

# United States District Court for the District of Nebraska

## Magistrate Judge Civil Case Management Practices

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## Communicating with the Assigned Magistrate Judge:

Case Conferencing Instructions: For each civil case, the assigned magistrate judge will file case conferencing instructions. Unless the court's order states otherwise, the parties shall use the filed instructions for all telephonic and telephonic/internet conferences held before the magistrate judge.

Requests for Conferences or Case Management Order Amendments: Requests for conferences with the magistrate judge assigned to a case, and unopposed modifications to the case management order deadlines, may be made by formal motion or by calling or emailing the judge's chambers.

## The Rule 26(f) Report:

Timing: An order will be entered which sets the deadline for filing the parties' Rule 26(f) Report. This order is typically not entered until all named defendants have been served and filed answers, and all Rule 12 motion practice is complete.

Exceptions apply. Contact the assigned magistrate judge's chambers by email or phone (with all counsel on the call/email or with their permission to call) if one or more of the parties believe the case should proceed immediately. A conference call will then be held (if all parties and the judge are available) or scheduled to discuss the circumstances.

**Note:** The Rule 26(f) Report provides the basis for entering the final progression order, including whether the case will be decided by the district judge, or by the assigned magistrate judge on consent. In creating the final progression order, the magistrate judges will rely on the parties' representations in the Report, and they may rely on or refer to those representations if any dispute arises thereafter.

Content: Section II of the Rule 26(f) Report, "Claims and Defenses," requests a brief explanation of what the case is about and the theories underlying the alleged claims and defenses. The magistrate judges envision a one- or two-paragraph summary of the lawsuit, similar to the preliminary statement provided to a jury at the outset of trial. The intent of this section is to provide a quick reference and case overview for the magistrate judges if they are asked to assist with discovery or case progression disputes.

At the civil bar's request, the court created a [Rule 26 Report Calculator](#) for generating proposed dates to complete the Rule 26(f) Report. This online tool was designed to offer insight on how cases are typically progressed in the District of Nebraska. It does not replace the need for counsel to decide what is reasonable and appropriate in a specific case.

## Scheduling Conferences:

To facilitate the efficient and expeditious progression of civil cases, the assigned magistrate judge may conduct initial planning conferences, interim status conferences as scheduled in the case progression order or by separate order, ad hoc conferences scheduled at the request of or more parties, and final resolution conferences.

Initial Planning Conferences: Initial Planning Conferences will be held if,

- 1) the parties request a conference in their Rule 26(f) Report; or
- 2) the parties cannot complete the report without the court's assistance; or
- 3) the magistrate judge believes a conference should be held.

Interim Status Conferences: At the parties' request in their Rule 26(f) Report or in the court's discretion, a conference call will be held to discuss the status of case progression following service of mandatory disclosures and prior to completion of written discovery or at such other time as may be appropriate. The case progression order may set this conference, with the date chosen on a case-by-case basis after the court reviews the parties' representations in their Rule 26(f) Report. For example, if the parties state they will be ready to discuss settlement after mandatory disclosures are served and reviewed, the case progression order may set a conference call shortly after the mandatory disclosure deadline. An interim status conference may also be set by separate order or email at any time during case progression

Ad Hoc Status Conferences: The magistrate judge assigned to the civil case is available for telephonic conferences at a party's sole request or the parties' mutual request. After the parties have thoroughly discussed any disputed issues to be addressed, they may contact the judge's chambers by telephone or email to set a conference for resolving specific scheduling or discovery issues, to discuss setting the case for mediation or a settlement conference, or to raise any other matters that may impact the prompt and efficient resolution of the lawsuit (e.g., use of court-to-court videoconferencing, pending and related actions in other forums, etc.).

**Note:** Before contacting chambers, the parties are encouraged to jointly review the magistrate judge's public calendar at <http://www.ned.uscourts.gov/court-calendar>. By doing so, they can propose available dates and times for the telephonic conference and simplify the scheduling process for the court.

Final Resolution Conference: During the time period between the discovery deadline and the summary judgment deadline, or earlier at the parties' request, a conference call will be held to discuss whether the case is likely to be resolved by settlement or by trial. If by trial, the trial date and pretrial conference setting will be discussed during the conference. In preparation for this conference, counsel must confer with their respective clients and any necessary witnesses regarding unavailable trial dates.

## Discovery Practices:

Voluminous Document Production: Documents produced in a digital format saved on a CD Rom, flash drive, cloud storage location, etc. must be saved on that electronic storage device or location in a searchable format and organized using, e.g., subfolders, bookmarks, or a linked table of contents to identify which documents are responsive to which discovery request or Rule 30(b)(6) deposition topic.

Privileged Information: The following outlines this court's general practices regarding resolution of disputes arising over requests for documents which may be protected from disclosure on the grounds of privilege or work product.

- 1) **Privilege Logs: Fed. R. Civ. P. 26(b)(5)**. To limit incurring potentially unnecessary expense and time in resolving discovery disputes over privilege and/or work product objections to discovery:
  - a. A producing party need not produce a privilege log at the time it raises privilege/work product objections to document production requests.
  - b. If a privilege log is not produced when the privilege/work product objections are raised in response to document production requests, the parties must confer in good faith within 30 days thereafter to discuss the privilege/work product objections and discuss whether and to what extent a privilege log is necessary, including but not limited to:
    - i) the time frame of any documents which must be listed (e.g., documents created pre- and post-litigation, a 5-year limit, etc);
    - ii) whether documents created by certain authors/recipients (e.g., litigation counsel, claims agents, in-house counsel, etc.), or certain categories of documents (e.g., insurance claim files, third-party statements obtained by accident investigators, etc), are presumptively confidential communications;
    - iii) whether the privilege log can list some or all of the withheld documents by category rather than individually; and
    - iv) whether entry of a protective order, claw-back agreement, or Rule 502(d) order will advance the goals outlined in Rule 1 of the Federal Rules of Civil Procedure by eliminating or curtailing the need to create a privilege log and file discovery motions.
- 2) **Privilege Disputes**. If the parties cannot resolve a dispute over privilege/work product objections without court intervention:
  - a. The objecting party shall promptly contact the court and set a conference call to discuss the parties' respective positions regarding the dispute.

- b. If the parties' dispute is not resolved after conferring with the court, the court will enter an order scheduling the following steps toward final resolution of the parties' dispute.
- i) **The producing party** shall for each document, disclose a description of the document withheld with as much specificity as is practicable without disclosing its contents, including:
    - (a) the general nature of the document;
    - (b) the identity and position of its author;
    - (c) the date it was written;
    - (d) the identity and position of its addressee;
    - (e) the identities and positions of all persons who were given or have received copies of it and the dates copies were received by them;
    - (f) the document's present location and the identity and position of its custodian; and
    - (g) the specific reason or reasons why it has been withheld from production or disclosure.
  - ii) **The non-producing party** may move to compel documents identified on the privilege log.
  - iii) **The producing party** may, in response to any motion to compel, seek a protective order to preserve the confidentiality of the documents identified in the privilege log. This motion for a protective order may also include a motion for *in camera* review.
- 3) ***In Camera* Review.** If a request for *in camera* review is granted, absent a prior order to the contrary, the documents subject to review by the judge must be filed by the producing party **under seal** using the court's CM/ECF system. The party filing documents for *in camera* review is encouraged to contact the Clerk's office with any questions on how to properly file documents under seal.
- 4) Nothing in this statement of general practices shall be construed as staying or extending the deadline for raising privilege or work product claims and objections in response to written discovery requests. Any privilege and/or work product objections which are not timely asserted will be deemed waived.

Electronically Stored Information (ESI): Parties requesting ESI discovery and parties responding to such requests are expected to cooperate in the development of search methodology and criteria to achieve proportionality in ESI discovery, including appropriate use of computer-assisted search methodology. To that end, if the parties anticipate ESI discovery will be requested:

- 1) Before filing their Rule 26(f) Report, the parties must discuss:
  - a. the anticipated topics of discovery;
  - b. the relevant time frame of this discovery;
  - c. the types of data which may be requested (e.g., email, data saved on servers or databases, text messages, voice mail, etc.);
  - d. the identity and number of likely custodians of this information;
  - e. the locations (e.g., workstations, laptops, servers, cloud storage, etc.) where the data may be stored;
  - f. whether reasonable measures have been implemented to preserve the data, including the form and method of notice of the duty to preserve, the persons (including any non-parties) who are responsible for such preservation, and whether preservation will require suspending or modifying any routine business processes or procedures, records management procedures and/or policies, or any procedures for the routine destruction or recycling of data storage media;
  - g. the anticipated cost and time required for locating, reviewing, and producing the requested information; and
  - h. the format (e.g., PDF, native files, etc.) and media (e.g., paper, CD ROM, flash drive, cloud location, etc.) for producing the requested data and information.
  
- 2) If a party believes the burden of complying with anticipated or served requests for producing ESI is disproportionate to the needs of the case, or if an ESI discovery dispute arises, the party from whom ESI has or will be requested must promptly schedule a conference with the magistrate judge assigned to the case. During that conference, the parties must be prepared to discuss:
  - a. The agreed-upon, or the parties' respective versions of, the criteria governing the scope of relevant discovery; and
  - b. As to the retrieval of additional ESI:
    - i. Have counsel engaged in an active, open, and cooperative dialogue regarding the search terms?
    - ii. Have the parties used a sample set of known relevant documents to create a listing of search terms? If not, why?
    - iii. What computer hardware has been searched so far and/or imaged in anticipation of searching ESI? If the scope of the imaging necessary is in dispute, the parties must be prepared to explain their respective parties' positions and the underlying reasons for those positions.
    - iv. As to the selection of keywords, explain how and why certain keywords should be used or discarded, including:

- (a) whether the actual document custodians have been contacted to assist in understanding the relevant keywords, acronyms, and abbreviations that may be used in the communications;
  - (b) who has provided input in selecting the keywords; and
  - (c) as to any review currently in progress, who ultimately decided which keywords were used.
- v. What form of document retrieval method is or should be used (e.g. a simple keyword search; a more sophisticated search that uses Boolean proximity codes; or predictive coding software), and compared to the amount at issue in this case, what is the cost and benefit of each method, and who should bear that cost?
- vi. Whether and how the people who created or are advocating selection criteria and a search methodology for this case are qualified to design an effective and reliable search and electronic information retrieval method.
- vii. As to a responding party's current efforts to retrieve and review electronic discovery:
  - (a) Have the results of the search been analyzed to assess the quality of the search means deployed?
  - (b) Is the search method reliable, accurate, and precise?
  - (c) How do you know?
  - (d) Can the methodology be improved and at what cost in terms of both time and money?
- viii. Have the parties discussed ranking the electronic discovery retrieved, and have they decided on a cutoff, after which the retrieved documents are likely irrelevant, duplicative, or so marginally relevant that the cost of the defendant's relevancy and privilege review is no longer justified?
- ix. Is professional assistance being used to develop retrieval and search parameters and methods and, if not, should the court appoint a special master with the cost assessed against the parties?
- x. Will completing certain discovery (by any means, including deposition) help the parties further refine future e-discovery efforts?
- xi. What options have the parties explored for locating and disclosing relevant discovery through means that are less expensive than reviewing ESI?

Discovery Disputes: Disputes over discovery should not derail the court's final scheduling order. To that end, a discovery motion (to compel, quash, or for a disputed protective order), including any motion regarding the scope and production of ESI, cannot be filed without first: a) thoroughly

discussing the issue with opposing counsel in good faith (NECivR 7.1 (i)); and then b) as stated in the case scheduling order, contacting the magistrate judge assigned to the case to discuss the discovery dispute. The failure to contact the court prior to filing a discovery motion may result in an order striking the motion.

If a conference with the magistrate judge is necessary, the judge's chambers will ask for an initial brief description of the issue(s) to be addressed. Depending on the type and extent of issues raised, the court may require the parties to email to the magistrate judge's chambers

- 1) a succinct summary which outlines the discovery requests in dispute, and/or
- 2) a [jointly completed table](#) which succinctly states each party's initial and compromise position as to each discovery request in dispute.

The emailed summary or table will either be discussed during an internet and/or telephonic conference, or at a hearing in court. Court hearings will be held on the record; internet and telephonic conferences may be held on the record at the parties' request or the court's sua sponte determination. The recording will be uploaded to CM/ECF if discovery agreements are reached or rulings are made. This recording provides the basis for appealing any rulings made by the magistrate judge during the conference.

If the discovery issues are not resolved during the pre-motion conference, deadlines for filing a written motion and an accelerated briefing schedule may be set at the conclusion of the conference. The court will then rule as soon as possible.

**Note:** In most cases, if a formal discovery motion is necessary because the moving party is demanding a full response to the discovery request as drafted, the magistrate judge will enter a ruling based on the language of that discovery request; that is, the court's formal motion ruling will likely not tailor or re-draft the moving party's discovery request to comply with the federal rules and the mandated proportionality under those rules. Rather, the court will overrule or sustain the objections to the discovery request as written and presented to the magistrate judge.

**Alternative Dispute Resolution:** The court favors permitting parties to resolve their disputes through informal settlement discussions, mediation, or settlement conferences. The magistrate judges will routinely remind counsel to explore these avenues during status or discovery conferences.

Mediation: Depending on the circumstances presented and at the parties' request, case progression deadlines may be stayed pending mediation. An order referring a case to mediation or setting a settlement conference will terminate pending motions. If the case is not resolved, those terminated motions may be reinstated by contacting the assigned magistrate judge and requesting reinstatement along with proposing new deadlines for any remaining briefing.



Settlement conferences: Settlement conferences can be set before a magistrate judge.

- If a district judge will preside over the trial, the magistrate judge assigned to the case will preside over the settlement conference.
- If the parties have consented to a jury trial before a magistrate judge, that same magistrate judge can preside over a settlement conference in the case, but only with the advance written agreement of all parties.
- If the parties have consented to a bench trial before a magistrate judge, or to a jury trial before that judge and the parties do not consent to having that judge also preside over a settlement conference, a settlement conference can be scheduled before another magistrate judge for the District of Nebraska.

In each of the foregoing circumstances, requesting and scheduling a settlement conference begins by either making the request during a conference call with the magistrate judge assigned to the case, or by emailing or phoning that judge's chambers.

Absent extenuating circumstances (e.g., an after-hours settlement), any settlement reached will be placed on the court's record at the close of the conference. The recording will be uploaded to CM/ECF and at the parties' request, can be filed under seal or restricted access.

**Final Pretrial Conferences:** The lead counsel for represented parties must attend the final pretrial conference. Prior to the pretrial conference, counsel shall fully comply with NECivR 16.2, and they must prepare and submit to the court the proposed Order on Final Pretrial Conference and Exhibit List(s), templates of which can found on the Court's website at <https://www.ned.uscourts.gov/forms>.

The parties' proposed Order on Final Pretrial Conference and Exhibit List must be emailed to the magistrate judge's chambers in Word format on or before the date and time set by the court's order. Pretrial conferences will be held either in person in the magistrate judge's chambers or by internet and/or telephonic conferencing using the case conferencing information assigned to the case.

By the time of the pretrial conference, the parties must be fully prepared for trial so that trial may begin immediately thereafter. If not previously scheduled, the trial date will be set at the pretrial conference. The pretrial conference will include a discussion of settlement, and based on their case investigation, discovery, and communications with clients and insurers (if any), counsel shall be prepared to discuss fully the subject of settlement, including realistic expectations about liability, obstacles to agreement, offers made, and offers which can be made at the conference. Counsel must be prepared to make recommendations or discuss whether further negotiations and/or alternative dispute resolution may resolve the case.

**Consent to Proceed before a Magistrate Judge:** With the consent of all parties, the magistrate judge may preside over the final trial, rule on all motions filed in the case, including motions to dismiss or for summary judgment, and enter the final judgment. The parties are reminded that in most circumstances, district judges must try criminal cases before civil cases, and Nebraska's criminal caseload per district judge ranks within the top 10 nationwide. By consenting to final resolution before a magistrate judge, the parties will receive a special setting and a certain trial date.

Motions for Summary Judgment: All judges enforce the local rules regarding summary judgment practice. See NECivR 7.1 and 56.1. If a lawyer fails to comply with local rules, every judge will, at a minimum, call that failure to the lawyer's attention in a written order and urge the lawyer to comply in the future. The judge may also impose harsher sanctions.

In cases in which the parties consent to trial by a magistrate judge, the presiding magistrate judge will attempt to resolve summary judgment motions within 60 days of the ripe date of the motion.

Trial Practices:

**Exhibits:**

- Exhibits must be pre-marked. Once an exhibit has been received, it must be given to the courtroom deputy. Exhibits offered and not received, are to be delivered to the courtroom deputy at the close of trial.
- Before the exhibits are delivered to the jury, counsel shall confer with each other in the presence of the courtroom deputy about which exhibits should go to the jury room.
- The parties shall provide a copy of each exhibit to the presiding magistrate judge. Paper copies are acceptable, but a properly bookmarked electronic copy (disc or flash drive) is preferred.
- Counsel are encouraged to use electronic means (computer or ELMO presentation) when displaying exhibits at trial.

**Depositions:** All depositions to be used at trial (except those which will be used only for impeachment) must be provided to the judge before the trial begins. When possible, deposition objections will be ruled on prior to trial so any videos can be edited accordingly. But if that is not possible, rulings on objections will be made as the deposition is being read or played.

**Questioning:** Re-cross examination is generally not permitted. Cross-examination should be limited to the scope of the direct examination, with redirect examination limited to the scope of the cross examination.

**Jury conduct:** During the trial, jurors are permitted to take notes, but not ask questions.