CHAMBERS PROCEDURES

Stephen P. Friot

United States District Judge

A. Introduction.

The chambers procedures which are set forth below are consistent with the Federal Rules of Civil Procedure (or, as applicable, the Federal Rules of Criminal Procedure) and are not intended to add to the already substantial demands of litigation practice. To the contrary, these chambers procedures are intended to remove uncertainty and guesswork for litigants and their counsel by providing reliable and concrete guidance as to my expectations and procedures in some of the many matters as to which the Federal Rules and the Local Rules leave the trial judge with substantial discretion.

Please review this entire document carefully. It will be time well-spent. At the status and scheduling conference (if one is held), you will be asked whether you have any questions about these chambers procedures. I will be happy to answer any questions you may have. I would also welcome suggestions concerning these chambers procedures.

B. Discovery matters in civil cases.

Depositions may continue by agreement of the parties after the discovery cutoff. Motions relating to depositions taken or attempted to be taken after the discovery cutoff will usually be stricken. The discovery cutoff is usually several weeks after the deadline for dispositive and Daubert motions, so be sure to complete discovery relevant to a dispositive or Daubert motion well before the motion is due.

Interrogatories and requests under Rule 34 must be served at least thirty days before the discovery cutoff. See Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003).

I rarely refer discovery disputes to Magistrate Judges. Unless a preliminary review of a motion to compel or a motion for a protective order indicates that the motion is unusually complex, I will typically set a discovery motion down for hearing as soon as is practicable in light of other matters on the docket. This will usually result in disposition of discovery motions before the briefing cycle otherwise applicable under the Local Rules would run its course.

The requirements of the Federal Rules and the Local Rules as to conferences of counsel to resolve discovery disputes without court involvement are exceptionally important. If it appears that an additional opportunity to discuss a discovery dispute may help resolve the dispute (entirely or at least in part), I may, in setting the motion for hearing, require counsel to confer in my conference room before the hearing on the motion. Reasonable lawyers, applying good judgment, can craft at least as good a resolution of a discovery dispute as the court can, because the lawyers, with their knowledge of their case, are in a better position to confidently determine what items are essential and what items can be conceded.

Obviously, discovery and scheduling matters are interrelated. Scheduling is discussed in part D, below. If you wait until the last minute (*i.e.*, until just before the dispositive and Daubert motion deadline or just before the discovery cutoff date) to do important discovery, do not assume that scheduling relief will follow as a matter of course if unanticipated problems crop up.

When it appears that all or a portion of a discovery dispute should never have required court intervention, and resulted in noticeable imposition upon the opposing party, I am mindful of the dictates of Rule 37. Fee shifting in discovery matters is often a matter of simple compensatory fairness, rather than punishment.

C. Expert reports in civil cases.

Compliance with the requirements of Rule 26(a)(2) with respect to expert reports is not just another discovery task – it is much more far-reaching than that. Your Rule 26(a)(2) expert reports are the foundation of your expert case. Timely and careful compliance with the requirements of Rule 26(a)(2) is essential, both as a matter of fairness to litigants and as a matter of orderly procedure during the series of interdependent scheduled events which occur in the final phases of discovery, motion work and trial preparation. The combined effect of Rule 26(a)(2), Rule 37(c)(1), Rule 702 of the Federal Rules of Evidence and the Daubert/Kumho line of cases is that a litigant who fails to provide timely and complete Rule 26 expert reports does so at his peril. Failure to timely comply with the requirements of Rule 26(a)(2) with respect to expert reports could seriously impair your ability to present your case. The expert reports are at least as important as the experts' depositions in determining the admissibility of your proposed expert testimony at trial (under Rule 702, Daubert and Kumho) and, under Rule 37(c)(1), are more important than the experts' depositions in determining the permissible scope of your proposed expert testimony at trial, as is made clear both by the text of Rule 37(c)(1) and by the Advisory Committee's Notes with respect to the 1993 revision of subdivision (c) of Rule 37.

If discovery from opposing parties is necessary as a source of foundation material for your experts' reports, you should start that discovery early, so that any problems may be resolved before they have an impact on your experts' preparation of their reports.

D. Scheduling in civil cases.

In the final weeks before trial, motions to modify the scheduling order and motions for extension of time for acts required by the rules (or otherwise) will ordinarily require a very strong showing. When a case gets into these final stages, all parties – and the court – will usually have made plans in reliance on the assumption that the parties and their counsel will do what they are supposed to do, when they are supposed to do it. Do not assume that I will grant late-stage motions that, if granted, would restart discovery, derail the schedule for briefing or consideration of pending motions, or impose a hardship on any parties during the final trial preparation phase of the case. It behooves counsel to do what good lawyers have always done: plan ahead, anticipate problems, and work nights and weekends if that is what it takes to do your job. I am especially unlikely to grant scheduling relief in situations in which the result of granting the relief would be that those who have diligently complied with the rules (or the schedule) would be put to a disadvantage at the hands of those who have not.

The interval between the dispositive and Daubert motion deadline and the trial docket is very important. The purpose of that interval is to provide an adequate opportunity for consideration of dispositive and Daubert motions prior to the final trial preparation period. This is a matter of fairness to the litigants, their counsel, and the court. Do not assume that a motion to extend the dispositive (or Daubert) motion deadline – or the time for responding to such a motion – will be granted. A strong showing must be made. Mere failure to do your discovery earlier in the case usually will not justify an extension. If a significant extension is granted, the order granting the extension will likely also postpone the trial docket, regardless of whether that

was requested or agreed to. If the motion requests postponement of the trial docket and is granted, the new trial docket may (depending on the condition of the trial docket for the month requested in the motion) be later, and perhaps significantly later, than the one requested. If the motion seeks more than a very short extension (*i.e.*, just a few days) for filing a dispositive or Daubert motion, and does not propose a new trial date, there is a strong possibility that the motion will simply be denied.

E. Settlement conferences.

I strongly encourage mediation as a cost-effective means of resolving disputes at a relatively early pretrial stage, but I rarely order mediation (as distinguished from a judicial settlement conference) if all parties do not indicate receptiveness to mediation. One of the benefits of mediation is that it gives the parties an opportunity to make a serious attempt to settle the case at a significantly earlier stage than the late stage at which judicial settlement conferences are usually scheduled. If a mediation deadline is set at the scheduling conference and later postponed to a date after the dispositive motion deadline, a judicial settlement conference will not usually be scheduled, or, if previously scheduled, will likely be cancelled.

The judicial settlement conference, if one is held, shall be attended by lead trial counsel for each party. See LCvR16.2(b)(4). (In other words, do not plan to proceed as lead counsel at trial if you did not attend the settlement conference.)

F. Trial briefs in civil cases.

Trial briefs are most helpful, even in uncomplicated cases. (It is a mistake to think that your summary judgment brief, which will have been filed long before trial, is an adequate substitute for a trial brief. The issues raised by a motion for summary judgment often differ radically from the issues that must be addressed at trial.) A good trial brief will (i) inform me about the basic facts of your case, (ii) briefly summarize the legal basis for your claims or defenses, (iii) alert me to anticipated evidentiary issues (and provide concise briefing on those issues), (iv) summarize your authorities in support of or in opposition to a Rule 50 motion, and (v) give me forewarning as to any unusual issues that may arise at trial. Remember that unusual evidentiary issues are made more difficult, not less difficult, when they are ignored until mid-trial.

G. Motions in limine.

Although the court does not have the discretion to decline to rule on properly raised evidentiary issues, the court does have considerable discretion with respect to whether evidentiary issues will be considered on an *in limine* basis. Use good judgment in deciding whether to file motions in limine. Difficult evidentiary issues can rarely be decided without the benefit of a reasonably detailed showing of the factual context in which the issue arises. If you are seeking a pretrial resolution of such an issue, it is up to you to provide the factual context in your motion in limine. Motions of the “keep out any evidence that might hurt my case” variety are not favored. Generic motions that are not articulated in terms of the facts of the case, or do not specify exactly what evidence is sought to be excluded, will usually be stricken or denied, because they amount to little more than a request that the court follow the rules of evidence. Likewise, “laundry list” motions in limine (*e.g.*, motions that include a long, generic list of matters sought to be excluded, with little or no meaningful argument) will usually be stricken.

If motions in limine are filed, the court may schedule argument on the motions to coincide with docket call or at another time within a few days before the trial is scheduled to start. If the trial is to start on a Monday, argument may be scheduled for the preceding Friday.

H. The final pretrial report in civil cases.

The final pretrial report, if approved, will supersede the pleadings. See Rule 16(e) and LCvR16.1(b)(1) and Appendix IV. For that reason, the final pretrial report should contain more than a brief, cryptic statement of the parties' claims and defenses.

Pretrial reports having the following deficiencies may not be approved:

1. Failure to comply with the scheduling order of the court, evidenced by such objections to listed exhibits as "not produced," "not seen" and to witnesses as "not timely listed." These objections are caused by a failure to exchange witnesses and exhibits on a timely basis in compliance with the court's scheduling order.

2. Listing excessive exhibits beyond realistic trial needs. Do not simply take your computer document index and transmute it into your exhibit list.

3. Indiscriminate objections (including repetition of objections citing the identical rules as to numerous exhibits). Every objection noted in the pretrial report should reflect the considered professional judgment of trial counsel. Indiscriminate objections may be stricken *in toto*.

4. Failure to include the exclusionary language for listed exhibits and witnesses as required by the mandatory provisions of local rules. See LCvR16.1(b)(2) and Appendix IV, parts 6 and 7.

5. Inadequate specificity in descriptions of exhibits. Generic descriptions of exhibits or categories of documents are insufficient.

6. Purported reservation of right to add exhibits and witnesses through further discovery when the discovery deadline has already passed. This purported reservation of rights is unauthorized and ineffectual.

I. Trials – civil and criminal.

PRIOR TO TRIAL:

1. Exhibits: Please prepare an index of exhibits that you expect to offer, using the attached form. (This form is also available in hard copy from the Courtroom Deputy and at http://www.okwd.uscourts.gov/files/ao187.pdf.) Provide three copies for the court and a copy for opposing counsel.

   Court time may not be used for marking exhibits. This must be done in advance of the court session. Exhibits shall be marked in numerical sequence. (There is no requirement that you offer your exhibits in sequence.) Duplicate exhibits will not be admitted.

   Exhibits are to be marked numerically, including the case number, and are to be placed in three-ring binders separated by tabs. Two copies of the exhibit notebook will be provided to the court on the first day of trial. One of those two sets will be

for Judge Friot, and the other will be placed on the witness stand for reference by witnesses. The set placed on the witness stand will be the record copy of the exhibits, with the original exhibit sticker affixed. (Any exhibits not admitted will be removed by the Courtroom Deputy before the record copy goes to the jury room.)

2. Witnesses: Please provide the court with three copies of your witness list. One of those copies will be given to the court reporter to avoid asking the spelling of the witnesses' names.

3. Depositions: If rulings will be necessary with respect to any testimony to be read from depositions, transcripts of the depositions shall be delivered to chambers not later than noon on Thursday of the week before the week the trial is scheduled to start. (If rulings are necessary as to any prerecorded deposition testimony that counsel intend to present with audio-visual equipment, the transcripts, marked as set forth below, should be submitted to the court at least seven days before the edited testimony is intended to be presented, unless other arrangements are discussed with and approved by the court, so as to assure sufficient time for any necessary editing of the video record.) The passages that the proponent of the deposition testimony intends to read shall be highlighted in green. The passages counter-designated by any other parties shall be highlighted in yellow. (Passages more than one page long may be marked with a vertical highlight of the appropriate color in the left margin.) To the cover of each such deposition transcript there shall be attached a list of objections, by page and line number, stating the basis for the objection. The objections shall also be noted with handwritten notations at the appropriate places within the deposition transcript.

   Use good judgment (and be realistic) when lodging objections to deposition testimony. Bear in mind that deposition testimony does not become objectionable just because you wish the witness had not said what he said.

4. Audio-Visual Equipment**:** If you intend to use any special equipment, such as videotapes, movies, slides, tape recorders or digital projection equipment, you should make the appropriate arrangements prior to the date of the trial and advise the Courtroom Deputy.

TRIAL:

1. Please be on time for each court session. Trial engagements take precedence over any other business. If you have matters in other courtrooms, arrange in advance for the handling of such matters by you or have an associate handle them for you.

2. One guiding principle for all jury trials is that the jurors' time must not be wasted. The jurors should go home from every day of trial with the feeling that they have had a good, solid day of progress toward conclusion of their service and that the parties and their lawyers did not waste their time.

3. Please stand when you address the court or make objections. (Counsel with physical disabilities are excused from this requirement.)

4. Stand a respectful distance from the jury at all times. Except as may be necessary for such purposes as reference to an oversized exhibit or reference to

a television screen, witnesses will be examined from the lectern. Statements and arguments to the jury will be made from the lectern.

5. In your opening statement to the jury, do not argue the case and do not discuss law. Confine yourself to a concise summary of the facts to follow. Do not describe in detail what individual witnesses will say. Unless the case is unusually complex, each party will be limited to 20 minutes.

6. Please stand when you question witnesses. (Counsel with physical disabilities are excused from this requirement.)

7. Except for children, address witnesses by their surnames, for example, Mr. A, Sergeant B or Doctor C.

8. Do not greet or introduce yourself to adverse witnesses. Begin your cross-examination without preliminaries.

9. When you object in the presence of the jury, make your objection short and to the point. Do not argue the objection in the presence of the jury and do not argue with the ruling of the Court in the presence of the jury. Do not make motions in the presence of the jury. Such matters may be raised at the first recess without waiving any rights by such delayed motion.

10. Exhibits as to which no objection is lodged in the pretrial report shall not be objected to when offered at trial, even if the court routinely inquires as to whether there is an objection when the exhibit is offered.

11. Unless specifically authorized by the court, there will be no reference in the hearing of the jury to discovery disputes or to matters relating to discovery compliance.

12. Never assert your personal opinion as to the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused, nor, as counsel, assert personal knowledge of a fact in issue, nor assert a fact not in evidence.

13. When another counsel has the floor, do not distract the court or jury by audibly conversing with your client or co-counsel, ostentatiously passing notes, rummaging through papers, or other conspicuous conduct.

14. Do not react to a statement by another counsel or a witness being examined by another counsel by a gesture or facial expression signifying agreement, disagreement, approval or disapproval. Advise your clients they are subject to this same limitation.

15. Do not bring food or beverage into the courtroom. Water is provided there.

16. Do not leave the courtroom while trial is in progress without obtaining leave of court. <u>This applies to all persons at the counsel table</u>.

17. It is the obligation of counsel to have their witnesses available to prevent any delay in the presentation of testimony or running out of witnesses before 5:00 p.m. on any trial day. If counsel has a problem in this regard, it should be promptly brought to the court's attention.

18. Before each morning and afternoon session of court, and at the end of the day, each attorney should tell opposing counsel the names of the witnesses he or she intends to call in the next session of court.

19. Where more than one attorney represents a party, only the attorney handling the particular witness may respond to an objection or raise an objection in regard to the testimony.

20. While the Court permits exhibits to be passed to the jury, this procedure should be used sparingly and reserved for truly significant exhibits. If possible, when you wish to publish an exhibit to the jury, have a copy for each juror.

21. Always show demonstrative exhibits or enlargements of admitted exhibits to opposing counsel before they are used or published to the jury.

22. If you use a digital enlargement of an exhibit in examining a witness (direct or cross), your computer operator must remain available to show the same exhibit to the witness at the request of opposing counsel.

23. Do not publish an exhibit to the jury, with visual presentation equipment or otherwise, before the exhibit has been admitted into evidence.

24. Do not ask the court, at trial, to certify your expert witness as an expert.

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

_____,	)	
	)	
Plaintiff(s),	)	**{PLAINTIFF'S -OR- DEFENDANT'S}**
	)	**EXHIBIT AND WITNESS LIST**
-vs-	)	
	)	
_____,	)	Case No. _____-F
	)	
Defendant(s).	)	

PRESIDING JUDGE STEPHEN P. FRIOT					PLAINTIFF'S ATTORNEY	DEFENDANT'S ATTORNEY
TRIAL DATE(S)					COURT REPORTER TRACY WASHBOURNE - 609-5505	COURTROOM DEPUTY LORI GRAY - 609-5502
PLF. NO.	DEF. NO.	DATE OFFERED	MARKED	ADMITTED	DESCRIPTION OF EXHIBITS AND WITNESSES	