

**PRACTICE AND PROCEDURE MANUAL FOR JUDGES  
AND MAGISTRATE JUDGES FOR THE MIDDLE  
DISTRICT OF TENNESSEE (Judge Kevin H. Sharp)**

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## **I. NAME AND BRIEF BIOGRAPHY**

### **Judge Kevin H. Sharp**

#### **Federal Judicial Service:**

U.S. District Court, Middle District of Tennessee

Nominated by Barack Obama on November 17, 2010, to a seat vacated by Robert L. Echols; Re-nominated on January 5, 2011; Confirmed by the Senate on May 2, 2011, and received commission on May 3, 2011.

#### **Education:**

Christian Brothers College, B.S., 1990; Vanderbilt University School of Law, J.D., 1993

#### **Professional Career:**

U.S. Navy, 1982 – 1986

Private practice, Nashville, Tennessee, 1993 - 1996

Attorney, Office of Compliance, United States Congress 1996 – 1997

Private practice, Nashville, Tennessee, 1997 - 2011

## **II. PRELIMINARY GENERAL MATTERS**

This Practice and Procedure Manual was compiled by the Federal Court Committee of the Nashville Bar Association. The Committee expresses thanks to all of the Judges and Magistrate Judges, and to the Clerk of the Court, for all of the input and guidance they provided in gathering this information.

In preparing the Manual, efforts were taken to avoid repeating or characterizing rules otherwise contained in the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Local Rules of Court, the Local Rules Governing Duties of and Proceedings before Magistrate Judges, or the Administrative Practices and Procedures for Electronic Case Filing. The Manual does not attempt to be an exhaustive guide for the practice of law. It is intended to provide information about judicial practices and preferences in this District that are not necessarily addressed in any set of rules.

To the extent that there is any conflict between this Manual and these other applicable rules, practices and procedures, the other applicable rules, practices and procedures control. **This Manual is the work of the Nashville Bar Association. It is not an official statement of the Court. This Manual may not be cited as authority.**

Last, at the time the Manual was prepared in 2005, this District had only recently adopted electronic case filing. It appears that some practices related to electronic case filing are still developing. Therefore, for some time, it may be prudent to address questions about electronic case filing to the Judge or Magistrate Judge in a particular case.

**A. Scheduling**

Judge Sharp's courtroom deputy is at (615) 736 -2778. There are no standard days or times for any particular matters, except for jury trials in Nashville which begin on Tuesdays at 9:00 a.m. All scheduling requests should be made by written motion.

**B. Correspondence with the Court**

Correspondence with the Court is discouraged. Written communication with the Court should be in the form of pleadings, motions, notices, memoranda, and briefs, as provided for in the Federal Rules of Civil Procedure and the Local Rules. In the rare instances when correspondence with the Court is permitted, directed or invited by the Court, a copy of the correspondence shall be served on opposing counsel, and all such correspondence will be filed with the Clerk of Court and is a matter of public record, unless otherwise directed by the Court as in the case of confidential settlement conference statements.

**C. Telephone Conferences with the Court**

The judges, upon request, generally will attempt to accommodate out-of-town counsel or other circumstances unique to the case by permitting joint telephone conferences with the Court. The judges also may entertain telephone conferences regarding discovery disputes that arise during depositions.

**D. Telephone Conference with Law Clerks**

Generally, telephone communications by counsel with the Court's law clerks is discouraged, if not prohibited. Some of the judges permit telephone communications with their law clerks to discuss case administration matters with counsel.

Judge Sharp allows telephone communication with his law clerks to discuss administrative matters only. The merits of the case should never be discussed with the law clerks.

**E. Pro Se Litigants**

Pro se litigants are expected to follow the Local Rules and these guidelines, as are all parties represented by counsel.

**F. Chamber Copies of Filings**

Judge Sharp does not want chamber copies of filings, unless he requests them.

**III. PRETRIAL MATTERS FOR CIVIL CASES**

**A. Case Management Conferences and Orders**

Judge Sharp refers all new cases to the magistrate judges for case management purposes. Scheduling orders or changes thereto are addressed with the magistrate judge assigned to the case.

After the initial case management conference is held by the magistrate judge, Judge Sharp will set the trial date.

**B. Agreed Orders, Continuances and Extensions**

Judge Sharp decides motions to continue the trial date. Judge Sharp will consider extensions of time upon agreement of the parties or for good cause shown.

Judge Sharp expects requests for continuances and extensions to be made in writing. They will be decided on a case-by-case basis.

**C. Pretrial Motions**

**1. Referral to Magistrate Judge**

Judge Sharp refers most discovery motions to a magistrate judge, but not dispositive motions. Judge Sharp assigns pro se cases to a magistrate judge for case management.

**2. Dispositive Motions**

The district judges, with the exception of pro se cases, normally resolve dispositive motions without reference to a magistrate judge. District judges may refer specific dispositive motions to a magistrate judge for a Report and Recommendation and will normally refer all dispositive motions in cases where at least one of the litigants is pro se.

**3. Briefs**

Judge Sharp requires that briefs not exceed twenty (20) pages. Replies are permitted, but optional, on all motions. Replies are restricted to five (5) pages, absent unusual circumstances.

**4. Oral Argument**

Judge Sharp grants oral argument when it is appropriate or when it would be beneficial.

**D. Discovery**

**1. Interrogatories**

The number of interrogatories can be discussed at the case management conference or through written motion and proposed agreed order.

**2. Telephone Depositions**

Judge Sharp has no applicable comments regarding this section.

**3. Discovery Disputes**

The judges agree that every effort should be made by the attorneys to resolve discovery disputes before bringing them to the Court's attention. For those cases assigned to a magistrate judge, discovery disputes will be decided by the case manager.

Judge Sharp refers most discovery matters to the magistrate judge assigned to the case. Discovery disputes, therefore, are typically heard by the magistrate judge.

**4. Motions to Compel/Rule 37 Sanctions**

Judge Sharp has no applicable comments regarding this section.

**E. Confidentiality Agreements and Protective Orders**

Judge Sharp considers them on a case-by-case basis.

## **F. Expert Witnesses**

In civil cases and in some criminal cases, Judge Sharp adopts the option provided for in LR 39.01(c)(6)(c). Motions *in limine* should be filed if an expert's qualifications are challenged.

Judge Sharp will consider requests for departure from this procedure on a case-by-case basis.

## **G. Settlement Conferences**

### **1. Who Presides**

All judges handle settlement conferences for each other. Most settlement conferences are done by magistrate judges who are not assigned to the case as case manager, although parties may request the case manager to preside. The selection of a judge to preside over a settlement conference is viewed as an appropriate use of forum shopping.

### **2. Procedure**

The general procedure for settlement conferences in non-jury cases is as follows: The settlement judge will issue an order setting forth his or her requirements for a judicial settlement conference. Normally, the parties will be required to provide the settlement judge with a confidential evaluation of their case and their demands. These confidential statements should be submitted directly to the settlement judge's courtroom deputy and not filed with the Court. They do not become part of the case file.

This submission should include a description of the case, the amount of the offer, the party's evaluation of the case, the cost of litigation, and representation that these matters have been discussed with the client. Any information that is not to be communicated to the other side needs to be designated as such. All individual parties must be present with full settlement authority, and all corporate parties must be present with representatives having full settlement authority unless prior approval is otherwise obtained. The attorneys are requested to give a short opening statement in the courtroom with everyone present.

The settlement judge then meets with the parties separately, and will meet with the attorneys individually, out of the presence of their clients. If settlement is reached, it is preferred that a settlement agreement be executed before the parties leave the courthouse.

## **H. Pretrial Briefs**

Judge Sharp requires pretrial briefs in a jury case. They are not required in a non-jury case. In a non-jury case, the general policy is to submit proposed findings of fact and conclusions of law after the trial and not file pretrial briefs. If there is a critical issue that an attorney feels a need to address, he/she and opposing counsel are permitted to file a brief on that particular critical issue before the trial. In Judge Sharp's opinion, the most effective pretrial briefs are those which are reasonably brief, to the point, and deal with the pivotal issues to be decided.

## **I. Pretrial Orders**

Unless ordered otherwise, an agreed proposed pretrial order should be jointly prepared by the parties and submitted to the Court no later than the time of the pretrial conference.

Judge Sharp issues an order regarding the requirements for a pretrial order and the pretrial conference. Generally, counsel must submit a joint proposed pretrial order prior to the pretrial conference. The pretrial order must contain: (1) a recitation that the pleadings are amended to conform to the pretrial order and that the pretrial order supplants the pleadings; (2) a statement of the basis for jurisdiction of the

Court; (3) a short summary of the plaintiff's theory (no more than one page); (4) a short summary of the defendant's theory (no more than one page); (5) a statement of the issues; (6) a succinct statement of the relief sought; (7) a summary of any anticipated evidentiary disputes; and (8) an estimate of the anticipated length of trial.

#### **J. Pretrial Conference**

Counsel must submit to the Court prior to the pretrial conference the following: (1) proposed jury instructions, with citations to supporting authorities; (2) proposed jury verdict forms; (3) stipulations; (4) motions *in limine*; (5) witness list; and (6) exhibit list.

Counsel shall also be prepared at the pretrial conference to: (1) identify and discuss undisputed facts and issues; (2) discuss the status of discovery; (3) preview proposed testimony; (4) discuss expert testimony; (5) preview proposed exhibits; (6) discuss motions *in limine*; (7) discuss settlement; and (8) discuss what shall be in the pretrial briefs and when the briefs shall be filed.

The parties may be required to file additional materials as necessary.

#### **K. Temporary Restraining Orders**

The clerk will notify the assigned judge when a TRO is being requested at the time the complaint is filed. The papers should state what efforts have been made to contact the other side. Hearings, if any, will be scheduled through the courtroom deputy of the district judge to whom the TRO application is assigned. The assignment of the TRO application and the assignment of the case are separate matters. The judge who decides the TRO may or may not be the judge who has been assigned to the case.

If a TRO matter is filed other than at the initiation of the case, counsel should advise the courtroom deputy of the presiding judge.

Requests for expedited discovery will be considered upon written motions if good cause is shown.

### **IV. PRETRIAL MATTERS FOR CRIMINAL CASES**

#### **A. Initial Appearances, Detention Hearings and Preliminary Hearings**

When a person is arrested on federal charges, the person ordinarily must be taken before a magistrate judge without unnecessary delay. Prior to this Initial Appearance, a pretrial services officer will provide the client with a financial affidavit if the defendant is seeking appointment of counsel, and will also provide a form called Important Notice to Defendant and Explanation of Rights and Proceedings. At the Initial Appearance, the magistrate judge will review these documents, the charges, and the statutory maximum penalties with the defendant. Fed. R. Crim. P. 5 sets forth the requirements for Initial Appearances.

In addition to the Initial Appearance, a magistrate judge will conduct the Arraignments, Detention Hearings, and Preliminary Hearings when the defendant has been arrested pursuant to a complaint. See Fed. R. Crim. P. 5.1 (Preliminary Hearings); Fed. R. Crim. P. 10 (Arraignments); 18 U.S.C. § 3142 (Bail Reform Act).

In felony cases where a defendant has been indicted, the defendant may submit a written "Waiver of Personal Appearance at Arraignment and Entry of Plea of Not Guilty," in lieu of an in-court arraignment.

In cases involving non-English speaking defendants, the Court will provide an interpreter to interpret during the court proceedings. If defense counsel requires an interpreter to converse with the client before

the Initial Appearance, counsel should contact the interpreter directly to arrange the meeting. The name and phone number for the interpreter can be obtained from the Clerk's Office at (615) 736-5498.

**B. Discovery and Pretrial Motions**

In felony cases, the practice in the Middle District is for the district judges to hear all pre-trial matters, such as admissibility of confessions, suppression of evidence, motions to dismiss, etc. If a particular matter is referred to a magistrate judge, it will be handled on an expedited basis. For petty offenses, which do not require consent, and for misdemeanors where consent to proceed before the magistrate judge has been granted, the magistrate judge will conduct all pretrial matters.

All judges will schedule suppression hearings when necessary in a particular case. Generally, the judges will try to schedule suppression hearings well in advance of trial.

**C. Status Conferences and Pretrial Conferences**

Judge Sharp holds status conferences and pretrial conferences in most criminal cases.

**D. Locating Incarcerated Clients**

There are no federal detention facilities currently located in the Middle District of Tennessee. The United States Marshals Service contracts for space with a number of local detention facilities in Tennessee and Kentucky. If a defendant is detained pending trial, defense counsel may contact the U.S. Marshal's Office at (615) 736-5417 to find out where their client is located. Defense counsel should then contact the facility directly concerning visitation and other rules of the particular facility where the client is located.

**E. Service of Subpoenas for Criminal Proceedings**

If defense counsel has been appointed by the Court, the United States Marshal will serve subpoenas on behalf of the defendant. Defense counsel must obtain an order from the district court judge that directs the United States Marshal to serve the subpoenas. This order should be obtained, and the list of subpoenas should be provided to the United States Marshal, well in advance of the criminal proceedings where the witnesses shall appear.

**F. Requests for Continuances of Trials in Criminal Matters**

Judge Sharp requires that a Waiver of Speedy Trial Rights, signed by the defendant, be filed along with a motion to continue a criminal trial.

Counsel should not assume that a trial will be continued automatically upon request of the parties. Further, each judge has different procedures and deadlines for filing motions to continue trials.

**G. Guilty Pleas**

The Court has standard plea petition forms that must be completed and submitted by the defendant in felony and misdemeanor cases. These form petitions are available on the Court's website. Even in cases where the defendant has entered a plea agreement with the U.S. Attorney, the standard plea petition must be submitted as well.

Judge Sharp requests that counsel notify the courtroom deputy by phone or email immediately upon the determination that a plea will be entered and suggest a time frame for the scheduling of the plea. A plea agreement (if any) and prosecution statement of elements and penalties must be delivered to chambers before the plea.

## V. TRIAL PROCEDURES

### A. Scheduling

Jury trials in Nashville usually begin on Tuesdays at 9:00 a.m. and continue until concluded. The court day generally runs from 9:00 a.m. to 5:00 p.m. with a one-hour lunch break. However, counsel should be prepared to arrive early or stay late in order to discuss matters outside the presence of the jury or when the jury wishes to deliberate past normal working hours.

### B. Out-of-Town Parties, Witnesses or Attorneys

The judges will attempt to accommodate out-of-town parties, witnesses and attorneys to the extent possible, although local counsel is expected to be ready to try the case. In attempting to accommodate out-of-town parties, witnesses and attorneys, the judges take into consideration potential hardship to other cases and the efficient administration of justice.

For Judge Sharp, any request to accommodate the schedules of out-of-town parties, witnesses and attorneys should be made by written motion at the earliest available opportunity or discussed at a pretrial conference.

### C. Motions in Limine

All of the judges encourage motions *in limine*. They alert the judges to evidentiary issues that will arise at trial and, when appropriate, may help narrow issues for trial. If a motion *in limine* is not decided until trial, the non-moving party should be careful to not go into a matter that is the subject of a motion *in limine*, whether in opening statements or with a witness, until a ruling has been made.

Judge Sharp requires that motions *in limine* be filed and responded to in advance of the pretrial conference and in compliance with the deadlines set out in the order setting the case for trial. Judge Sharp makes every effort to decide motions *in limine* at the pretrial conference.

### D. Voir Dire and Jury Selection

All of the judges permit reasonable *voir dire* by the attorneys after initial questions by the Court. Counsel will not be permitted to argue their case or get too personal with the jury. Beyond this, there is some variation among the judges regarding how they handle *voir dire* as discussed below.

In civil cases, typically, seven jurors are seated. There are no alternates in federal civil trials. Each side (not each party) has three peremptory challenges, which it exercises at the same time on written forms; therefore duplicate strikes are a possibility. Challenges for cause are made at the bench during or at the end of *voir dire*. Jury selection begins by the Court placing fourteen (14) panel members in the jury box. After the Court's initial *voir dire*, counsel for plaintiff and then counsel for defendant may ask questions. In pro se cases, the Court conducts all the *voir dire*. If seven or more panel members remain after the juror challenges are completed, the seven members with the lowest seat numbers are sworn as jurors. If less than seven panel members remain, additional panel members are placed in the jury box for *voir dire*. Once a side passes a juror without challenge, they may not challenge that juror later. The process, if necessary, continues as described until the jury is fully selected. Jury selection in criminal cases follows the same pattern as in civil cases except twelve (12) jurors and two (2) alternates are typically selected.

### E. Note-Taking by Jurors

All of the judges allow jurors to take notes and to take their notes into the jury room during deliberation. All of the judges instruct the jury regarding the use of notes.

## **F. Opening Statements**

### **1. Length**

Although the judges may consider a time limit on a case-by-case basis for good cause, there is no set time limit for opening statement by any of the judges. Also, the judges agree that opening statements should be direct and not contain arguments of counsel. Subject to the caveat that the judges all may make case-by-case determinations for good cause, some of the judges have provided additional guidelines regarding the expected length of opening statements.

Judge Sharp gets an estimate from counsel as to how long opening statements will last. He generally suggests no more than twenty (20) minutes.

### **2. Use of Exhibits**

Counsel who wish to use exhibits or demonstrative evidence in opening statement should consult with opposing counsel in advance and attempt to work out any objections. Counsel should also request permission from the judge to use exhibits or demonstrative evidence in opening statements. As a general rule, exhibits to which no counsel has an objection will be allowed during opening statement, and contested exhibits will not be allowed without prior Court approval.

## **G. Courtroom Decorum and Witness Examination**

Counsel shall stand when speaking, all objections and comments thereon shall be addressed to the Court. There shall be no oral confrontation between opposing counsel, and neither counsel nor parties may leave the courtroom without prior approval of the judge.

There is some variation among the judges regarding where counsel should stand in the courtroom and regarding how documents are passed. Except as noted below, it is generally expected that counsel will remain behind, or within an arm's length, of the podium, ask permission to approach a witness, and that the judge's clerk or a courtroom officer will pass exhibits to the witness. Counsel should introduce their witnesses with the background information referred to in LR 39.01(c)(2) and avoid time-consuming questions on that subject. Counsel shall make their objections without speeches or coaching the witness. Counsel should not repeat or attempt to re-characterize a witness's answers during an examination.

Judge Sharp does not allow interim commentary by counsel during trial. More than one attorney may participate in a case, but only one of them may examine a particular witness.

## **H. Side Bar Conferences**

Side bar conferences are allowed, but requests for them should be kept to a minimum and used only for matters that can be resolved quickly. One of the reasons to keep side bar conferences to a minimum is that, due to the size of some of the courtrooms, it is not always possible to prevent the jury from hearing such conversations.

Judge Sharp adds that, in addition to the general statement above, she prefers that matters that need to be discussed out of the presence of the jury be raised during recesses.

## **I. Videotaped or Audiotaped Testimony**

Videotaped or audiotaped testimony is allowed. Counsel should edit the tape to remove irrelevant and objectionable material. Opposing counsel should be allowed to review the tape before it is presented. The use of videotaped testimony should be discussed at the pretrial conference so appropriate equipment can be made available at the trial.

**J. Deposition Reading**

Reading a deposition into the record is allowed. Depositions read at trial should be edited so that only testimony relating to the witness's background, the issues in the case and credibility is read. It is permissible to have co-counsel or a paralegal read the answers of the witness from the witness box when a deposition is to be read at trial.

If a transcript is lengthy and it is a non-jury trial, counsel may ask the Court if it would prefer to just have the transcript submitted rather than read into the record.

**K. Exhibits**

When introducing an exhibit, counsel should always show it to opposing counsel first and have an extra copy available for the Court. Copies of each party's exhibit list shall be provided to the Court, the courtroom deputy, court reporter and opposing counsel on the first day of trial.

Premarked: Judge Sharp would like exhibits to be pre-marked with exhibit stickers provided by the courtroom deputy. Judge Sharp covers this topic in his order setting the case for trial.

Multiple copies of exhibits: Judge Sharp wants exhibits which are being introduced to be shown to opposing counsel first and to have an extra copy available for the Court.

Copies of exhibits for each juror: Judge Sharp will allow copies of the exhibits to be given to each juror, but requests advance notice of the intent to do so. Furthermore, he encourages the use of the overhead evidence presenter to eliminate the time-consuming process of passing exhibits to the jury

Stipulation as to admissibility and authenticity: The parties should stipulate as to the admissibility and authenticity of as many exhibits as possible prior to trial.

**L. Witness Lists**

Witness lists should be provided to the Court, the courtroom deputy, the court reporter and opposing counsel at the beginning of the trial.

**M. Courtroom Technology**

Use of courtroom evidence presenter with camera and screen/visual aids: All of the courtrooms have wireless internet connectivity. All judges expect counsel who plan to use courtroom technology to learn how to use it prior to trial so they can accomplish what is intended without assistance from the courtroom staff.

**N. Motions for Judgment as a Matter of Law**

If a party can anticipate this motion, it should give the Court advance notice and file a brief in support of the motion. Otherwise, it will be heard on oral motion and argument. In many cases a ruling will be delayed until after a jury verdict.

**O. Proposed Jury Instructions and Verdict Forms**

In addition to the requirements of LR 51.01, counsel should confer in good faith and agree on a verdict form and as many jury instructions as possible by the deadline set at the pretrial conference. Counsel are to file an agreed set of jury instructions, in hard copy and on disk, one instruction per page, with heading at the top. By the same deadline, each counsel should file additional instructions about which there is not

agreement, with citations to authority, in hard copy and on disk. The standard introductory and concluding instructions given by the Court in every trial do not need to be submitted by counsel.

**P. Proposed Findings of Fact and Conclusions of Law**

Proposed findings of fact and conclusions of law are to be submitted by the deadline in the order setting the case for bench trial.

**Q. Offers of Proof**

Offers of proof are allowed. Most frequently, they will take place outside the presence of the jury, usually during a break, at lunch or at the end of the day.

**R. Closing Argument**

Counsel may not express personal opinions or beliefs (such as statements that begin with "I believe..."), or make personal references to other lawyers. Counsel may argue any inferences from the proof that are logical and supported by the evidence. There is no set length for closing argument.

**S. Jury Deliberation**

1. Copies of Instructions

A copy of the jury instructions is sent to the jury room with the jurors when they retire to consider their verdict.

2. Access to Exhibits

Absent any objections, and subject to Item 3 below, jurors are given access to exhibits admitted at trial. Exhibits are sent to the jury room at the beginning of deliberation.

3. Access to Transcript of Testimony or Videotaped Testimony

Due to the concern that access tends to give undue emphasis to testimony which is transcribed or videotaped, this is discouraged and not frequently allowed. However, the judges will make determinations on a case-by-case basis.

4. Availability of Counsel

Counsel will not be required to remain at the courthouse during jury deliberations, but they must advise the courtroom deputy of a phone number where they can be reached on short notice. Counsel must be available to appear in court without unreasonable delay while the jury is deliberating.

5. Taking the Verdict and Special Interrogatories

The judges will read the verdict form and special interrogatories.

6. Polling the Jury

Judge Sharp will poll the jury in every case.

7. Interviewing the Jury

LR 39.01(f)(2) controls requests for post-verdict interviewing of jurors. Permission to interview jurors will only be granted in exceptional circumstances.

**T. Requests for Attorney's Fees**

All requests for attorney's fees should be made by filing an application in writing supported by detailed affidavits and time records, in accordance with LR 54.01(b).

**VI. SENTENCING IN CRIMINAL CASES**

LCrR 32.01 sets forth the timetable to be followed before a sentencing hearing. The Court will schedule a sentencing hearing at least 80 days after a finding of guilt by a jury, or after the submission of a guilty plea by a defendant.

Shortly after the finding of guilt or submission of guilty plea, a probation officer will contact defense counsel to arrange a presentence interview with the defendant and counsel.

Both parties are expected to confer with the probation officer during the presentence investigation process with a view toward resolving any disputed facts or factors.

Fed. R. Crim. P. 32 requires the probation office to disclose the presentence report to the defendant at least 35 days before sentencing. LCrR 32.01 then requires both parties, within 14 days of receiving the presentence report, to provide written objections concerning the contents of the presentence report. The objections should be provided both to the probation office and opposing counsel.

Within seven days of receiving the parties' objections, the probation office must disclose any changes or unresolved factual disputes or objections that remain in the presentence report.

At least seven days prior to sentencing, the parties shall file with the clerk, and with a copy to probation and opposing counsel, a pleading entitled "Position of the (Government or Defendant) With Respect To Sentencing Factors" containing only unresolved matters previously raised with all parties in writing.

With consent of the parties or when the interests of justice require, the Court may on a case-by-case basis modify the requirements set forth in LCrR 32.01 in order to carry out prompt and fair sentencing.

**VII. MEDIA COMMUNICATIONS**

The Court speaks through its orders and memorandum opinions.