



Motions Practice and Brief Writing for Attorneys Appearing in the Western District of Pennsylvania¹

**Prepared by the Programs and Methodology Subcommittee
of the Strategic Planning Committee
for the United States District Court
for the Western District of Pennsylvania**

A. Actions Required Before Filing a Motion

1. ***Pre-Motion Conciliation.*** Before proceeding to discovery motions practice, lawyers are required under Federal Rule 37(a)(1) to certify “that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” *Id.* In addition, many Judges in this District prefer or require that discovery disputes first be presented to them orally (most often by telephone) to determine whether the dispute(s) can be resolved without resort to motions practice.

¹ This summary addresses common issues and deficiencies that arise within the context of motions practice in this District. The contents herein should be read as consistent with the Local Rules of the United States District Court for the Western District of Pennsylvania, effective September 1, 2009 (“the Local Rules”) and, to the extent there are any perceived discrepancies, the Local Rules control. Also controlling are the specific procedures of the individual District Court/Magistrate Judges, found on the District’s external website. *See* discussions *infra* in text.

2. *Review of Applicable Rules of Procedure.* Before drafting any motion, attorneys should consult the Federal Rules of Civil Procedure, the Local Rules, and the standing practices and procedures of the presiding or referred Judge (available at <http://www.pawd.uscourts.gov/Pages/courtpractice.htm>).

3. *Review of Substantive Law and Identification of Supportive Evidence/Pleadings.* Too often, attorneys fail to identify or apply existing legal standards regarding procedural and evidentiary issues. Counsel should review all potentially applicable rules, statutes, and court decisions to determine whether a body of law exists that addresses the substantive issue(s) presented. In addition, counsel must be prepared to support any statements of fact with appropriate evidentiary materials (*e.g.*, affidavits, deposition testimony, documentary evidence). Factual averments unaccompanied by supportive evidence (or, as appropriate, allegations in the pleadings) will be disregarded. Under Rule 12(b)(6), moreover, additional facts cannot be pled in a brief; leave to amend must be granted.

B. Motions and Briefs

1. *No Duplication of Argument in Motions and Briefs.* If a motion is accompanied by a brief, counsel should state the substance of their legal arguments in the brief and not the motion. The motion should not make arguments or requests that are not contained in the brief. In essence, the Court should have confidence that a party's legal brief contains all the necessary information and that an independent review of the motion is unnecessary.

2. *Paragraph-By-Paragraph "Responses" to Motions Are Superfluous.* In opposing a motion, a party should not file a "response" admitting or denying each paragraph of the motion. Rather, arguments (and citations to evidentiary support) should be presented in a single document entitled a "brief" or "response," "in opposition" (if applicable).²

² Within the context of summary judgment, the above observations do not apply to parties' Responses to Concise Statement of Material Fact, which must address factual contentions on a paragraph-by-paragraph basis. *See* discussion *infra* regarding summary judgment motions.

3. **Citation to Evidentiary Materials.** When citing evidentiary or other record materials, counsel should provide as much information as is necessary to, (a) identify the docket filing/ exhibit where the materials can be located, and (b) pinpoint where in the exhibit the supportive information appears.

- a. *Deposition testimony* should be identified by page number (and line(s), if requested by the presiding/referred Judge). Counsel also should be sensitive of the Court's need to review the entire colloquy, *i.e.*, the pages preceding and following the supportive testimony. That being said, counsel should not attach the entire deposition transcript, but only excerpts, absent extraordinary circumstances.
- b. For *documentary evidence*, as well as deposition testimony, the most efficient method for identifying the location of supportive materials is by CM/ECF docket number, the entry's corresponding attachment or exhibit number/letter, and page number(s). Although there are no hard and fast rules regarding CM/ECF exhibits/attachments (aside from those established by the Clerk, *see generally* <http://www.pawd.uscourts.gov/Pages/cmecf.htm>), counsel should make best efforts to label and identify their materials so the Court can easily find them.

4. **Citation to Legal Authority.** Although judges have differing views regarding Blue Book compliance, at a minimum counsel must provide case citation(s) in a format allowing access through one of the computer research providers utilized by the Court, namely Lexis/Nexis, Loislaw, and Westlaw. If a case is not included in published case Reporters (*e.g.*, F.3d, F. Supp.2d, A.2d), appropriate online citations should be provided (*e.g.*, 1997 WL 805165, 1998 U.S. Dist. Lexis 17389). If a court decision is not available online, a copy should be appended to the party's brief. **Pinpoint citations to supportive passages (*i.e.*, Reporter or "star" page numbers) are mandatory.**

5. Content of Briefs.

a. *Generally.* Brevity and conciseness are highly valued. Unless the case involves novel issues or rarely implicated legal doctrines or statutes, counsel may assume the Judge has a working knowledge of the law and that they are writing to an educated audience. Only those facts relevant to the parties' legal arguments (*i.e.*, those arising in counsel's argument section) should be recited; absent unusual circumstances, long recitations of "background" facts are of limited value.

b. *"Boilerplate" Standards of Review.* The Court is well versed in the standards applicable under Federal Rules 12 and 56. "Boilerplate" standards sections are rarely useful (or considered), and they serve only to consume a party's allotted page limit.

c. *Tone.* All filings should adhere to the highest standards of civility and professionalism. *Ad hominem* attacks on opposing counsel are inappropriate, as are pleas for sympathy and inflammatory or gratuitous factual references unrelated to the merits.

6. Proposed Orders. Local Rule 7.D requires that all motions be accompanied by a proposed order. *See id.* Although proposed orders are often less critical (although still required) for dispositive motions, they can be very helpful where the party requests specific, detailed relief. Counsel should take this opportunity to carefully examine the full extent of the relief requested, and make the proposed order as detailed and "signature-ready" as possible.

7. Motions for Summary Judgment.

a. *Concise Statements of Fact and Responses.* Local Rule 56.B.1 requires the movant to file a separate "Concise Statement of Material Facts" setting forth, in paragraph form, "the facts essential for the court to decide the motion . . . which the moving party contends are undisputed and material," and providing

evidentiary support. *See id.* Local Rule 56.C.1 requires the non-movant to file a corresponding “Responsive Concise Statement,” answering the movant’s factual statements, explaining the basis for denial(s), and identifying any additional material facts. *Id.* **Importantly, counsel’s failure to respond to an opposing party’s Statements of Fact will result in those facts being deemed admitted.** *See* Local Rule 56.E.³

- b. *Federal Rule 56(f) Requests.* If counsel believes that he/she currently lacks sufficient evidence to oppose summary judgment, Rule 56(f) allows the Court to enter a continuance. *See id.* **In order to be eligible for this relief, however, counsel must supply an affidavit showing cause (*see id.*) and the request should appear conspicuously on the record.** *See generally* Simas v. First Citizens’ Fed. Credit Union, 170 F.3d 37, 46 n.4 (1st Cir. 1999) (Rule 56(f) request is typically presented by motion, it must “be made within a reasonable time after the filing of the summary judgment motion,” and it shall “place the district court on notice” of relief requested) (citations and internal quotations omitted).

8. *Motions in Limine and at Trial.* Under Local Rule 16.1.C.4, motions *in limine* must be accompanied by a Certificate stating that opposing counsel have conferred and made a reasonable effort to reach agreement on the issue raised by the motion. *See id.* In addition, most Judges have standing procedures regarding motions *in limine*. *See generally* <http://www.pawd.uscourts.gov/Pages/courtpractice.htm>. If necessary, counsel should seek clarification from the Court regarding deadlines for motions *in limine* and responses, as issues raised on the eve of trial will be met with disapproval and may be disregarded as untimely.

³ Although courts generally are reluctant to resolve motions based on technical deficiencies, the clear mandates of Local Rule 56 have led Judges in this District to invoke the “deemed admitted” provisions in 56.E. Thus, an attorney’s failure to comply with Local Rule 56 is done at his or her own peril.

9. *Requests for Relief Through Ex Parte Communications Are Prohibited.* Aside from purely administrative matters, scheduling requests, and very brief deadline extensions, counsel should not contact the Judge’s Chambers *ex parte* seeking substantive relief. Fairness requires that opposing counsel be made privy to any statements or characterizations of the requesting party’s counsel, and they are entitled to be heard in response.

10. *Documents May Not Be Faxed to Judges Without Leave of Court.* Under Local Rule 5.2.C, parties are prohibited from faxing any type of document to a Judge’s Chambers without prior leave of court. *See id.* Documents may not be faxed to the Clerk’s Office absent a “[t]echnical failure” of CM/ECF, as defined in Local Rule 5.2.C.

C. Motions/Responses Checklist

_____ Confer with opposing counsel to determine whether non-dispositive motions can be amicably resolved without court intervention.

_____ Call the Judge's chambers to determine whether he/she will entertain discussions in an attempt to resolve the dispute.

_____ If a motion is required, consult the Federal Rules of Civil Procedure, the Local Rules, and the Judge's standing practices and procedures.

_____ Determine whether the Judge has established page limitations regarding the brief and, if so, be prepared to comply with them or seek leave to exceed the page limit for good cause.

_____ Determine the operative facts supporting the motion/response and secure appropriate evidentiary support; if additional pleadings are required to survive Rule 12(b)(6), seek leave to amend.

_____ In drafting the brief, provide detailed citations to both the record and the law, with the goal of providing the Judge easy access to the referenced materials.

[For Summary Judgment Motions Only]

_____ Timely prepare concise statements of material fact and/or responses thereto in conformity with Local Rule 56.

_____ If, for good reason, you lack sufficient evidence to oppose summary judgment, clearly and conspicuously request relief under Federal Rule 56(f), and supply an affidavit showing cause.