

PRACTICE AND PROCEDURE MANUAL

U.S. MAGISTRATE JUDGE JOE B. BROWN

I. Brief Biography

Judge Brown was appointed U.S. Magistrate Judge in August, 1998. He was graduated from Vanderbilt University in 1962 and from Vanderbilt University Law School in 1965. He was Legislation Editor of the Law Review and a member of the Order of the Coif. Upon graduation he entered the U. S Army and served on active duty for 6 years as a legal assistance officer, trial and defense counsel, chief of military justice at Fort Gordon, Georgia and Military Judge at Fort Knox, Kentucky. He then joined the U.S. Attorney's Office in Nashville, where he served Assistant and First Assistant from 1971 until 1981 when he was appointed U.S. Attorney. The majority of his work was in Criminal Law. In 1991 Judge Brown was appointed a Special Assistant U.S. Trustee and was the National Coordinator for Bankruptcy Fraud for the U.S. Trustee program, Department of Justice.

II. Preliminary General Matters

D. Case Management and Scheduling

Judge Brown is assigned cases for case management the same as Judges Haynes and Griffin. Case management, under Local Rule 11, starts with the setting of a case management conference before the appropriate Judge or Magistrate Judge approximately 45 days after the suit is filed or removed. Counsel for the plaintiff is responsible for serving the notice on the opposing party. Cases instituted by pro se plaintiffs and filed in forma pauperis will usually be referred to a Magistrate Judge for a frivolity review before process is ordered served on the defendant.

Judge Brown tries to use the initial case management conference as the first step in resolving the case as quickly and efficiently as possible. The parties should have met and discussed the case before the conference. If service of process has just been made or had not been made, counsel for the plaintiff should request a delay in the conference. No real purpose can be served if the parties have not had an opportunity to confer before the conference. Counsel should look at the conference as a time to discuss their case with the Judge and try to lay out an orderly plan for case management. No two cases are exactly the same and the proposed management plan should reflect a tailoring of the plan to the needs of the case. Some cases may be amenable to a quick dispositive motion that can and should be filed before there is any real discovery. Other cases may need only limited discovery before a dispositive motion can be filed. Other cases may be clear on liability and need only discovery on damages. Some cases may be ready for an early settlement conference or other form of alternative dispute resolution (ADR). Many cases may be able to proceed to an early resolution with written discovery before depositions are required. Counsel should meet and discuss the issues in their case and come to the conference with a plan that is tailored to their case. Counsel who show up at the initial case management meeting without a plan can expect to spend some time in court working one out, or they will be required to come back for a second meeting when they are prepared.

Local Rule 11 sets out the matters that should be covered in the proposed case management order. A plan and order that sets out clear, concise theories of the parties and the issues to be resolved can be of great help to both the court and the parties in determining the best course of action for the remainder of the case. Local Rule 11 gives an outline for the content of the plan and order. However, counsel should use it as a

guide and not a binding form. If a particular heading is not relevant to the particular lawsuit, it should be left out or at least noted not to be relevant. The initial plan and order is just that - an initial plan. Counsel should submit changes as needed. No lawsuit ever proceeds exactly as planned and Judge Brown will be glad to have subsequent case management meetings and to revise the initial order as needed to meet the needs of the case.

Deadlines set in the initial order should be realistic. Judge Brown will normally approve any reasonable deadlines proposed by counsel for written discovery, depositions, disclosure of experts under Rule 26, dispositive motion deadlines, and deadlines for amending pleadings, etc. If counsel need to change the deadlines, they should submit an agreed order or a motion with reasons **before** the deadline passes. Judge Brown does not like deadlines to be ignored and request for changes to come in **after** the deadline has passed.

Judge Brown requests that the scheduling order include a paragraph that states discovery dispute motions will not be filed until the counsel have scheduled and conducted a telephone conference about the dispute with Judge Brown.

Additional case management conferences will be set as needed, and a final case management conference will be set in accordance with Local Rule 11(d)(6) at the conclusion of all pretrial activities. The final order will set the scheduling for filing exhibits and witness lists, final pretrial orders, schedules for submitting jury instructions, motions in limine, and will set a trial date in consulting with the District Judge, if consent to proceed before the Magistrate Judge had not been filed. Normally the trial date will not be set until all dispositive motions are resolved, all settlement possibilities have been explored, and discovery completed. Local Rule 11(d)(5). The district judge will normally schedule a final pretrial conference with the parties a short time before the trial date.

E. Correspondence with the Court

Correspondence with the court is not normally needed or authorized by the rules. There may be times when the court will request something be done by correspondence with a copy to opposing counsel. In those cases a copy of the correspondence will be kept in the case file maintained by the clerk. Attorneys should call Ms. Tina Smith, the courtroom deputy, at (615) 736-7052, for any scheduling matters.

F. Telephone Conferences with the Court

Judge Brown has no objection to having telephone conferences where there are out-of-town counsel, or where the matter is a simply one that involves case status or some other simple matter. Judges Brown's courtroom, 776, will have the capability of having a telephone conference with most counsel in court and one or more attorneys on a conference call. Judge Brown encourages telephone conferences whenever it is possible to resolve the matter without formal motion and reply.

G. Telephone Conference with Law Clerk

Scheduling matters should go to the courtroom deputy, Tina Smith, or in her absence to the Judge's secretary, Ms. Pat Whitley (615) 736-2119. Procedural and administrative question may be directed to the law clerk, (615) 736-2119. However the law clerk cannot and will not give legal advice or discuss the merits of the case. Message may be left with any of the judges staff. The chambers fax number is (615) 736-2121.

H. Pro Hac Vice Admissions

No motion for pro hac vice admission is required if a certificate of good standing from another district court clerk is filed. If a motion is filed, it will be granted provided it meets the requirements of Local Rule 1.

Counsel are reminded that local counsel must be designated and that one counsel per law firm must be designated for the clerk to send orders to.

I. Briefs

Briefing schedules are proper for discussion at case management conferences. Specific dates are normally set. Long briefs are not favored and page limits may be set. A short brief and reply on unusual aspects of a case are appreciated. Reply briefs should rarely be needed.

J. Miscellaneous

Judge Brown does not like to let any matter pass without setting a follow-up date or deadline. Judge Brown will respond to any counsels motion to ascertain the status of a case under Local Rule 8(b)(8). Matters will at times fall through the crack and this motion will insure that does not happen. Filing such a motion will not be held against an attorney, it simply shows the attorney is concerned about the case.

III. Pretrial Matters- Civil Cases

A. Dispositive motions.

Judge Brown is referred dispositive motions for a report and recommendation by the district judges as they see fit. Normally pro se plaintiff's and prisoner's litigation will be left with the Magistrate Judge for a report and recommendation.

Under Local Rule 8(b), motions for summary judgment must be accompanied by a separate statement of undisputed facts and each fact must include specific citations to the record. Attorneys are encouraged to deliver to the opposing attorney the initial statement on a computer disk to ease the burden of the responding party and to insure that the responses can be made on the same document. These statements are meant to concern undisputed facts and parties on both sides must resist the temptation to turn them into arguments about the facts and the case.

In pro se cases, attorneys should always allow sufficient space for the pro se party to respond and should type in the word RESPONSE after the question.

B. Continuances and Extensions

Requests for rescheduling or extensions should be made to the courtroom deputy, Ms. Tina Smith. Reasonable requests will be granted to the extent possible. Last minutes request (less than three days) should be avoided if at all possible.

If requests for extensions or continuances are made by telephone, the attorney requesting the change should submit an agreed order reflecting the change.

If a party requests a change in the initial case management conference, the stay of discovery, pursuant to Local Rule 11(e)(1)(a), will remain in effect unless otherwise ordered by the court.

C. Pretrial Motions

1. Form of Motions

The local rules should be followed.

2. Referrals to Magistrate Judges

This will differ depending on the district judge and the nature of the case. The Magistrate Judges will normally handle the majority of non-dispositive motions. Whether stated in the order deciding the non-dispositive motion or not, the parties have ten days to file an objection with the district court under Rule 203(d)(2).

3. Oral Argument

If a party requests oral argument, the request will normally be granted.

4. Chambers Copies of Filings

Copies of materials should not be delivered to chambers unless requested by the court. At times, on a short deadline, a copy may be delivered to chambers. All copies delivered to chambers should be clearly marked "Chambers Copy."

5. Proposed Orders

They may be submitted to the court as an aid, however unless requested they are not required or encouraged.

6. Resolution of Motions Before Trial

Under Local Rule 11(d)(5), all dispositive issues, all discovery, and all settlement negotiations must be completed before a case is set for trial, unless the district judges directs otherwise.

D. Discovery

1. General

All discovery issues and other non-dispositive issues will be considered by the Magistrate Judge who serves as the case manager and as otherwise directed by the district judge

2. Discovery Period and Extensions

Case management should set reasonable deadlines for each stage of discovery as appropriate. Reasonable requests for extensions will be granted. Agreed

orders will be granted so long as they are reasonable. Proposals to delay proceeding indefinitely will not be considered.

3. Interrogatory/Responses

(a). Number Limit

Local Rule 9(a)(2) allows 30 interrogatories total, regardless of the number of sets. If the needs of the case dictate more than 30 interrogatories, such issues should be raised at a case management conference, or in that is not practical, by motion or a proposed agreed order.

(b). Instructions and Definitions

Judge Brown will not normally be involved in these unless there are objections. As a matter of comment, many counsel use boiler plate for these that need serious tailoring and reduction. Some of the instructions and definitions make little sense to anyone.

(c). Objections

Objections should be stated in conformance with the Federal Rules of Civil Procedure. Rule 33(b)(4) requires the statement of objections with specificity and the basis therefor. Long speeches and speaking objections should not be made. Counsel should not make objections just for the sake of objecting.

4. Resolution of Discovery Disputes

Every effort should be made by the attorneys to resolve discovery disputes before bringing them to the court for resolution. Rule 37(a)(2) of the Federal Rules of Civil Procedure, and Local Rule 9(e) require the parties to confer in good faith prior to filing a motion to compel and the moving party must certify they have complied. The case management order should require that the parties schedule and conduct a telephone conference with Judge Brown before filing discovery disputed motions. Judge Brown is available to hear and rule on these matters as required. This can be at a case management conference, a special hearing, a telephone conference, or by motion. If a dispute is anticipated it may be possible to resolve it before a deposition is started. In **extreme** cases of abuse in the taking of deposition, Judge Brown will require the deposition to be video or audio taped and even taken in his courtroom.

As a general rule all the judges in the Middle District favor full discovery, and unless the matter involves privilege, liberal discovery will be permitted. However counsel should be aware of the cost and burden of unnecessary discovery and should try to place reasonable limits on their request. Abuses are normally evident and do not reflect well on counsel. Better prepared counsel tend to have focused discovery and avoid unnecessary disputes.

5. Motion to Compel and Rule 37 Sanctions

See # 4 above. Sanction motions should be rare and only when **fully** justified by the facts. However repeated failure to respond or to comply with orders to compel, or other orders of the court, can and will result in sanctions.

6. Request for Expedited Determinations

Requests for lift of stay of discovery, pending the initial case management conference, will be considered, if the attorney submits the discovery sought, the need for the expedited discovery, and the date the discovery is need by. Other requests for shortened deadlines or other relief will be considered on a case by case basis.

7. Telephone Depositions

Telephone depositions are encouraged.

8. Instructing a Witness Not to Answer

An instruction not to answer is only permissible on privileged matters. The proper course is for the party asking the question to ask the specific question, and then to adjourn that part of the deposition until a ruling can be obtained from the Magistrate Judge. Telephone conferences may be used. If it is anticipated that such an issue will come up, a preferable practice may be for the objecting party to file a motion for a protective order, since the objecting party is in the best position to state why the matter at issue is privileged.

9. Confidentiality Agreements

The party seeking confidentiality bears the burden of showing good cause. However, unless there is an issue of public interest, agreed orders for these agreements will normally be granted.

E. Settlement

1. Who Presides

Normally the settlement conference will be scheduled before a Magistrate Judge who is not the case manager. If the parties request the settlement be before Judge Brown, where he is the case manager, he will grant that request as a rule. Selection of the judge to preside over a settlement conference is a proper use of forum shopping providing both parties agree.

2. Procedure

Settlement conferences are governed by Local Rule 20. All parties to the conference must be present with a representative who has full settlement authority, unless prior approval has been obtained for participation of a representative by telephone. Normally an order will be issued setting out the ground rules for the conference and the deadline for submitting each sides confidential settlement position paper. This document will be clearly marked as a

confidential settlement document, not for filing, and submitted to Judge Brown's courtroom deputy by the time set in the settlement order.

The conferences will start in the courtroom with all parties present, where Judge Brown will give a short statement why settlement is in the best interest of all parties and why good faith give and take will have to occur. Following, the attorneys will be asked to give a short presentation about their case. Thereafter Judge Brown will meet with the parties separately, usually starting with the plaintiff. Judge Brown will normally then meet with the attorneys for all sides, without their parties present, and then meet separately or jointly as the case requires. Each case is somewhat different and Judge Brown is willing to try whatever seems to work and will take suggestions of the parties very seriously.

If a settlement is reached, Judge Brown will try to get it reduced to writing before the parties leave the courthouse. Judge Brown will keep a settlement conference going as long as there is any hope of settlement.

F. Pretrial Briefs

1. Form

The clear statement of the facts is critical. A one-sided statement of the fact should be avoided at all cost. Counsel should read and comply with Local Rule 11(b)(10)-(15).

2. Scope in Non-Jury Case

In non-jury cases, Judge Brown would prefer them before trial, although a short version could be submitted pre-trial and a full version submitted after trial. Judge Brown likes to rule as soon as possible after the trial is completed .

3. Scope in Jury Trial

They are very helpful pre-trial along with proposed jury instructions.

G. Injunctions

Injunctions are rarely heard by the Magistrate Judges. If they are referred to the Magistrate Judge for a report and recommendation, or the parties have consented to have the case decided by the Magistrate Judge, they will be heard on an expedited basis.

IV. Pretrial Matters - Criminal Cases

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 Judge Brown, it will be handled on an expedited basis. For petty offenses, which do not require consent, and misdemeanors where consent to proceed before the Magistrate Judge has been granted, the Magistrate Judge will conduct all pretrial matters.

V. Trial Procedure

Trial procedure are only relevant in consent cases. The trial will be scheduled at a final case management conference.

A. Scheduling and Location

Parties who consent to trial before the Magistrate Judge will normally get a speedy trial date. Non-jury trials will be in Courtroom 776. Long jury trials may be held in other courtrooms, since Courtroom 776 does not have a formal jury box.

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

Judge Brown will try to accommodate scheduling conflicts, insofar as possible.

C. Motions In Limine

Judge Brown strongly encourages the use of motions in limine and will set deadlines for filing them pre-trial. If possible, he will try to rule on all of them pre-trial. He does not like to have to face them in the middle of a proceeding.

D. Courtroom Decorum

In case management conferences, counsel may remain seated since one goal of the case management conference is the exchange of ideas. For motions and other formal proceedings, counsel should stand. The podium should be used for any thing that is lengthy. Counsel should ask permission to approach the witness. Documents may be handed to the witness by a courtroom officer, courtroom deputy, or law clerk. If no one is available, counsel will be given permission to hand documents directly to the witness or to the court.

E. Voir Dire

Judge Brown will permit reasonable *voir dire* by the attorneys after preliminary questions by the court. Counsel will not be permitted to get too personal with the jury. Jury selection will be done using Senior District Judge Wiseman's method. Enough Jurors will be seated, after challenges for cause, to take care of all strikes and each side will pass in their strikes at the same time.

F. Notes and Questions by Jurors

1. Notes

Jurors will always be permitted and encouraged to take notes if they want to.

2. Questions

Judge Brown plans to permit jurors to ask questions. Jurors will be instructed that as triers of the facts, they are permitted to ask questions, but that they should assume the attorneys know more about their cases than anyone else and should not ask questions unless necessary to clear up an important point, after both sides have finished questioning a witness. Questions will be submitted to the

court, shown to both sides for any objection, and then put to the witness by either the court or one of the parties selected by the court. If the question is objectionable, the court will tell the jury why it will not be asked. The court will not tell the jurors which party objected to the question. If questions get out of hand the court will cut them off.

G. Opening Statements

1. Length

There is no set length, as long as they are not too long. Counsel will not be permitted to use the opening statement as a closing argument.

2. Use of Exhibits

Exhibits may be used in opening statements, provided they will not be objected to during the trial

H. Side Bar Conferences

Side bars may be used, although due to size of courtrooms they should be kept to a minimum, as they may be overheard by the jurors, or the jury might have to leave, if the matter will take some time to resolve.

I. Videotaped Testimony

Judge Brown has no problem with this type testimony, provided that the tape is edited before presentation to remove any irrelevant and objectionable material. Opposing counsel must be allowed to view the tape before it is presented.

J. Deposition Reading.

The use of "two person" reading is allowed and encouraged so long as the readers do not try to ham it up.

K. Exhibits

All exhibits should be pre-marked and sufficient copies made available for court and jurors. Overhead projectors and computer presentations may be used.

L. Expert Witnesses

Judge Brown will use the procedure outlined in Local Rule 12(c)(6)(c), unless both parties request that they be allowed to proceed with a standard question and answer format.

M. Motion for Judgment as a Matter of Law

If the parties can anticipate this motion, they should give the court advanced notice and file a short brief. Otherwise, it will be heard on oral motion and argument. In most cases a ruling will be delayed until after a jury verdict.

N. Proposed Jury Instructions and Verdict Form

Proposed Jury instructions will be required before the trial starts. Supplementary instructions may be requested during trial, if necessary. A final conference will be held before closing arguments to inform counsel of the courts final jury charge. A proposed verdict form should be submitted in complicated cases.

O. Proposed finding of Fact and Conclusion of Law

They may be submitted before or after trial, as the parties desire. If possible, Judge Brown would like a copy of them on computer disk in Word Perfect format. Judge Brown will try to give a preliminary ruling from the bench, wherever possible, at the conclusion of the trial.

P. Offers of Proof

Lawyers are encouraged to use them where it will expedite the proceedings.

Q. Closing Arguments

No set length so long as they are reasonable. Counsel must refrain from stating personal beliefs in argument. The use of the phrase "I believe" is strongly discouraged.

R. Jury Deliberations

1. Copy of Instructions

A copy will be provided to the jury.

2. Access to Exhibits

Jurors will have access to all exhibits during deliberations.

3. Access to transcripts of Testimony or Videotaped Testimony

Generally these will be available to the jury. There may be a caution not to give undue weight to the part considered, and in some cases the court may require the other parts of testimony to go with the requested part.

4. Availability of Counsel

Counsel are not required to remain in the courthouse, provided they can be reached by phone, and can return to court within a reasonable time.

5. Polling the Jury

The court will poll the jury in every case.

6. Interviewing the Jury

Local Rule 12(h) applies and Judge Brown will consider requests on a case-by-case basis after the trial is over.

VI. Sentencing in Criminal Cases

Judge Brown will follow the sentencing guidelines where applicable and will use a pre-sentence report, except in petty offenses where jail time is not requested.

VII. Other Comments

A. Responsibility of Local Counsel

Local counsel are important to the case. It will be rare for Local Rule 1(h) to be waived. Local counsel may expect outside counsel to carry the ball, but they should be prepared to go forward with the case, if necessary. If counsel seek to withdraw, they must follow the Local Rule on 10 day notice to the client. Good cause must be shown absent consent of the client and a showing that the case will not be unduly delayed.

B. Sanctions

Judge Brown is not a big fan of motions for sanctions and will be reluctant to impose them, unless the conduct is very serious. However where warranted, he will not hesitate to impose them under Rules 11, 16 or 37, as appropriate. Counsel who abuse discovery, and who ignore deadlines and other court orders, will be sanctioned. If the matter is very serious, Judge Brown would be inclined to do a report and recommendation to the district judge. Under current rules, the Magistrate Judge does not have contempt authority but can refer the matter to the district court for action on contempt by the district court. The matter may also be referred to the Tennessee Disciplinary Counsel for investigation.

C. Submission Under Seal

Matters to be submitted under seal should be placed in a sealed envelope, with the case name and docket number on the envelope, and a notation that it is **sealed**. The matter should be accompanied by a motion to seal and the matter will remain sealed until the court has ruled on the motion to seal.

D. Agreed Orders

These are fine when they concern routine matters such as extending discovery and other routine deadlines or rescheduling hearings.

E. Pet Peeves

Missing deadlines and then asking to extend the deadlines well after the time to act has passed.

Making my first name Joseph rather than Joe. It is Joe and I have a birth certificate to prove it.