Federal Pretrial and Trial Issues

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This outline is divided into two parts. I have included a section on pretrial issues because civil jury trials have become rare in federal court. For the few cases that go to trial, I have included a section on trial pointers. I received a number of suggestions on the trial pointers from my colleagues.

The United States District Court for the Eastern District of Virginia implemented electronic case filing (ECF) on March 26, 2007. All attorneys are required to complete the mandatory ECF training and to register with the clerk's office to use the ECF system, see, http://www.vaed.uscourts.gov/ecf/Required%20Training%20and%20E-Filing%20Registration.html

NOTICE

The Federal Appellate, Bankruptcy, Civil and Criminal Rules, as amended effective December 1, 2009, substantially changed the time-computation rules. You must be aware of the new time rules so that you do not run afoul of deadlines.

The Local Civil, Criminal and Admiralty Rules were amended effective November 19, 2010. The redlined version of the changes may be found at

http://www.vaed.uscourts.gov/localrules/Oct2010amendments.pdf

The updated Local Rules may be found at

http://www.vaed.uscourts.gov/localrules/LocalRulesEDVA.pdf

The amendments modified some deadlines (including opting out of the national summary judgment schedule), eliminated some outdated provisions, clarified some ambiguities, and corrected a typographical error.

An order of court may change the deadlines for individual cases.

PART ONE–PRETRIAL ISSUES

I. Introduction to Pretrial Issues

This outline will briefly focus on the areas of discovery, summary judgment, final pretrial conferences, and settlement conferences. I will point out common mistakes made by counsel. However, I must emphasize that you must read the appropriate Federal Rule of Civil Procedure (hereinafter "FRCP") and Local Rules in order to comply with the court's procedures. Also note that each of the District Judges has a slightly different FRCP 16(b) order. Make certain you comply with that Judge's directions. All of the Magistrate Judges use the same FRCP 16(b) order.

II. Expert Disclosure

A. **All experts must be disclosed**. FRCP 26(a)(2)(A). Experts are defined as witnesses who provide testimony under Fed.R Evid. 702, 703 and 705. Furthermore, a witness who is retained or specially employed to provide expert testimony in the case, or who is an employee of the party regularly giving expert testimony, must provide a detailed report as described in FRCP 26(a)(2)(B).

B. Not all expert witnesses are required to provide a written report under FRCP 26(a)(2)(B). For example, a treating physician may provide expert testimony, but is not subject to the requirement to prepare a FRCP 26(a)(2)(B) report. See 1993 Advisory Notes, FRCP 26(a)(2) and Hall v. Sykes, 164 F.R.D. 46 (E.D.Va. 1995). Additionally, any expert who receives only travel expenses and a statutory witness fee is not considered "retained or specially employed," and is thus not subject to the report requirements. Smith v. State Farm Fire & Cas. Co., 164 F.R.D. 49, 55-56 (S.D. W.Va. 1995). However, the rules **now** require a party disclose the subject matter of the testimony of an expert witness who is not required to prepare a FRCP 26(a)(2)(B) detailed report as well as a summary of the facts and opinions of that witness. FRCP 26(a)(2)(C), effective Dec. 1, 2010.

C. Counsel should be fully aware of the local procedure regarding the timing of disclosure of expert testimony.

1. Local Rule 26(D) governs the timing of expert disclosure in the Eastern District of Virginia. See Attachment A.

2. The requirements of Local Rule 26(D) may be modified by the scheduling orders of the various Judges. The Norfolk and Newport News Judges set the timing of expert disclosure in paragraph 2 of the FRCP 16(b) scheduling order. See Attachment A.

D. If a party files a request for disclosure of the identity of experts and the expert opinions, then you must respond within 30 days with the identification of the expert, and the expert opinion. You cannot wait until the mandatory disclosure deadline to respond unless there has been no timely request or unless you truly do not have your expert witness or expert opinion until the deadline.

E. Do not expect that these deadlines will be extended without a motion supported by good cause presented to the court prior to the deadline.

F. Sanctions.

1. FRCP 37(c)(1) requires sanctions against a party who fails to disclose expert testimony in the form of disallowance of use of that testimony at trial, hearing, or motion.

2. FRCP 37(c)(1) also includes a number of discretionary sanctions.

3. Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592 (4th Cir. 2003) sets forth the procedure trial judges must follow to impose the sanction of exclusion of evidence. When determining whether the failure to disclose was “substantially justified” or “harmless,” a district court is guided by five factors: 1) surprise of the other party, 2) ability to cure the surprise, 3) extent of disruption if allowed, 4) importance of the evidence, and 5) explanation of failure

(including potential bad faith). Id. at 597. See e.g. Steele v. Kenner, No. 04-1812, 2005 U.S. App. LEXIS 6776 (4th Cir. April 20, 2005) (unpublished) (affirming district court's exclusion of expert testimony from plaintiff's case-in-chief for failure to timely disclose medical expert on causation).

III. Discovery Issues

A. Objections to Discovery

1. Counsel must file objections to discovery requests strictly in accordance with Local Rules 26(B) and 26(C). The objections must be in writing and served within 15 days after service of the discovery requests or 15 days after a case has been removed or transferred to this court. Read the Local Rules for details. FAILURE TO FILE OBJECTIONS WILL RESULT IN WAIVER OF ALL OBJECTIONS. You will be compelled to answer all of the unobjected discovery requests. The moratorium on discovery set out in FRCP 26(d) does not extend the time for filing objections to discovery requests.

2. Counsel frequently fail to follow the requirements of FRCP 26(b)(5)(A)when objecting to discovery requests based on privileges or work product of counsel.

a. FRCP 26(b)(5)(A) states:
When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must:
(I) expressly make the claim; and
(II) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

b. Sanctions

1. A generalized objection on the basis of privilege and/or work product may result in the party's objection being summarily overruled. The court need make no further inquiry since counsel failed to comply with the details of FRCP 26(b)(5)(A).

2. At a minimum, the court will require an index log citing the privilege and work product objections. Monetary sanctions may also be imposed on counsel personally for wasting the time of opposing counsel and the court by failing to comply with the procedures set forth in the rule. FRCP 37(c)(1).

3. Objections Related to Depositions

a. Objection to potential witnesses appearing at deposition of others.

1. FRCP 30(C) was amended on December 1, 1993 to clarify that the exclusion of witnesses pursuant to Federal Rule of Evidence 615 is not automatically granted at depositions. See 1993 Advisory Notes, FRCP 30(c).

2. Counsel must request a protective order pursuant to FRCP 26(c)(1)(E) to exclude witnesses from a deposition.

3. If counsel are surprised by potential deponents appearing at the deposition of another, then they should immediately telephone the court and ask for a ruling on whether the potential deponent may attend the deposition.

b. FRCP 30(c)(2) requires that "An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition— must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Counsel may not terminate the deposition without risking severe sanctions for failing to comply with this rule.

1. Counsel may not make "talking objections" in a deposition. This rule specifically prohibits counsel from suggesting answers to a witness by use of lengthy objections that would plant in the mind of the witness counsel's suggested answer to the question.

2. Counsel may not instruct a deponent not to answer a question except when necessary to preserve a privilege, to enforce a limitation on evidence previously directed by the court or to present a motion to the court that the opposing party is conducting the examination in bad faith or in a manner as to unreasonably annoy, embarrass or oppress the deponent or party. FRCP 30(c)(2)

3. Sanctions against the party violating FRCP 30(c) may include striking the testimony of the witness if it is the violating party's witness or striking the cross examination of the witness by the violating party. In addition, the court can order the deposition resumed if counsel improperly terminate the deposition. The court may require the losing party to pay for travel, court reporter, and other expenses associated with the deposition. FRCP 30(d)(3)(C).

c. If you plan to use depositions at trial, you must review the depositions in accordance with Local Rule 30(F) and schedule a hearing with the court prior to trial for rulings on objections. Failure to follow this rule will result in a waiver of objections.

d. In nonjury cases, you are required to submit a summary of the deposition in accordance with Local Rule 30(G).

e. A deposition is now presumed, with a few exceptions, to last no longer than one day of seven hours. FRCP 30(d)(1).

B. Consultation Among Counsel

1. The Local Rules for the Eastern District of Virginia require counsel "to meet and confer in person or by telephone with his or her opposing counsel in a good-faith effort to narrow the area of disagreement" before a discovery dispute may be brought before the court. Local Rule 7(E).

   a. The emphasis on this rule is that the discussion must be in "good-faith."

   b. If counsel do not certify that such a discussion has taken place, no hearing will be held.

2. The most common irritant to a judge in a discovery dispute occurs when lawyers start pointing fingers at each other and accusing each other of improper conduct and untruthfulness. There are some occasions when such charges are valid. However, in the vast majority of situations the lawyers simply have not extended common courtesy to each other to resolve their differences, and therefore they resort to pettiness in their accusations.

C. Motions to Compel

1. If opposing counsel has failed to provide discovery in a timely manner, consult with counsel as set forth in III.B. above. If opposing counsel refuses to return your calls, letters or e-mails, then certify that you have tried to communicate, attach copies of letters and e-mails, file the motion, and set a hearing.

2. Do not wait too late to file a motion to compel and set a hearing. If you do not promptly act to compel discovery, you may lose the right to that discovery because the motion was filed too late to produce the discovery in a timely manner.

3. A motion to compel must be accompanied by a brief in accordance with Local Rules 37(A) and (B) and 7(F). Attach the discovery requests, answers and objections <u>at issue</u> in the dispute to the motion or brief. The opposing party is required to file a responsive brief. Failure to file a responsive brief waives any argument on the motion. The Judges read the pleadings before the court date and appreciate as much relevant detail as possible prior to the hearing.

D. Completion of Discovery

1. The Rule 16(b) Order defines "completed." It is ignored so often that it is set out below.

"Completed" means that interrogatories, requests for production, and requests for admission must be served at least thirty (30) days prior to the established completion date so that responses thereto will be due on or before the completion date. All subpoenas issued for discovery shall be returnable on or before the completion date.

2. Extra time (usually seven days after defendant's discovery deadline) is provided in the Rule 16(b) Scheduling Order to complete discovery of experts. See Attachment C ¶ 4.

E. Motions in Limine

The gatekeeping function performed by the court when determining the admissibility of expert testimony under Fed.R.Evid 702, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, Ltd., 526 U.S. 137 (1999), is beyond the scope of this outline.

F. Sealed Documents

1. Local Civil Rule 5 of the Eastern District of Virginia Local Rules, regarding the sealing of documents, was amended (effective March 8, 2004) to reflect the Fourth Circuit's opinion in Ashcraft v. Conoco, Inc., 218 F.3d 288 (4th Cir. 2000).

    a. Ashcraft merely restates, without change, the procedures for sealing documents established by the Fourth Circuit in In re Knight Publishing Company, 743 F.2d 231 (4th Cir. 1984), and reiterated in Stone v. University of Maryland Medical Systems Corporation, 855 F.2d 178 (4th Cir. 1988). See Ashcraft 218 F.3d at 302.

    b. Knight held there is a "presumption" favoring public access to "judicial records and documents," which can be overcome only if it is "outweighed by competing interests." Knight, 743 F.2d at 235.

    c. Before documents are sealed, the District Court must:

        1. provide public notice of the request to seal and allow interested parties a reasonable opportunity to object;

        2. consider less drastic alternatives to sealing the documents; and

        3. provide specific reasons and factual findings supporting its decisions to reject the alternatives and seal the documents. *Id.*

2. Filing Requirements

    a. A document will not be filed under seal unless one of the following requirements has been met (Local Civil Rule 5(A)):

        1. a protective order has been entered in the case allowing future pleadings to be filed under seal;

        2. a statute provides for filing under seal (e.g. False Claims Act, qui tam); or,

        3. the document is accompanied by a motion that meets the requirements discussed below in III.F.3.

    b. The document to be sealed should be submitted to the Clerk's Office in an envelope and clearly labeled "UNDER SEAL" with the following notations made on the envelope: case number, case caption, reference to any statute, rule, or order permitting the item to be sealed, and a non-confidential descriptive title of the document (Local Civil Rule 5(E)).

3. Motion to Seal a Document

    a. Any motion to seal a document (Local Civil Rule 5(D)) or for a protective order, which provides for the filing of documents under seal, Local Civil Rule 5(C), shall be accompanied by:

        1. a notice that identifies the motion as a sealing motion;

        2. a non-confidential supporting memorandum and proposed order, each including:

            - a non-confidential description of what is to be sealed;

            - a statement as to why sealing is necessary, and why another procedure will not suffice;

            - references to governing case law; and,

- unless permanent sealing is sought, a statement as to the period of time the party seeks to have the matter maintained under seal and as to how the matter is to be handled upon unsealing;

3. a proposed order should recite the findings required by Ashcraft to support the proposed sealing.

b. A non-confidential motion, non-confidential memorandum, and notice are required even if counsel are submitting a proposed consent order to seal.

c. A party may also submit a confidential memorandum for *in camera* review. (This memorandum will not be filed or docketed, and will be returned to counsel upon a ruling by the Court.) Local Civil Rule 5(C)

d. Other parties and non-parties may submit memoranda in support of or in opposition to the motion, and may designate all or a portion of the memoranda as confidential. (Any confidential memoranda will be treated as sealed until the outcome of the ruling on the motion.) Local Civil Rule 5(D).

4. Motion to Seal a Case (Local Civil Rule 5(F))

a. The same procedures outlined above for filing a motion to seal a document apply to a motion to seal a case. Note: the motion to seal a case is a public document. Therefore, counsel may want to use pseudonyms in place of party names, or caption the case Under Seal v. Under Seal.

b. In order to comply with Local Civil Rule 5(B), which requires public notice of all motions to seal, a "Sealed Cases Log" has been created to document motions to seal cases.

1. The Sealed Cases Log can be viewed for a fee on the Court's PACER internet site (http://pacer.vaed.uscourts.gov). Enter the following case number: Alexandria 1:06sc1, Norfolk 2:06sc1, Richmond 3:06sc1, or Newport News 4:06sc1. Note: the Sealed Cases Log will correspond to the current calendar year. In the year 2006, each case number will reflect 06 (i.e. 1:06sc1).

2. The Sealed Cases Log can be viewed for free on the Clerk's Office computer terminals. In addition, there is a case file jacket in the Clerk's Office with copies of all civil motions to seal cases.

5. Personal Identifiers

a. Local Civil Rule 7(C), regarding the use of personal identifiers, was amended (effective March 8, 2004 and February 15, 2005).

b. Parties shall not include, or shall partially redact where inclusion is necessary, the following personal identifiers in any pleading or document filed with the Court, including exhibits thereto, unless otherwise ordered by the Court:

1. social security numbers (use last four digits),
2. names of minor children (use initials),
3. dates of birth (use only the year),
4. financial account numbers (use last four digits), and
5. home addresses (use only city and state).

c. If it is necessary to include a personal identifier in a pleading or order, a redacted version shall be publicly filed, and an unredacted version or reference list shall be submitted for filing under seal. Cite the "E-Government Act of 2002" as authority in support of sealing the pleading, order, or reference list.

IV. Summary Judgment

A. Timing

1. The Local Rule for the Eastern District of Virginia requires summary judgment motions to be filed in advance of trial so that the court may reasonably consider them (Rule 56(A)). Local Rule 56 (A) states that the time provisions of F.R.Civ.P. 56(b) shall not apply to this District. Filing a summary judgment motion so that the response is due several days before trial is not filing within a "reasonable time period."

2. The Rule 16(b) order states:

   Disposition of motions for summary judgment maturing immediately preceding the final pretrial conference, or later, is left to the discretion of the Court, and such motions may or may not be addressed prior to trial.

3. U.S. District Judge Henry Coke Morgan, Jr.'s tongue-in-cheek rule on timing of summary judgment follows:

   "It is too early to file a summary judgment motion before the end of discovery and not timely thereafter."

B. Statement of Material Facts

1. Local Rule 56(B) <u>requires</u> each brief in support of a motion for summary judgment to include a specifically captioned section listing all material facts which that party contends are not in dispute, with cites to the supporting portions of the record.

2. A brief in response to a summary judgment motion <u>must</u> set forth in a specifically captioned section all material facts as to which it is contended there exists a genuine issue requiring litigation, with supporting citations to the record.

3. The court may assume the facts identified by the moving party in its listing of material facts are admitted unless such facts are controverted in the statement of issues filed in opposition to the motion.

C. Page Limitations

1. Local Rule 7(F)(3) contains page limitations for all briefs, including summary judgment.

2. Opening and responsive briefs, exclusive of affidavits and supporting documentation, cannot exceed 30 8 ½" by 11" double-spaced pages.

3. Rebuttal briefs may not exceed 20 double-spaced pages.

4. The court may grant permission for longer briefs in advance of the filing of the brief. Good cause must be shown in the motion requesting more pages.

5. The typeface must be at least 10 point if Courier New and 12 point if Times New Roman.

D. A party may not file separate motions for summary judgment addressing separate grounds without leave of court. Local Rule 56(C).

V. Final Pretrial Conferences

A. Time and Form

1. This is a scheduled court appearance for which you must appear and be ready at the appointed time. Do not expect to arrive at the last minute to complete the assembly of the Final Pretrial Order.

2. The proposed order must be in a final form for the judge.

3. See Attachment D for a suggested form for pretrial orders.

B. Common Mistakes

1. Failure of counsel to work together to stipulate undisputed facts.

2. Failure to accurately number and fully describe exhibits.

3. Failure to note objections on the Final Pretrial Order.

4. Frivolous objections to exhibits.

5. Omission of a trial issue in the Final Pretrial Order, which may preclude that issue from being presented at trial.

6. Failure to bring relevant discovery material if you have an objection to a witness or exhibit based on lateness or non-disclosure in discovery.

7. Failure to bring exhibits that are the subject of objections to the Final Pretrial Conference.

8. Failure to advise the court that a case has settled and then failing to appear at the Final Pretrial Conference.

9. Attempting to set motions for hearing at the Final Pretrial Conference.

VI. Settlement Conferences

A. Timing

1. Any judge may order a settlement conference or the parties may request a conference.

2. Some cases may benefit from a settlement conference as early as the initial pretrial conference. Other cases need discovery to flesh out facts and damages before a settlement conference can be of use.

3. Counsel are now required to discuss settlement possibilities at the Fed. R. Civ. P. 26(f) conference.

B. Preparing for the Settlement Conference and Attachment B

1. Talk with your client and prepare the client to be flexible.

2. The magistrate judge will enter an order setting out the requirements of the settlement conference. The order used by all the magistrate judges in Norfolk/Newport News is included as Attachment E.

3. Make certain the party or an officer or agent with full settlement authority attends the conference or, with the permission of the settlement judge, is available for telephone conference. See Local Civil Rule 83.6(H).

4. Evaluate your cost of litigation versus the cost of settlement.

C. Settlement Conference Procedures

1. Settlement judges expect to engage in ex parte communications with all parties. As a result, the settlement judge will not make any further rulings, either dispositive or non-dispositive, in the case.

2. The information that the settlement judge receives will remain confidential. It will not be disclosed to other judges of the court or to any other party without permission of the disclosing party.

3. The discussions occurring in the settlement conference may not be used by or against any party except to further settlement discussions.

4. As a general rule, the plaintiff will open the settlement conference with a statement of the strengths and weaknesses of its case. The defendant will respond with its position. The plaintiff may make a short reply. At this point the settlement judge decides the best way to proceed. For example:

   a. Ex parte discussions with the parties.

   b. Focus discussion on issues of substantial agreement.

   c. Focus discussion on the issue of maximum disagreement.

   d. Focus on liability.

   e. Focus on damages.

   f. Focus on emotional issues.

5. All parties to a settlement conference must be flexible in their positions in order to settle the case.

D. Post Conference

1. If a case settles, the dismissal order should be delivered to the Clerk within four business days.

2. Don’t be surprised if the settlement judge calls you with additional suggestions if the case does not settle at the time of the conference.

PART TWO –TRIAL TIPS

I. Introduction to Trial Tips

A. **Read and understand the Federal Rules of Civil Procedure.**

B. **Read and understand the Federal Rules of Evidence.**

C. **Read and understand the Local Rules of the Eastern District of Virginia**. I have bolded the above 3 commands because of their importance and the fact that many lawyers do not bother to read the rules. You will need to know procedural rules in every case you try and learning them early and well will stand you in good stead throughout your career.

II. Preparation Before Trial

A. Exhibits must be pre-marked to correspond to the Final Pretrial Order and converted for electronic display.

B. Subpoena the witnesses and prepare them for trial.

C. File motions in limine and consider any possible appellate issues.

D. Prepare the jury instructions so that you will know what to prove.

III. Jury Selection

A. Find out how your trial judge selects a jury. Fed. R. Civ. P. 47.

B. A civil jury in U.S. District court consists of 6 to 12 jurors, all of whom will deliberate. There are no alternates. Fed. R. Civ. P. 48.

C. Make Batson objections before the jury is sworn. Batson v. Kentucky, 476 U.S. 79 (1986).

D. **WARNING**–You will waive trial by jury if you do not make a timely jury demand as required by Fed. R. Civ. P. 38(b), (d).

IV. Opening Statement

A. Before opening statement, move to sequester witnesses. Fed. R. Evid. 615.

B. Opening statement is a roadmap of your case and your first opportunity to impress the jury with your case. Do not lose this opportunity by arguing the case and incurring the wrath of the judge at this very early stage of the trial.

C. Tell a story–use visual aids.

D. Keep it short.

V. Exhibits

A. The exhibits must be pre-marked to correspond to the Final Pretrial Order and the appropriate number of copies supplied to the court and opposing counsel. Local Civil Rule 79(A).

B. Be very familiar with the exhibits so that you are not trying to find an exhibit while examining a witness.

C. Introduction of an exhibit.

1. The exhibit is pre-marked and a copy previously furnished to counsel.
2. Show the exhibit to the witness.
3. Lay foundation for the exhibit (rarely will you need to prove chain of custody of an exhibit).
4. Move for admission of the exhibit.
5. Publish the exhibit to the jury–you should have an electronic display of the exhibit or copies to give to all jurors.

VI. Examination of Witnesses

A. Direct Examination

1. Have witness tell the relevant part of the story without getting bogged down in unimportant details.

2. Don't use slang or professional jargon in asking the questions.

3. Ask open ended questions and let the witness talk to the jury.

4. Listen to the answers to your questions.

5. DO NOT LEAD–the jury wants to hear the witness, not you.

6. Look for examples of "predicate questions" if you are unsure about how to lay the foundation for the admission of the testimony.

B. Cross Examination

1. Do not cross examine if there is no reason to do so.

2. Prepare for cross examination before trial.

3. Do not have the witness repeat the direct testimony.

4. If the witness has testimony favorable to your side, make certain that the testimony is presented to the jury.

5. LEAD the witness.

6. Listen to the witness' answer.

7. End your cross examination on a strong note.

8. Find a video copy of the late Irvin Younger's lecture on the "Ten Commandments of Cross Examination" and commit it to memory. (I Googled this title and got 61 hits).

VII. Objections

A. Stand up and make the objection **before** the witness answers.

B. State the legal basis for the objection and cite to the appropriate Federal Rule of Evidence.

C. Be prepared with case law.

D. Know Fed. R. Evid. 103 concerning objections and preserving evidence.

E. If the ruling is against you, do not continue arguing with the court. You will impress the jury that the evidence is very much against your case.

F. Proceed with the trial without conveying "agony or ecstasy" to the jury.

G. Do not make speaking objections before the jury.

H. Remember that the standard of review on an appeal of an evidentiary ruling is abuse of discretion–a very tough standard to obtain a reversal.

VIII. Damages

A. After 24 years on the bench, I am still amazed at the failure of lawyers to prepare damage evidence.

B. Figure out what your damages are, and present them throughout trial through exhibits and witnesses so that you can argue damages in your closing argument.

C. Use charts and summary exhibits to support the damages. Fed.R.Evid. 1006.

D. At least some federal judges will not permit counsel to inform the jury of the amount sued for in the complaint. The judges find that Va. Code §8.01-379.1 is a procedural rule which does not apply in federal court.

IX. Closing Argument

A. Argue your case. Do not simply rehash your opening statement.

B. Use exhibits in closing–have the exhibits on an electronic display if possible.

C. Refer to the jury instructions and argue that what the court is telling the jury about the law supports your case.

D. Maintain eye contact with the jury; do not read your closing argument. Keep the jury awake and alert.

E. Make certain that you continue your presentation of the theory of the case in your closing argument by referring to the exhibits and testimony that supports your theory.

X. Jury Instructions and Verdict Forms

A. As stated previously, prepare the jury instructions well before trial so that you know what to prove.

B. Make certain that your objections to the jury instructions are preserved for appeal.

C. Consider the use of special verdict forms to guide the jury to a decision.

ATTACHMENT A

LOCAL CIVIL RULE 26

DISCOVERY AND DISCLOSURE

(D) **Expert Disclosures:**

(1) Agreement Upon Disclosure: Counsel are encouraged to agree upon the sequence and timing of the expert disclosures required by Fed. R. Civ. P. 26(a)(2). All such agreements must be in the form of a consent order entered by the Court.

(2) Timing of Mandatory Disclosure: Absent such a consent order or unless ordered otherwise, the disclosures required by Fed. R. Civ. P. 26(a)(2) shall be made first by the plaintiff not later than sixty (60) days before the earlier of the date set for completion of discovery or for the final pretrial conference, if any, then by the defendant thirty (30) days thereafter. Plaintiff shall disclose fifteen (15) days thereafter any evidence that is solely contradictory or rebuttal evidence to the defendant's disclosure.

(3) Completion of Disclosure: Whether accomplished by agreement pursuant to Local Civil Rule 26(D)(1) or pursuant to the schedule set by Local Civil Rule 26(D)(2), all parties shall complete all forms of expert disclosure and discovery not later than thirty (30) days after the date upon which plaintiff is, or would be, required by Fed. R. Civ. P. 26(a)(2)(C) to disclose contradictory or rebuttal evidence.

(4) General Provisions: For purposes of this Local Rule, counter-claim plaintiffs, cross claimants, and third-party plaintiffs shall be plaintiffs as to all elements of the counterclaim, cross-claim, or third-party claim. Answers to interrogatories directed at clarification of the written reports of expert witnesses disclosed pursuant to Fed. R. Civ. P. 26(a)(2) shall be due fifteen (15) days after service.

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Lisa Gregory, et. al.
on behalf of herself and all other similarly situated,

Plaintiffs.

Civil Action No: 2:12cv11

v.

Belfor USA Group, Inc.,

Defendant.

RULE 26(f) PRETRIAL ORDER

Subject to any special appearance, questions of jurisdiction, or other motions now pending, the Court **ORDERS** as follows:

1. On **March 2, 2012 at 2:00 p.m.**, the parties shall confer for the purpose of conducting the conference required by Federal Rule of Civil Procedure (hereinafter "Rule") 26(f). Unless otherwise agreed upon by the parties, the parties shall meet in person at the offices of counsel located closest to the courthouse at Norfolk. By agreement of the parties, this conference may be conducted at anytime prior to the Rule 16(b) conference or at any place and by any means of communication so long as the parties accomplish the purposes of Rule 26(f) in a timely manner. The parties' proposed discovery plan shall provide for completion of all discovery on or before **July 10, 2012**, and shall be formulated to accommodate a trial date before **September 12, 2012**. The parties shall report orally upon their discovery plan at the subsequent Rule 16(b) conference and the plan shall not be filed with the Court.

2. The Rule 16(b) scheduling and planning conference will be conducted at the Walter E. Hoffman United States Courthouse in Norfolk on **March 12, 2012 at 9:00 a.m. in Courtroom 4 Witness Room, first floor**.

(a) The Rule 16(b) conference may be rescheduled for an earlier date by agreement of the parties, **subject to the availability of the court;** however, **the conference may not be postponed to a later date** without leave of court. If the date poses an unavoidable

conflict for counsel, and all counsel and unrepresented parties can agree on an alternate date, please call **Patrice Thompson** in the Clerk's Office at **(757) 222-7218** for assistance.

(b) At the conference, all parties shall be present or represented by an attorney, admitted to practice in the Eastern District of Virginia, who possesses the authority to agree upon all discovery and scheduling matters that may reasonably be anticipated to be heard by the court.

(c) The parties are advised that the court has instituted a procedure for Settlement and Alternative Dispute Resolution (ADR) contained in Local Rule 83.6. In accordance with Local Rule 83.6(D), utilization of ADR procedures shall not operate to change any date set by order of the court, by the Federal Rules of Civil Procedure, or by the Local Rules of Practice.

(d) The parties shall complete the initial disclosures set forth in Rule 26(a)(1) on or before **March 26, 2012**. Any objections to the requirement of initial disclosure, and any unresolved issues regarding the discovery plan, shall be addressed at the Rule 16(b) conference.

3. Subject to the limitations imposed in pretrial orders, the parties may initiate any form of discovery at anytime subsequent to the date of this order, provided that no party will be required to respond to a deposition notice or other form of discovery sooner than **April 6, 2012**, unless specifically ordered by the court. All objections to interrogatories and requests for production and admission should be served within fifteen (15) days after service of such discovery requests. The failure of a party to comply with any disclosure provision, or any other form of discovery, will not excuse any other party from the failure to comply with any disclosure provision or any other form of discovery.

4. Interrogatories to any party by any other party shall be limited to thirty (30) in number, including sub-parts. Depositions of nonparty, non-expert witnesses shall be limited to five (5) in number. There shall be no limit placed upon the number of depositions of military witnesses, or of witnesses not subject to summons for trial, which are undertaken by the proponent of the witness for the purpose of presenting such deposition testimony at trial. By agreement of the parties, or upon good cause shown, the court may enlarge the number of interrogatories which may be served upon a party, and the number of depositions which may be taken, or limit the number of depositions of military witnesses, or those taken by the proponent of the witness for presentation in evidence in lieu of the appearance of the witness.

____
UNITED STATES DISTRICT/MAGISTRATE JUDGE

Date: February 17, 2012

ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Lisa Gregory, et. al.

Plaintiffs,

Civil Action No: 2:12cv11

v.

Belfor USA Group, Inc.,

Defendant.

RULE 16(b) SCHEDULING ORDER

Subject to any motions now pending, the parties having reported to the Court in accordance with Federal Rule of Civil Procedure (hereinafter "Rule") 26(f), the Court **ORDERS** as follows (**only the court, by order, may approve extensions of time**):

1. **Trial** shall commence on **October 2, 2012, at 10:00 a.m.**, at Norfolk. Unless otherwise ordered by the court, the party intending to offer exhibits at trial shall place them in a binder, properly tabbed, numbered, and indexed, and the original and two (2) copies shall be delivered to the clerk, with copies in the same form to the opposing party, one (1) business day before the trial. The submitting party may substitute photographs for demonstrative or sensitive exhibits.

2. The party having the burden of proof upon the primary issues to which potential Rule 702, 703 or 705 evidence is directed shall **identify expert witnesses** to be proffered upon such an issue by name, residence and business address, occupation and field of expertise on **June 4, 2012**. The disclosure outlined in rule 26(a)(2)(B) shall be made on **July 5, 2012**. In addition to the disclosures required by Rule 26(a)(2)(B), the same disclosures shall be made on the same dates regarding all witnesses proffered by a party for the purpose of presenting evidence under Rules 702, 703 or 705 of the Federal Rules of Evidence, whose first direct contact with the case or the parties occurred subsequent to the filing of this action. Rule 702, 703 or 705 disclosures intended solely to respond to, contradict or rebut evidence on the same subject matter

disclosed by another party pursuant to paragraph (a)(2)(B) of Rule 26, or pursuant to this order, shall be made on **August 16, 2012**. Any rebuttal disclosure by the party bearing the initial burden of proof shall be made on **August 21, 2012**, and shall be limited as to source to expert witnesses previously identified. Further rebuttal to Rule 702, 703 or 705 evidence shall be permitted only by leave of court.

3. **Discovery** shall be commenced timely and, except as to expert witnesses, shall be completed by **plaintiff(s)** on or before **July 24, 2012**; by **defendant(s)** on or before **August 21, 2012**. **"Completed"** means that interrogatories, requests for production, and requests for admission must be served at least thirty (30) days prior to the established completion date so that responses thereto will be done on or before the completion date. All subpoenas issued for discovery shall be returnable on or before the completion date. Unrepresented parties may request subpoenas of witnesses for depositions or trial, but such requests must be accompanied by a memorandum containing the name, address and purpose of the testimony of each witness and be approved in advance of issuance by a judge or magistrate judge of this court. Such approval shall not preclude any witness from contesting a summons. In accordance with Rule 5(d), depositions upon oral examination and upon written questions, interrogatories, requests for production, requests for admission, notices for depositions and production, requests for disclosure of expert information, expert information, disclosures, and answers and responses or objections to such discovery requests **shall not be filed** with the court until they are used in the proceeding, or ordered filed by the court. Discovery improperly submitted will be discarded by the clerk without notice to counsel. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if sought to be used by any party or ordered filed.

4. All **discovery** of experts, and all **depositions** taken by the proponent of a witness for presentation in evidence in lieu of the appearance of the witness at trial, shall be concluded on or before **August 28, 2012**.

5. The **pretrial disclosures** required by Rule 26(a)(3) shall be **delivered** to all counsel and unrepresented parties on or before **August 29, 2012**, and filed with the Court at the final pretrial conference as part of the final pretrial order. Any objections to this disclosure shall be **delivered** to all counsel and unrepresented parties on or before **September 5, 2012**, and, if unresolved, will be heard at the final pretrial conference. The failure to **deliver** timely objections

to Rule 26(a)(3) disclosures shall constitute a waiver of the right to object. Wherever **delivery** to counsel or unrepresented parties, as opposed to the Clerk, is required by this order, facsimile transmission or equivalent electronic transmission during normal business hours on the due date, accompanied by simultaneous service by mail, shall be considered timely.

6. An **attorneys' conference** is scheduled in the office of counsel for plaintiff or, if the plaintiff is unrepresented, at the office of counsel for the defendant whose office is located closest to the courthouse at Norfolk on **<u>September 7, 2012</u>**. Counsel and unrepresented parties shall meet in person and confer for the purpose of reviewing the **pretrial disclosure** required by Rule 26(a)(3), preparing stipulations, and marking the exhibits to be included in the final pretrial order outlined in paragraph 7. With the exception of rebuttal or impeachment, any information required by Rule 26(a)(3) not timely disclosed, **delivered**, and incorporated in the proposed final pretrial order shall result in the exclusion of the witnesses, depositions, and exhibits which are the subject of such default.

7. A **final pretrial conference** shall be conducted on **<u>September 14, 2012, at 11:00 a.m.</u>**, at the courthouse in Norfolk, at which time trial counsel and unrepresented parties shall appear and be prepared to present for entry the proposed final pretrial order setting forth: (1) a stipulation of undisputed facts; (2) identification of documents, summaries of other evidence, and other exhibits in accordance with Rule 26 (a)(3)(A)(iii) to which the parties agree; (3) identification of Rule 26(a)(3)(A)(iii) materials sought to be introduced by each party to which there are unresolved objections, stating the particular grounds for each objection, and arranging for the presence of any such materials at this conference; (4) identification of witnesses in accordance with Rule 26(a)(3)(A)(i) indicating any unresolved objections to the use of a particular witness and the grounds therefor, and designating those witnesses expected to testify by deposition in accordance with Rule 26(a)(3)(A)(ii); (5) the factual contentions of each party; and (6) the triable issues as contended by each party. While preparation of the final pretrial order shall be the responsibility of all counsel and unrepresented parties, counsel for the plaintiff, or if the plaintiff is unrepresented, counsel for the first-named defendant, shall distribute a **proposed final draft** to all other counsel and unrepresented parties on or before **<u>September 12, 2012</u>**. Unresolved objections shall be noted in the proposed final pretrial order, but disagreements concerning the content of the final draft shall be resolved before the final pretrial conference, at which time the parties shall present a complete and endorsed proposed draft of the final pretrial order. Failure to

comply with the requirements of this paragraph may result in the imposition of sanctions pursuant to Rule 16(f).

8. Trial **by jury** has been demanded. Proposed *voir dire* and two sets of jury instructions (TYPED IN CAPITAL LETTERS), shall be **delivered** to the Clerk on or before **September 25, 2012**.

9. Motions

a. Disposition of **motions for summary judgment** is left to the discretion of the court, and such motions may or may not be addressed prior to trial.

b. Counsel must file a brief in support of their motion or response to a motion as required by Local Civil Rule 7(F).

c. Briefs may not exceed the page limits set by Local Civil Rule 7(F)(3) without an order of the court.

d. Counsel filing a dispositive or partially dispositive motion against a pro se party must comply with the notice requirements of Local Civil Rule 7(K).

e. The original signature of counsel of record must be on all pleadings and motions filed with the court. Local counsel are required to sing the pleading. See Local Civil Rule 83.1(F) for counsel's responsibilities.

10. **ADR** has neither been requested nor ordered in this case. If the parties agree upon a settlement, counsel for one of the parties shall immediately notify the court by facsimile mail directed to the clerk's office with copies to all other counsel of record. If an endorsed dismissal order is not received within eleven (11) days of receipt of the facsimile notice by the clerk, the court may enter an order dismissing the case with prejudice and retaining jurisdiction to enforce settlement.

Raymond A. Jackson
United States District Judge

Date: March 12, 2012

ATTACHMENT D

A Suggested Form of Order

for Final Pretrial Conference

(Caption of Action has been omitted.)

Order on Final Pretrial Conference

In conformity with the Local Rules for the United States District Court for the Eastern District of Virginia relating to pretrial procedure, it is ORDERED that:

1. The parties hereto agree upon a stipulation with respect to certain undisputed facts as follows:

(Set forth all factual stipulations at this point.)

2. (a) The parties hereto agree that the following exhibits may be introduced in evidence without the necessity of further proof:

Joint Pretrial Exhibits Description

Ex. #_______

(b) The plaintiff desires to introduce into evidence Plaintiff's Ex. #_______, but defendant objects to said exhibit and, as ground for said objection, states:

Plaintiff's Exhibit No. Description Objection

(c) The defendant (or respondent) desires to introduce into evidence Defendant's Ex. #_______, but plaintiff objects to said exhibit and, as grounds for said objection, states:

Defendant's Exhibit No. Description Objection

(d) The third-party defendant desires to introduce into evidence Third-Party Defendant's Ex. #_______ and states that the purpose of said exhibit is ___________, but the third-party plaintiff objects to said exhibit and, as grounds for said objection, states:

Third-Party Exhibit No. Description Objection

3. (a) The names of the witnesses who will (or may) testify at the instance of the plaintiff, including any witnesses testifying by deposition, and the purposes of such testimony, are, for example:

John Doe – Eye witness

Dr. Richard Roe – Medical

Sam Smith – Expert

(b) The names the witnesses who will (or may) testify at the instance of the defendant (including any testifying by deposition), and the purpose of such testimony, are:

(Same form as 3.(a))

(c) The names of the witnesses who will (or may) testify at the instance of the third-party defendant (including any testifying by deposition) and the purpose of such testimony, are:

(Same form as 3.(a))

4. (a) The factual contentions of the plaintiff are ____.

(b) The factual contentions of the defendant are

_______________________________________.

(c) The factual contentions of the third-party defendant are

______________________________________.

5. (a) The triable issues as contended by the plaintiff are

_______________________________________.

(b) The triable issues as contended by the defendant are

_______________________________________.

(c) The triable issues as contended by the third-party defendant are

___________________.

NOTE: The Court may incorporate into any formal order, or counsel may agree, that other matters may be set forth in the pretrial order including, but not limited to:

(a) A settlement deadline after which there will be no further negotiations.

(b) Rulings on objections to depositions.

(c) Time for presentation of written requests for charge.

(d) Special interrogatories for jury.

(e) Time for filing any pretrial brief on triable issues.

(f) Assignment of trial date if not already selected.

____

UNITED STATES DISTRICT/MAGISTRATE JUDGE

Norfolk, Virginia

Date: (month, day, year)

ATTACHMENT E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

YYYYYYYYY,

Plaintiff,

v.

ACTION NO. 2:09cv

ZZZZZZZZZZZ,

Defendant.

SETTLEMENT CONFERENCE ORDER

This case has been referred to the undersigned for a settlement conference. In order to facilitate the just and expeditious resolution of this case, it is ORDERED as follows:

1. All parties and their lead counsel are required to appear at a settlement conference scheduled in the United States District Court, 600 Granby Street, Norfolk, Virginia 23510, at XX:XX a.m. on XXXXXX, 2012, for the purpose of conducting discussions, in good faith, towards a compromised resolution of this case. Counsel must notify parties attending the settlement conference that electronic equipment (cell phones, pagers, laptops, etc.) is not permitted in the courthouse without the express permission of the Court.

2. **EACH PARTY MUST BRING TO THE SETTLEMENT CONFERENCE A PERSON WITH FULL AND COMPLETE AUTHORITY TO SETTLE THE CASE.** Local Civil Rule 83.6.

3. No party representative or party shall appear at the conference via telephone without first obtaining Court approval.

4. The authority of persons in attendance shall include the ability to completely resolve all facets of the case without the need to seek or obtain additional authority from persons not in attendance. An insured party shall appear together with a representative of the insurer with authority to negotiate and conclude a settlement. An uninsured corporate party shall appear by a party representative with authority to negotiate and conclude a settlement. If there are issues involving medical or other liens, plaintiff shall attempt to have a representative for the lienholder present or available by telephone with authority to negotiate and conclude a settlement.

5. Prior to the settlement conference, the parties should make a good faith effort to negotiate and settle the case. Specific proposals and counter proposals beyond the initial offer and demand should be exchanged.

6. The substantive negotiations at the settlement conference are confidential and may not be used by the parties for any purpose other than settlement. Federal Rule of Evidence 408.

7. The parties must:

a. **Submit a brief memorandum of five pages or less directly to the chambers of the undersigned (do not file in the clerk's office) by noon on XXXXX, 2011.** Do not serve a copy of the letter on the opposing party unless you wish to disclose your settlement position. The memorandum can be faxed to (757) 222-7027.

b. The memorandum will be considered and maintained on a confidential basis and will be destroyed upon conclusion of the conference, regardless of outcome.

c. The memorandum should address the following:

I. An objective overview of the basic allegations and relevant facts;

II. A realistic assessment of the strengths and weaknesses of each party's position;

III. A summary of settlement discussions to date; and

IV. A statement of settlement expectations (to include proposed settlement offers).

V. Identify the lawyers and party representatives who will attend the conference.

8. If the case presents unusual circumstances, or if you have any questions, counsel are encouraged to set up a conference call with the undersigned.

9. At the settlement conference, counsel must be prepared to provide a brief oral presentation outlining the factual and legal highlights of the case to be followed by separate confidential caucuses.

10. The parties must be prepared to reduce to memorandum form at the conclusion of the conference the basic terms of any settlement agreement. In the alternative, the court may require counsel and the parties to state the terms of the settlement agreement on the record.

11. If ex parte or other confidential discussions occur during the settlement conference, the undersigned will not conduct any other hearing or make any further decisions in this case

after beginning the settlement conference. The undersigned will not disclose the information received during the settlement conference to anyone without the permission of the party providing the information. The discussions occurring in the settlement conference may not be used by or against any party. Federal Rule of Evidence 408.

12. If a party appears at the settlement conference without having complied with the requirements of this Order, the Court may continue or cancel the settlement conference, and may assess against the noncomplying party, attorney, or both, a monetary sanction which may include the fees and expenses incurred by the other parties in attending the settlement conference.

The Clerk shall mail a copy of this Order to all counsel of record.

____

Tommy E. Miller
UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia
,2011