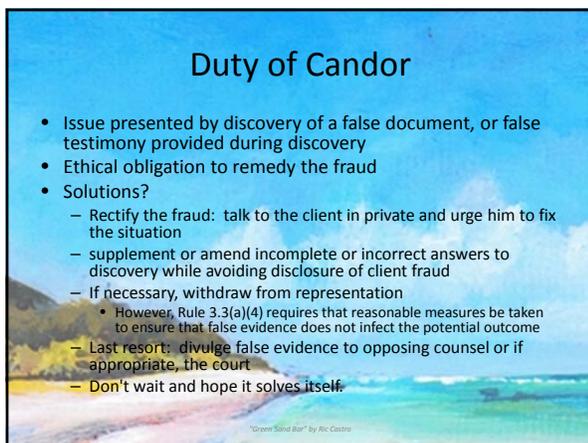
- List each document separately unless they are of the same type (receipts, vouchers)
- Review your opponent's disclosures and note what had been earlier requested but not disclosed, or inconsistencies
 - Determine whether to object, and if an objection harms or helps your case
 - Objections not made may be waived



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Duty of Candor

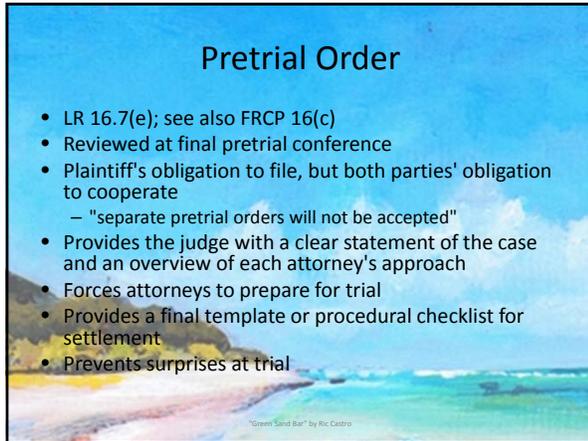
- Issue presented by discovery of a false document, or false testimony provided during discovery
- Ethical obligation to remedy the fraud
- Solutions?
 - Rectify the fraud: talk to the client in private and urge him to fix the situation
 - supplement or amend incomplete or incorrect answers to discovery while avoiding disclosure of client fraud
 - If necessary, withdraw from representation
 - However, Rule 3.3(a)(4) requires that reasonable measures be taken to ensure that false evidence does not infect the potential outcome
 - Last resort: divulge false evidence to opposing counsel or if appropriate, the court
 - Don't wait and hope it solves itself.



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Pretrial Order

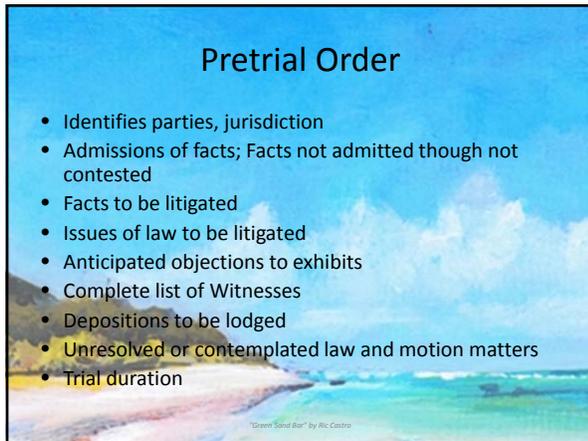
- LR 16.7(e); see also FRCP 16(c)
- Reviewed at final pretrial conference
- Plaintiff's obligation to file, but both parties' obligation to cooperate
 - "separate pretrial orders will not be accepted"
- Provides the judge with a clear statement of the case and an overview of each attorney's approach
- Forces attorneys to prepare for trial
- Provides a final template or procedural checklist for settlement
- Prevents surprises at trial



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Pretrial Order

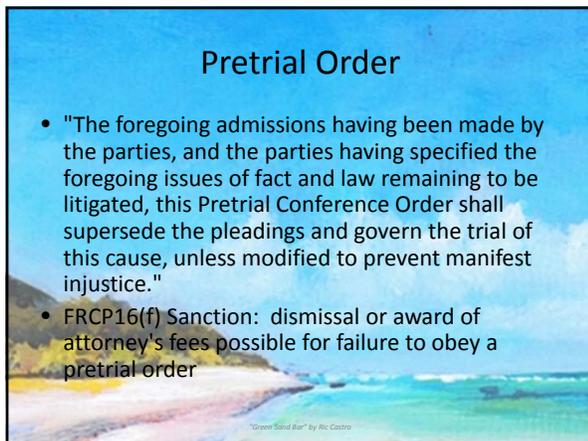
- Identifies parties, jurisdiction
- Admissions of facts; Facts not admitted though not contested
- Facts to be litigated
- Issues of law to be litigated
- Anticipated objections to exhibits
- Complete list of Witnesses
- Depositions to be lodged
- Unresolved or contemplated law and motion matters
- Trial duration



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Pretrial Order

- "The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this Pretrial Conference Order shall supersede the pleadings and govern the trial of this cause, unless modified to prevent manifest injustice."
- FRCP16(f) Sanction: dismissal or award of attorney's fees possible for failure to obey a pretrial order



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Tips for Preparing for the Pretrial Order

- Review your proof outline, the pleadings, your draft jury instructions, your witness and exhibit lists, and the expert reports
- Pay attention to what your opponent inserts
 - last opportunity for final discovery of opponent's evidence, witnesses, documents and strategy
- Don't wait for the plaintiff. Prepare your own to help you anticipate evidence and learn what you've missed.
- Avoid revealing your trial strategy.

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Jury Instructions

- LR 16.7(f) - due 7 days prior to trial
- Joint proposed jury instructions encouraged
- Federal jury instructions for federal causes of action and procedural issues
- State jury instructions for state causes of action
- Consult: Ninth Circuit pattern jury instructions; Federal Jury Practice and Instructions; other reliable sources
 - courts reluctant to adopt tailor-made instructions unless supported by a higher court

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Jury Instructions

- Be guided by your proof outline - elements and burden of proof
 - helps to ensure you have met all elements
- Anticipate objections
- Cite caselaw accurately
- Avoid dictum
- Be logical - think of how it reads to the jury
- Think of the appeal

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