

# PLEADINGS & MOTIONS: CIVIL PRACTICE TIPS & EXAMPLES

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## **I. PENNSYLVANIA CIVIL PRACTICE AND PROCEDURE UPDATE**

Everything in our daily life has been affected by the Covid-19 pandemic, including our court systems. Before discussing our suggested tips and procedures for better pleadings and motions, it is beneficial to review some of the key changes courts have undergone in light of the pandemic.

### **A. Pennsylvania Supreme Court Judicial Emergency**

State courts across the country had to quickly adapt to the growing crisis brought on by Covid-19, and Pennsylvania was no different. Beginning in March, the Pennsylvania Supreme Court issued a series of emergency judicial orders that, *inter alia*, extended filing deadlines and postponed hearings and trials, including the Pennsylvania Supreme Court's argument session, which was originally set to take place in Pittsburgh from April 21 through April 23. (The first of these Orders is attached as **Appendix A**.)

The emergency orders also empowered president judges in each of the county courts across Pennsylvania to take measures necessary to keep the public safe, while continuing the business of courts to the extent possible, through the use of advanced communication technology. The statewide judicial emergency lasted from March 16 to June 1. At the conclusion of the statewide judicial emergency, the Pennsylvania Supreme Court advised the individual county courts that those courts, in their judgment, could exercise county-wide emergency powers by filing a self-executing declaration of emergency with the Pennsylvania Supreme Court.

### **B. Allegheny County Courts (Pittsburgh)**

Many of the Pennsylvania county court systems have implemented targeted changes in response to the pandemic, many of which remain in effect through the end of the year, and possibly well into next year. In Allegheny County, Pennsylvania, the County where Pittsburgh is located, some of the key changes implemented as a result of Covid-19 are as follows:

#### **1. Court Proceeding Logistics**

- a. Face masks and social distancing required;
- b. Only "persons with essential court business" (parties, attorneys, witnesses, etc.) guaranteed admission into courts and courtrooms;
- c. Proceedings administered remotely, through Advanced Communication Technology ("ACT"), "whenever appropriate and feasible";
- d. Taking witness testimony through ACT "strongly encouraged";
- e. Deadlines set to expire before June 1, 2020 were uniformly extended;

#### **2. Civil Division-specific changes**

- a. Non-jury trials resumed in June 2020;<sup>1</sup>
- b. Jury trials resumed authorized to resume in September 2020;<sup>2</sup>
- c. A wide range of matters are required or encouraged to be conducted remotely, including

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<sup>1</sup> Although non-jury trials have been formally resumed, almost all of the trials have been conducted virtually.

<sup>2</sup> On September 15, the President Judge of the Fifth Judicial District of Pennsylvania (Allegheny County) authorized jury selection for criminal and civil trials to resume, beginning on October 19. As part of this Order, the President Judge stated that jury selection would take place at the David L. Lawrence Convention Center in Pittsburgh, rather than the courthouse, and that civil jury trials would be held in the Convention Center, as well. Criminal jury trials will be divided between three locations, to allow for sufficient social distancing. One important feature of this order, is the civil trials will proceed at the Convention Center, only upon the agreement of the parties.

calendar control motions, discovery motions, and oral arguments on Preliminary Objections and Motions for Summary Judgment;

d. Judges “invested with substantial discretion with the enforcement of time deadlines.”

See **Appendix B** for the most recent Allegheny County Judicial Emergency Orders, effective through the end of the year.

Given the variance among Pennsylvania counties regarding Covid-19 restrictions and procedures, if you have a matter pending in Pennsylvania State Court, it is important to know and understand the rules and procedures governing your matter so that you can plan for all contingencies and develop a litigation strategy that comports with those restrictions.

## **II. PLEADINGS: WRITING ROCK-SOLID COMPLAINTS AND RESPONSES**

### **A. Comply with the Relevant Federal, State, and Local Rules.**

In the fast-paced, often hectic world of litigation, it can be easy to overlook the nuances of different court rules. One of the most important things we can do when preparing a complaint and the related pleadings is to *follow the rules*. A good place to start when preparing a complaint is to familiarize yourself with the relevant rules of procedure, including any relevant local and/or judge-specific rules, especially when working in an unfamiliar jurisdiction. Becoming familiar with the local rules will help to ensure that you do not miss a key procedural requirement that may not be typical “standard practice.”

For example, the Pennsylvania Rules of Civil Procedure specifically enumerate a “Notice to Plead” requirement. Lawyers who do not typically practice in Pennsylvania are likely to be unfamiliar with this requirement. In accordance with Pennsylvania Rule of Civil Procedure 1361, a Plaintiff filing a complaint, or Defendant asserting a New Matter (affirmative defenses) or Counterclaim, must include a Notice to Plead, which provides the opposing party with notice that they have twenty days to file a written response to the given pleading. Failure to include a Notice to Plead with a filed pleading prevents the opposing party from being required to respond to that pleading. *See* Pa. R.C.P. No. 1026 (“ . . . no pleading need be filed unless the preceding pleading . . . is endorsed with a notice to plead”). The form of such a Notice to Plead is as follows:

To  
[OPPOSING PARTY]  
:  
You are hereby notified to file a written response to the enclosed [name of pleading] within twenty (20) days from service hereof or a judgment may be entered against you.  
  
[ATTORNEY SIGNATURE]

Absent a detailed review of the state and local rules, an out-of-state practitioner may neglect to include a notice to plead, which could severely delay the litigation and/or cause embarrassment with a client.

### **B. Research Relevant Issues *Before* Writing.**

Before you begin preparing any complaint or response to a complaint, it is important to develop a solid understanding of the law underlying your case by thoroughly researching the relevant issues. It can be easy to convince yourself that the relevant law is simple, or that you have a complete understanding regarding the law at issue, especially if you have some experience with the area of

law at issue. However, even if you believe that you have a firm grasp regarding the applicable law, it is still important to confirm that understanding with the requisite research. You may find that there are rules, exceptions, or elements of a given claim that you did not consider or that were changed through recent judicial decisions.

Researching the relevant issues in advance eliminates the need to completely rethink or rewrite portions of your pleading, resulting in more efficient practice, and potentially saving your client additional expense. Researching before you begin to write will also give you a firm structure from which to develop your arguments. Take, for example, the elements of a claim like “tortious interference with contractual relations,” which are:

- (1) the existence of a contractual relationship between the complainant and a third party;
- (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship;
- (3) the absence of the privilege or justification on the part of the defendant; and
- (4) the occasioning of actual damage as a result of the defendant's conduct.<sup>3</sup>

Knowing and understanding these elements prior to drafting a pleading, can help you more efficiently and effectively organize your pleading.

### **C. Allege Subject Matter Jurisdiction, Personal Jurisdiction, and Venue.**

When preparing a complaint, it is vital to establish in that complaint that the court where the matter was initiated has subject matter jurisdiction and personal jurisdiction over the parties, and demonstrates that the venue is proper. For your complaint to be effective, it is imperative that the complaint alleges that the court has the legal authority to hear the claims presented and enforce any judgments.. Failure to establish subject matter jurisdiction, personal jurisdiction, and venue can lead to your case’s dismissal.

The following is an example of a proper statement of subject matter jurisdiction, personal jurisdiction, and venue, taken from a recently filed case in Pennsylvania state court.

#### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over Defendant A because Defendant A owns the Hotel located in Pittsburgh, Pennsylvania. Moreover, Defendant A entered into and breached the hotel management with Plaintiff regarding hotel management services for the Hotel in Pittsburgh, Pennsylvania.
10. This Court has jurisdiction over Defendant B because Defendant B engaged in systematic and continuous contacts with Pennsylvania as a result of, *inter alia*, Defendant B’s interference with the agreement to manage the Hotel in Pittsburgh, Pennsylvania. Moreover, on information and belief, Defendant B is now managing the Hotel in Pittsburgh, Pennsylvania.
11. This Court has jurisdiction over Defendant C because Defendant C engaged in systematic and continuous contacts with Pennsylvania as a result of, *inter alia*, Defendant C’ interference with the agreement to manage the Hotel in Pittsburgh Pennsylvania. Moreover, on information and belief, on numerous occasions prior to the occurrences giving rise to this action, Defendant C had contact with Defendant A in Pittsburgh, Pennsylvania regarding the Hotel.
12. Venue is appropriate in the Court of Common Pleas of Allegheny County because the transactions and occurrences giving rise to Plaintiff’s causes of action took place in Pittsburgh, Pennsylvania.

This full Complaint will be referred to throughout these materials, and is attached as **Appendix C**.

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<sup>3</sup> See **Appendix C**, at 8-9, for an example of how these elements can be used to frame the facts and argument in a pleading.

#### **D. Prepare Concise and Plain Statement of the Facts.**

Whether you are preparing a complaint or an answer, a concise, plain, and favorable summary of the case and statement of the facts can go a long way in helping to distill the dispute at issue, and to help convince the court that your factual arguments favor your legal position. It is important to keep the facts as simple and straightforward as possible, highlighting the facts that are key and advantageous to your case. When stating the facts, avoid unnecessary, legalistic language and passive voice, as both can make your writing confusing. The easier you can make it for the court to follow your version of the facts, the more likely the court will understand your arguments.

The following is a factual introduction from a recent complaint filed in Pennsylvania state court.<sup>4</sup> The full complaint is attached as **Appendix C**. Notice how the language is straightforward, and simply states the issue at bar. Even before the Court gets to the legal claims, it is on notice of the gist of the dispute and Plaintiff's position.

1. Plaintiff brings this action as result of Defendant A's unsubstantiated breach of a hotel management agreement regarding the management of the Hotel in Pittsburgh's East Liberty neighborhood (the "Hotel").
2. For many years, pursuant to a management agreement between Plaintiff and Defendant A, Plaintiff efficiently managed the Hotel in East Liberty. However, without justification and following the urging and unjustified interference of Defendant C and Defendant B, Defendant A improperly attempted to terminate, and in fact breached, the hotel management agreement with Plaintiff.
3. Defendant A's breach of the hotel management agreement and Defendant C and Defendant B's inference with that agreement have prohibited Plaintiff from performing under, and completing the term of, the management agreement, damaging Plaintiff in numerous respects.
4. Despite Plaintiff's attempts to amicably resolve the matter, Defendants have failed to pay Plaintiff for past management fees and past expenses incurred by Plaintiff in the management of the hotel. Plaintiff has been further damaged by, *inter alia*, losing the income stream from future management fees, and as a result of goodwill lost stemming from the unjustified breach of the hotel management agreement, leaving Plaintiff with no choice but to bring this action.

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<sup>4</sup> For the purposes of these examples, the names of the parties to the Complaint have been changed and certain portions of the Complaint have been reworded. For the full Complaint, see **Appendix C**.

**E. Prepare Separate Counts for Each Legal Claim.**

Pennsylvania Rule of Civil Procedure 1020 requires that the complaint must contain separate counts for each distinct legal claim alleged. Thus, if you are bringing claims for breach of contract, tortious interference, misappropriation of trade secrets, and civil conspiracy, you must separate each of those claims into its own, separately organized “count.” Likewise, if you are defending against multiple claims, your answer to the plaintiff’s complaint should be organized based into counts based on the claims brought against you. For example:

COUNT I  
BREACH OF CONTRACT  
*Plaintiff v. Defendant A*

34. Plaintiff hereby incorporates by reference paragraphs 1–33 of this Complaint as thought set forth fully herein.

35. Defendant A and Plaintiff duly entered into and executed the HMA, and Defendant A has no justification for breaching the HMA.

36. At all times relevant to this lawsuit, Plaintiff fully complied with the terms of, and fully performed under, the HMA.

37. By attempting to terminate the HMA and obstructing Plaintiff’s performance under the HMA, Defendant A breached the HMA.

38. As set forth in this Complaint, Plaintiff has been damaged by Defendant A’s breaches of the HMA.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in its favor in an amount in excess of the jurisdictional limits for arbitration, plus interests, costs, and any other such relief as this Court deems just and proper.<sup>5</sup>

**F. Pennsylvania Requires Facts to be Specifically Plead.**

In Pennsylvania, the material facts of every claim or defense must be “stated in a concise and summary form.” Pa. R.C.P. No. 1019(a) (“the material facts on which a cause of action or defense is based shall be stated in a concise and summary form.”) This “fact pleading” requirement is more strict than the “notice pleading” requirements of many other jurisdictions, including federal courts. Unlike Pennsylvania, most other courts allow plaintiffs to satisfy their pleading obligations by merely notifying the opposing party of the general issues at stake. *See* Fed. R. Civ. P. 8.

Following this higher pleading standard, if a complaint filed in Pennsylvania state court fails to allege sufficient facts to describe the nature and extent of the asserted claims, the Pennsylvania court has latitude to dismiss the case. *See Hill v. Kilgallen*, 108 A.3d 934 (Pa. Commw. Ct. 2014) (dismissing a plaintiff’s claim for failure to allege specific facts).

Given Pennsylvania’s strict fact pleading requirements, when filing a complaint in Pennsylvania state court, it is important to support every claim alleged in the complaint with specific facts that support each of the claim’s elements. For an example of the level of specificity required, see the statement of facts in the sample Complaint in **Appendix C**, at 4-7.

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<sup>5</sup> Remember to include a “WHEREFORE” clause at the end of each count, identifying and requesting the specific relief you seek.

### **III. EFFECTIVE PRETRIAL MOTIONS PRACTICE**

In Pennsylvania state court, there are three commonly filed pre-trial motions (excluding motions in limine): (1) Preliminary Objections (motion to dismiss) (Pa. R.C.P. No. 1028); (2) Motions for Judgment on the Pleadings (Pa. R.C.P. No. 1034); and (3) Summary Judgment Motions (Pa. R.C.P. No. 1035.1). Preliminary Objections can be filed in response to the complaint; Motions for Judgment on the Pleadings can be filed after the complaint and answer have been filed and the pleadings closed; and Summary Judgment Motions are typically filed at, or near, the close of discovery. *Id.*

#### **A. Preliminary Objections (“Motion to Dismiss”)**

Often times Defendants in Pennsylvania state court litigation respond to a complaint by filing “Preliminary Objections.” *See* Pa. R.C.P. No. 1028. Preliminary Objections are the Pennsylvania equivalent of a Motion to Dismiss. Like a Motion to Dismiss, Preliminary Objections serve as a way to request that the court dismiss a case based on the opposing party’s failure to comply with procedure, or where the complaint fails to state a viable claim on its face. Pa. R.C.P. No. 1028(a)(1-8).

In accordance with Rule 1028, Preliminary Objects can be made on the following grounds:

- (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
- (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
- (3) insufficient specificity in a pleading;
- (4) legal insufficiency of a pleading (demurrer);
- (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;
- (6) pendency of a prior action or agreement for alternative dispute resolution;
- (7) failure to exercise or exhaust a statutory remedy; and
- (8) full, complete and adequate non-statutory remedy at law.

A party asserting Preliminary Objections must make all of its objections at the same time and in the same set of Preliminary Objections. *See* Pa. R.C.P. No. 1028(b). For many—though not all—of these objections, failure to raise the objection at the Preliminary Objections stage can result in waiver, meaning you will not be able to raise the objection later in the case if that objection is not raised as part of the Preliminary Objections. *See* Pa. R.C.P. No. 1032. Under Rule 1032, a party does not waive the following objections, even if it fails to raise them in Preliminary Objections: (1) failure to state a claim upon which relief can be granted, (2) failure to join an indispensable party, (3) failure to state a legal defense to a claim, (4) failure to exercise a statutory remedy, or (5) lack of subject matter jurisdiction.

Most Preliminary Objections can be submitted to the court based solely on the allegations set forth in the complaint. However, some preliminary objections, like those raising issues of fact, can be evaluated after the parties conduct limited discovery. *See* Pa. R.C.P. No. 1028(c)(2). Preliminary Objections raising issues of fact typically involve a defendant’s challenges to jurisdiction and/or venue. *See Sunlion Energy Sys. V. Jones Family Farm*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 7233 (Pa. Ct. Com. Pl. Lancaster 2017); *Abbott v. Am. Lafrance, LLC*, 2016 Phila. Ct. Com. Pl. LEXIS 400 (Ct. Com. Pl. Phila. 2016).

Following Rule 1028(c)(2), where Preliminary Objections raising issues of fact are filed, the court will permit limited discovery between the parties to aid in resolving the dispute.<sup>6</sup> One example of a fact-based Preliminary Objection is an objection

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<sup>6</sup> The scope and procedure for resolving Preliminary Objections raising issue of fact varies county by county. Accordingly, it is important to review and

to the court's personal jurisdiction over one of the parties. When such an objection is raised, the court will permit the objecting party to discover evidence related to the opposing party's domicile and contacts with the Commonwealth of Pennsylvania. *See Com. V. TAP Pharm. Prods.*, 885 A.2d 1127, 1150 (Pa. Commw. Ct. 2005) (deferring consideration of defendant's Preliminary Objections to allow plaintiff an opportunity to conduct discovery on the issue of personal jurisdiction).

Procedures underlying the adjudication of Preliminary Objections vary from county to county in Pennsylvania. In Allegheny County, for instance, under Local Rule 1028(c), Preliminary Objections are heard and ruled on by the designated Motions Judge. Allegheny County Civil Rule 1028(c) (stating that Preliminary Objections are to be filed with the Motions Clerk and heard by the Motions Judge). It is imperative to understand the county rules governing the adjudication of the Preliminary Objections and the proper judge prior to filing the Preliminary Objections. Attached as **Appendix D** is an example of a set of Preliminary Objections.

### **B. Judgment on the Pleadings**

Once the pleadings are closed, the Pennsylvania Rules of Civil Procedure permit parties to file a Motion for Judgment on the Pleadings. *See* Pa. R.C.P. No. 1034. The standards and procedure for Motions for Judgment on the Pleadings in Pennsylvania are the same as those in federal court. Under Rule 1034, after the close of pleadings, any party may move for judgment on the pleadings and attempt to establish that they are entitled to judgment as a matter of law, where there is no dispute of material fact, and all inferences are drawn in favor of the non-moving party. *Id.* Thus, a persuasive Motion for Judgment on the Pleadings must demonstrate that, even if all of the opposing party's allegations were true, the opposing party's claim or defense must fail, and the moving party is entitled to the relief sought. A party may make this Motion "within such time as not to unreasonably delay the trial." *Id.*

Pennsylvania Rule 239.6 requires that every court promulgate a local version of Rule 1034, describing the procedure for Motions for Judgment on the Pleadings. *See* Pa. R.C.P. No. 239.6. In Allegheny County, for instance, Local Rule 1034(a) requires parties to file the motion with the Calendar Control Office, and describes the manner in which the court schedules arguments on the Motions. *See* Allegheny County Local Rule 1034(a). Because these rules differ from county to county, it is imperative that attorneys practicing in Pennsylvania know and understand the local rules of court as they pertain to Motions for Judgment on the Pleadings.

### **C. Summary Judgment**

Pennsylvania Rules of Civil Procedure 1035.1 through 1035.5 permit, any party to move for Summary Judgment, requesting the court to grant that party a favorable judgment on any or all of the claims at issue. *See* Pa. R.C.P. No. 1035.1-1035.5. Motions for Summary Judgment in Pennsylvania are very similar to summary judgment motions filed in Federal Court, except in Pennsylvania state court there is no requirement that the moving party file a concise statement of material fact.

In reviewing a Motion for Summary Judgment, the court reviews the pleadings, depositions, interrogatories, and affidavits to determine whether the moving party is entitled to judgment as a matter of law. Again, as is the case with most motions filed in Pennsylvania state court, the applicable local rules may affect the procedure and requirements for a Motion for Summary Judgment and its accompanying brief. *See* Defendant County Local Rule 1035.2(a) ("Except as otherwise permitted by Order of Court for

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understand the procedures applicable in the county where your case is pending. For example, in Allegheny County, Preliminary Objections raising issues of fact requires filing of a brief within 14 days of the argument on the Preliminary Objections, while in Westmoreland County, Preliminary Objections raising issues of fact requires a brief within 60 days of filing. *Compare* Allegheny County Local Rule 1028(c)(1)(c) *and* Westmoreland County Local Rule W1028(c)(2)(a).

cause shown or by agreement of the parties by filed stipulation, Motions for Summary Judgment shall not exceed five (5) pages in length and supporting briefs as well as briefs in opposition shall not exceed 10 pages in length.”)

Like in Federal Court, judgment as a matter of law in Pennsylvania Courts is proper only where there is no genuine issue of material fact with regard to the issue or issues being raised in the motion, or where the opposing party has failed to produce evidence of facts essential to its cause of action or defense. *See Yourway Transp. Co. v. Becker*, 52 Pa. D. & C. 5th 278 (Pa. Ct. Com. Pl. Lehigh County 2015) (granting the defendant’s motion for summary judgment on a breach of contract claim where the plaintiff failed to “adduce sufficient evidence essential” to its claim.) Thus, a compelling Motion for Summary Judgment will typically demonstrate that the facts are undisputed, and that the law requires that the moving party is entitled to a judgment in its favor as a matter of law, given the set of undisputed facts. *See, e.g., Deal v. Children’s Hosp. of Pittsburgh*, 223 A.3d 705 (Pa. Super. Ct. 2019) (affirming a grant of summary judgment where defendant’s demonstrated based on undisputed facts that plaintiff had no cause of action for wrongful discharge); *Cholewska v. Gelso*, 193 A.3d 1023 (Pa. Super. Ct. 2018) (affirming a grant of summary judgment for defendants in a negligence action where “reasonable minds [could not] differ” as to the material facts establishing that defendant did not create a foreseeable, unreasonable risk of harm.)

**D. Best Practices Applicable to Pretrial Motions**

The illustrative examples below are taken from a brief and statement of materials facts in support of a Motion for Summary Judgment filed in the Court of Common Pleas of Blair County, Pennsylvania. The full Motion for Summary Judgment and brief in support are attached as **Appendix E**.<sup>7</sup>

**1. Write a short and clear introduction.**

INTRODUCTION

This case concerns Plaintiff’s supply of telecommunications equipment and related services to Defendant, and Defendant’s related failure to pay the amounts owed in accordance with Plaintiff’s agreement with Defendant regarding the supply of the telecommunications equipment.

Plaintiff provided telecommunications equipment and related services to Defendant pursuant to a written contract with an initial term of 60 months. Under the express, unambiguous terms of that written contract, at the end of the each 60-month period, the contract automatically renews for an additional 60-month period, unless Defendant provides express written notice of termination prior to the end of the preceding 60-month term.

The uncontroverted evidence demonstrates that Defendant did not provide express written notice of termination prior to the end of the most recent 60-month term, dictating that the agreement be automatically renewed. In fact, it is undisputed that Defendant did not terminate its agreement with Plaintiff and that Defendant continued to use Plaintiff’s equipment and services for several months into the next 60-month term. However, after securing telecommunications equipment and related services at a lower rate from another vendor and months after the contractual deadline to terminate its agreement with Plaintiff, Defendant refused to abide by its contractual obligations, refused to pay the contractual amounts owed, and took the unsupportable position that the parties’ agreement was terminated. Defendant’s position is contrary to the express terms of the parties’ agreement and well-settled Pennsylvania law.

<sup>7</sup> For the purposes of these examples, the names of the parties have been changed and certain portions of the Brief have been re-worded. For the full Brief, see **Appendix E**.

Plaintiff initiated this lawsuit against Defendant to seek recovery for the damages incurred by Plaintiff as a result of Defendant's breach of the parties' agreement. Plaintiff now brings this motion for partial summary judgment requesting that the Court enter an order confirming that, as a matter of law, Defendant failed to terminate the parties' agreement because Defendant did not provide express written notice of termination prior to the end of the prior lease term.

Since the question of whether Defendant failed to terminate the parties' agreement is a legal question expressly to be determined by the Court, this motion is appropriate to bring at this time, and only the Court (and not a jury) can decide this legal issue. See Humberston, 75 A.3d at 513 ("it is the court's rather than the jury's duty to interpret a contract").

As set forth more fully below, given that Defendant did not provide express written notice of termination of the parties' agreement prior to the end of the prior lease term, the unambiguous language of the parties' agreement and Pennsylvania law dictate that partial summary judgment be entered in favor of Plaintiff confirming that Defendant breached its agreement with Plaintiff.

## **2. Draft a factually accurate narrative.**

Following the express language of the Agreement, given that the Agreement was executed on May 8, 2009, if Defendant elected not to renew, the Agreement was required to be expressly terminated prior to April 8, 2014. See Agreement, Ex. 5 at § 13. Defendant did not terminate the Agreement prior to April 8 2014; thus, the Agreement automatically renewed on May 8, 2014 for an additional 60-month period.

From May 2014 through June 2019, Defendant continued to use and pay for Plaintiff's equipment and services and again did not provide written termination of the parties' agreement prior to April 8, 2019. As a result of Defendant's failure to provide written termination, the Agreement renewed for an additional 60-month period in May of 2019

Consistent with the automatic renewal of the Agreement, in May of 2019, Defendant continued to make rental payments to Plaintiff in May and June 2019, after the completion of the prior term (May 2014 through April 2019) and after Defendant's obligation to terminate the Agreement had lapsed.

Then, on August 2, 2019, after the Agreement was renewed and after Defendant paid two-months' rent for the current 60-month lease term, Defendant sent a letter to Plaintiff purporting to terminate the Agreement. That August 2, 2019 letter is attached as Ex. 8. This August 2019 letter, sent four months after the deadline to terminate, does not constitute effective termination under the parties' agreement because it was sent after renewal of the 60-month lease term. Defendant did not make the required July 2019 rental payment and, after sending the August 2, 2019 letter, Defendant altogether ceased making payments to Plaintiff.

## **3. Know the standard that must be met and craft an explanation of the standard.**

### STANDARD OF REVIEW

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure provides, in relevant part, that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for summary judgment in whole or in part as a matter of law." Pa. R.C.P. 1035.2. Summary judgment may be entered where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law. Keystone Freight Corp. v. Stricker, 31 A.3d 967 (Pa. Super. 2016). "Failure of a non-moving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law." Id.

**4. Use the most persuasive components of the relevant law.**

Termination of the Agreement is a Legal Issue to be Decided by the Court

As an initial matter, the issue of whether Defendant effectively terminated the Agreement is a question of law to be decided by the Court. “[C]ontract construction and interpretation is generally a question of law for the court to decide.” Pops PCE TT, LP v. R&R Restaurant Group, LLC, 208 A.3d 79, 87 (Pa. Super. 2019). Whether a contract is effectively terminated is one such question of law for the court’s review. See id. (sufficiency of letter purporting to terminate lease agreement was question of law for court); see also Com. Dept. of Transp. v. Brozetti, 684 A.2d 658 (Pa. Cmwlth. 1996) (reviewing and affirming Board’s interpretation of termination provisions of underlying contract).

**5. Apply the law to the facts in a convincing and credible manner.**

The undisputed record evidence in this matter is utterly devoid of any communications from Defendant to Plaintiff providing express written notification of Defendant’s intent to terminate the Agreement prior to May 2019. Defendant admits that the Agreement clearly requires express written notice of termination in order to terminate the Agreement. Given the lack of evidence of any such written notice, Plaintiff submits that Defendant is in breach of the Agreement and respectfully requests that partial summary judgment be entered in Plaintiff’s favor.

Plaintiff and Defendant entered into the Agreement on May 8, 2009 for an initial five-year term. See Agreement, Ex. 5. The Agreement provides that it “shall renew automatically for successive terms unless either party gives the other written notice of its intent to cancel this Agreement at least thirty (30) days prior to the expiration of the original term or any renewal term.” See Agreement, Ex. 5 at § 13. Thus, the Agreement automatically renewed on May 8, 2014, and again on May 8, 2019, and written notice of termination would have been required to be disseminated by Defendant by April 8, 2019. The record is devoid of any such written termination notice.

Moreover, to the extent that Defendant claims that it gave Plaintiff verbal notice of its intent to terminate, such notice is insufficient under the plain language of the Agreement and Pennsylvania law. See, e.g., Accu-Weather, Inc. v. Prospect Communications, Inc., 644 A.2d 1251, 1254 (Pa. Super. 1994) (citing Wright v. Bristol Patent Leather Co., 101 A. 844, 845 (1917)) (“In Pennsylvania, conditions precedent to a contract termination must be strictly fulfilled.”); Residential Reroofers Local 30-B Health and Welfare Fund of Philadelphia and Vicinity v. A & B Metal and Roofing, Inc., 976 F. Supp. 341, 347 (E.D. Pa. 1997) (noting that “[c]ourts consistently conclude that contracts with ‘Evergreen Clauses’ requiring written notice are not terminated absent compliance with the terms of the contract” and holding that defendant’s efforts to terminate CBA were ineffective where defendant failed to comply with CBA’s explicit requirements).

Because there is no record evidence of any written notice of termination at least 30 days prior to the automatic renewal of the Agreement, the Agreement automatically renewed for another five-year term, and Defendant is in breach of its obligations under the Agreement. Accordingly, Plaintiff submits that summary judgment in its favor is warranted.

#### IV. **PREPARING MOTIONS IN LIMINE**

See *Appendix F* for a sample Motion in Limine.

##### **A. Select the Most Effective and Important Issues.**

When filing a motion in limine, it can be tempting to file a motion regarding every possible evidentiary issue that may arise during the course of a trial. However, courts may have a strong dislike for the “shotgun approach” to motions *in limine*—filing as many as you can think of and hoping some “stick”—is unlikely to be effective. See Anna Manasco, *Top Tips for Top-Notch Motions in Limine*, American Bar Association (May 4, 2019), <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/articles/2019/spring2019-top-tips-for-top-notch-motions-in-limine/> (“Be wary of (and careful with) the ‘shotgun’ approach to your motions *in limine*.”)

Instead, it is typically more effective to file targeted motions in limine that only address the most prejudicial, clearly inadmissible, and inappropriate evidence. Pennsylvania Courts also typically dislike it when parties attempt to argue previously adjudicated dispositive, non-evidentiary issues in a motion *in limine*. Unless there is a very compelling reason to re-raise an issue through a motion in *limine* that practice should be avoided. .

##### **B. Keep the Motions Concise.**

All good legal writing is concise, but concision is especially important for an effective motion *in limine*, particularly in Pennsylvania courts where a judge may not have a lot of time to consider an *in limine* motion. Given the potentially complicated issues and rules of evidence at stake and the often voluminous pool of potential evidence, it is critical that your motions *in limine* state clearly, plainly, and concisely what evidence you are seeking to exclude (or, in some cases, include). By keeping your motions *in limine* narrow and succinct, you can ensure that the court fully understands which evidence you are hoping to exclude and/or admit

##### **C. Remain Professional.**

By their nature, motions *in limine* raise issues that will affect the scope of the evidence at trial, and can therefore become contentious. It is critical, however, that an attorney does not allow the heat of the moment to affect his or her professional demeanor. Avoid name-calling, finger-pointing, or other language that might lead a judge to believe you are going beyond zealously advocating for your client, and are instead becoming unprofessional.

##### **D. Consider the Consequences.**

Remember that motions *in limine*—especially those that seek broad exclusions—can cut both ways. Before bringing a motion *in limine*, think carefully about how the motion might affect your own evidence. Likewise, make sure you are not doing your opposing party any favors with a motion *in limine* that prevents that party from admitting piece of evidence or calling a witness that is helpful to your case. Do not let a potential early “win” on a motion *in limine* cloud your judgment with respect to your strategy at trial.

## V. **HOW TO PREPARE PERSUASIVE BRIEFS AND EXHIBITS**

Throughout this section, we will draw examples from the brief filed for the petitioners in *New York Times v. Sullivan*, 376 U.S. 254 (1964), a landmark Supreme Court case establishing the constitutional boundaries of defamation law. Despite lower court rulings finding the New York Times liable for defamation against a government official, the brief filed on behalf of the New York Times garnered a 9-0 decision in its favor. That brief is attached as **Appendix G**.

### A. **Know Your Audience.**

Research the judge or panel that will be hearing your case, and understand both what that judge/panel may expect from your materials, and how those judges have ruled on similar issues in the past. When the law is uncertain, understanding how the assigned judge thinks about a given issue can also be invaluable in preparing persuasive materials.

### B. **Start the Brief by Concisely Framing Your Argument.**

Never underestimate the value of a good first impression. From the first paragraphs of your brief, you should convey the relevant issues, why those issues are important, and what action you are asking the court to take. For example, the opening paragraph of petitioner's Summary of the Argument in *New York Times v. Sullivan* is as follows:

Under the doctrine of "libel per se" applied [by the courts] below, a public official is entitled to recover "presumed" and punitive damages for a publication found to be critical of the official conduct of a governmental agency under his general super-vision if a jury thinks the publication "tends" to "injure" him "in his reputation" or to "bring" him "into public contempt" as an official. The publisher has no defense unless he can persuade the jury that the publication is entirely true in all its factual, material particulars. The doctrine not only dispenses with proof of injury by the complaining official, but presumes malice and falsity as well. Such a rule of liability works an abridgment of the freedom of the press.

In a few brief sentences, the petitioner conveyed to the court exactly what the petitioner believes was wrongly decided by the lower courts.

### C. **Start with Your Strongest Argument.**

Often, your strongest argument may be the one that persuades the court to decide the case in your favor, even if it does not involve the most "important" or weighty substantive issue. In *New York Times*, where the client was a national newspaper who sought not to be held legally liable for alleged factual mistakes, the client's strongest argument was that the state law imposing liability for a publication that "tends" to "injure" the public official was unconstitutional under the First Amendment's protection of a free press. Counsel for petitioner, therefore, began their argument by attacking the law's strict application, noting that under the law, "Good motives or belief in truth [on the part of the publisher], however reasonable, are relevant only in mitigation of punitive damages if the jury chooses to accord them weight." These words, which demonstrate the unreasonableness of the state defamation law, turned out to be rather important, as the Supreme Court ultimately held that a publisher found liable for defamation must actually *know* that its statement was false, or must have acted recklessly in publishing false information.

#### **D. Use Headings and Sub-headings.**

Strong headings and sub-headings can make a big difference in the overall persuasive quality of your brief. Use headings to help guide the court through your facts and arguments, letting them know exactly what to expect from each section. This will allow the reader to make sense of the full picture of your case. As to its First Amendment argument, the petitioners in *New York Times* employed these headings, outlining in a few words the theme of the arguments that would follow:

First: The State Court's Misconception of the Constitutional Issues

Second: Seditious Libel and the Constitution

Third: The Absence of Accommodation of Conflicting Interests

Fourth: The Relevancy of the Official's Privilege

#### **E. Present Your Arguments in a Logical Order**

Your arguments should flow naturally from one to the next, though how that occurs will vary from case to case. In some cases, it may make sense for your arguments to track the development of the facts, in a chronological order. This can be true especially when you have multiple claims that do not depend on one another. *See Appendix C* at 7-11.

In other cases, it may be most logical to present your arguments in a cascading, “even if” fashion, presenting your baseline argument first, and then presenting other arguments in the event that the court rules against you on the first issue. That tactic was employed in *New York Times v. Sullivan*, where the petitioners presented their First Amendment argument first, followed by a narrower argument about the invalid application of the defamation law, and finally by a jurisdictional argument. *See Appendix G* at 38, 58, 69.

#### **F. Be Professional.**

Although it should go without saying, it is worth noting that most courts expect and prefer professionalism from the attorneys appearing before them. Professionalism also affects persuasiveness. Your briefs and exhibits should therefore reflect a high level of professionalism. At a minimum, this includes using language that is respectful to both the court and the opposing party.

When it comes to formality, err on the side of being too formal rather than too informal. A more informal judge is likely to forgive or overlook formality, but a more traditional, formal judge may look down upon informal writing styles and terminology, which can affect the credibility of your arguments.

#### **G. Use Plain Language.**

As with professionalism, it is important to remember that judges and their clerks are human, and that few humans enjoy reading dense, technical writing. While you will no doubt be dealing with complex facts and complicated law in many of your cases, the simpler you can make your writing, the more easily the court will be able to understand your view of the case. Forcing the court to weed through overly technical or stylistic language can hinder your ability to make an effective argument, especially if your opponent is skilled at simplifying the complex.

To the extent possible, consider writing as if your reader were an intelligent, non-legal reader. Do not be patronizing, but explain the facts and law in a way that can be easily understood by someone who *has not* spent months or years with the subject matter of your case. Doing so should make sure that any judge can easily digest and understand your arguments.

#### **H. Repeat Key Facts and Arguments.**

In most cases, you will have a key set of facts or key points of law that are essential to your arguments. It may, *inter alia*, be a damaging statement from the opposing party that satisfies a required element of your case, or a key public policy

principle underlying the law in question.

Once you have identified these key facts and arguments, do not be afraid to repeat them throughout your brief, reminding the court that the crucial facts and law are on your side. You will want to be judicious about how, and how often, you employ them, but strategic repetition can strengthen your overall argument.

In *New York Times*, one of the themes the petitioners put forth was that the First Amendment's protections are broad, and that most areas of First Amendment jurisprudence favor more speech, rather than restrictions on speech. The petitioners reminded the Court throughout their brief that the First Amendment "must be taken as a command of the broadest scope that explicitly language, read in the context of a liberty-loving society, will allow," and that freedom of the press "need[s] breathing space to survive."

## **VII. TOPFIVE MISTAKES TO AVOID WITH PLEADINGS, MOTIONS, AND BRIEFS**

### **A. Avoid Writing in the Passive Voice.**

Passive voice sounds weak, and can undermine otherwise strong facts in your favor. By way of example, instead of writing "The contract was purportedly cancelled on March 15" (passive), write, "The defendant purported to cancel the contract on March 15" (active).

### **B. Beware of Ambiguous Pronouns.**

The use of too many pronouns can confuse your reader, and you may accidentally assign an action to the wrong actor. Restate the proper party names, rather than relying too heavily on "he," "she," "they," or "it."

### **C. Watch out for Unnecessary Wordiness.**

There are two reasons to avoid unnecessary language. First, you will likely be constrained by a word limit, and wasted words will prevent you from thoroughly and convincingly making your case. Second, as discussed, judges are human, and are often very busy. You do not want to get on a judge's bad side by making him or her read an unnecessarily long pleading, motion, or brief. To avoid this, examine each sentence in your writing and ask "Can this sentence be shorter, while conveying the same point?" Striving to root out unnecessary wordiness will help to clarify your writing, while naturally helping you find and eliminate passive voice and ambiguous pronouns.

### **D. Do Not Over-use Legalese.**

While there are certain legal terms of art you will not be able to avoid, when you have the choice, it is better to opt for plain language rather than legalese. For one thing, too much legalese often appears pretentious, rather than sophisticated or impressive. A brief peppered with Latin phrases and ancient legal terms is one that a judge has to *decipher*, rather than simply read, which can distract from your otherwise effective legal arguments.

### **E. Proofread – Typos are Bad.**

This is another tip that may go without saying, but in the rush to meet deadlines, it can be overlooked. Be sure to proofread your final product before serving or filing it. Typos and other errors in writing can be confusing and distracting. Moreover, they can negatively affect your credibility and professionalism in the eyes of the court and/or your client. These types of mistakes are entirely within your control, and therefore, entirely avoidable.

Louis A. DePaul is a member of the law firm of Eckert Seamans Cherin & Mellott, LLC, where he concentrates his practice on business litigation. His practice and experience cover a broad range of business litigation, including complex commercial litigation, class action litigation, products liability litigation, real estate litigation, intellectual property litigation, bankruptcy litigation, and employment disputes. Mr. DePaul has litigated cases in state, federal, bankruptcy, and appellate courts in multiple jurisdictions and his experience extends to commercial arbitrations and mediation. He is a Fellow of the Allegheny County Bar Foundation and a member of the Allegheny County Bar Association. Mr. DePaul earned his B.S. degree, with Highest Graduating Distinction, from Carnegie Mellon University and his J.D. degree from the University of Pittsburgh School of Law.

# PLEADINGS & MOTIONS: CIVIL PRACTICE TIPS & EXAMPLES

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# PENNSYLVANIA CIVIL PRACTICE AND PROCEDURE UPDATE

- **Pennsylvania Supreme Court Judicial Emergency**
  - The PA Supreme Court issued a State of Emergency, enacting changes including:
    - Extensions of filing deadlines;
    - Postponed hearings and trials;
    - President Judges of county courts empowered to take necessary steps.
- **Allegheny County Courts (Pittsburgh)**
  - The President Judge of the Fifth Judicial District enacted county-specific measures, such as:
    - Requiring face masks and distancing in courthouses;
    - Limiting court access to “persons with essential court business”;
    - Employing “Advanced Communication Technology” for remote proceedings;
    - Slowly resuming trials at alternate sites, including the Convention Center.

# Pleadings: Writing Rock-Solid Complaints and Responses

- **Comply with Relevant Federal, State, and Local Rules.**

- Familiarize yourself with the relevant rules.
- Some jurisdiction-specific requirements may not be the typical “standard practice.”
- Example: Pennsylvania’s “Notice to Plead” (Pa. R.C.P. Rule 1026):

To

[OPPOSING PARTY]

:

You are hereby notified to file a written response to the enclosed [name of pleading] within twenty (20) days from service hereof or a judgment may be entered against you.

[ATTORNEY SIGNATURE]

# Pleadings: Writing Rock-Solid Complaints and Responses

- **Research Relevant Issues *Before* Writing.**

- Avoid the mistake of thinking you know the law at-issue.
- Researching in advance eliminates the need to rethink or rewrite – saving time and money for your client.
- Structure your argument around the law. Ex. The elements of “tortious interference with contractual relations”:
  - (1) the existence of a contractual relationship between the complainant and a third party;
  - (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship;
  - (3) the absence of the privilege or justification on the part of the defendant; and
  - (4) the occasioning of actual damage as a result of the defendant's conduct.

# Pleadings: Writing Rock-Solid Complaints and Responses

- **Allege Subject Matter Jurisdiction, Personal Jurisdiction, and Venue.**
  - It is necessary to establish jurisdiction and venue.
    - “Jurisdiction” is a court’s legal authority to hear the claims presented.
    - “Venue” is the proper court in which to hold the case, based on party’s relationship to the relevant geographic area
  - Failure to allege jurisdiction and venue can result in dismissal of your case.

## **JURISDICTION AND VENUE**

9. This Court has jurisdiction over Defendant A because Defendant A owns the Hotel located in Pittsburgh, Pennsylvania. Moreover, Defendant A entered into and breached the hotel management with Plaintiff regarding hotel management services for the Hotel in Pittsburgh, Pennsylvania.

10. This Court has jurisdiction over Defendant B because Defendant B engaged in systematic and continuous contacts with Pennsylvania as a result of, *inter alia*, Defendant B's interference with the agreement to manage the Hotel in Pittsburgh, Pennsylvania. Moreover, on information and belief, Defendant B is now managing the Hotel in Pittsburgh, Pennsylvania.

11. This Court has jurisdiction over Defendant C because Defendant C engaged in systematic and continuous contacts with Pennsylvania as a result of, *inter alia*, Defendant C' interference with the agreement to manage the Hotel in Pittsburgh Pennsylvania. Moreover, on information and belief, on numerous occasions prior to the occurrences giving rise to this action, Defendant C had contact with Defendant A in Pittsburgh, Pennsylvania regarding the Hotel.

12. Venue is appropriate in the Court of Common Pleas of Allegheny County because the transactions and occurrences giving rise to Plaintiff's causes of action took place in Pittsburgh, Pennsylvania.

# Pleadings: Writing Rock-Solid Complaints and Responses

- **Prepare a Concise and Plain Statement of the Facts.**

- A concise, plain-language, favorable summary of the case and statement of the facts is key to a persuasive pleading.
- Keep the facts simple and straightforward.
- The easier you can make it for the court to understand your version of the facts, the more likely the court will understand your arguments.

# Sample Summary of the Case

I. Plaintiff brings this action as result of Defendant A's unsubstantiated breach of a hotel management agreement regarding the management of the Hotel in Pittsburgh's East Liberty neighborhood (the "Hotel").

II. For many years, pursuant to a management agreement between Plaintiff and Defendant A, Plaintiff efficiently managed the Hotel in East Liberty. However, without justification and following the urging and unjustified interference of Defendant C and Defendant B, Defendant A improperly attempted to terminate, and in fact breached, the hotel management agreement with Plaintiff.

III. Defendant A's breach of the hotel management agreement and Defendant C and Defendant B's inference with that agreement have prohibited Plaintiff from performing under, and completing the term of, the management agreement, damaging Plaintiff in numerous respects.

IV. Despite Plaintiff's attempts to amicably resolve the matter, Defendants have failed to pay Plaintiff for past management fees and past expenses incurred by Plaintiff in the management of the hotel. Plaintiff has been further damaged by, *inter alia*, losing the income stream from future management fees, and as a result of goodwill lost stemming from the unjustified breach of the hotel management agreement, leaving Plaintiff with no choice but to bring this action.

# Pleadings: Writing Rock-Solid Complaints and Responses

- **Prepare Separate Counts for Each Legal Claim.**

- *See* Pa. R.C.P. Rule 1020:

COUNT I  
BREACH OF CONTRACT  
*Plaintiff v. Defendant A*

34. Plaintiff hereby incorporates by reference paragraphs 1–33 of this Complaint as thought set forth fully herein.

35. Defendant A and Plaintiff duly entered into and executed the HMA, and Defendant A has no justification for breaching the HMA.

36. At all times relevant to this lawsuit, Plaintiff fully complied with the terms of, and fully performed under, the HMA.

37. By attempting to terminate the HMA and obstructing Plaintiff’s performance under the HMA, Defendant A breached the HMA.

38. As set forth in this Complaint, Plaintiff has been damaged by Defendant A’s breaches of the HMA.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in its favor in an amount in excess of the jurisdictional limits for arbitration, plus interests, costs, and any other such relief as this Court deems just and proper.

# Pleadings: Writing Rock-Solid Complaints and Responses

- **Pennsylvania Requires Facts to be Specifically Plead.**

- Material facts must be “stated in a concise and summary form.” *See* Pa. R.C.P. Rule 1019(a).
- Pennsylvania’s “fact pleading” requirement is more strict than Federal Court standard of “notice pleading.”
  - Fact pleading requires that each claim in a complaint be supported by specific facts.
- Failure to support claims with specific facts can lead to dismissal of your case.
  - *See Hill v. Kilgallen*, 108 A.3d 934 (Pa. Commw. Ct. 2014).

# Effective Pretrial Motions Practice

- **Preliminary Objections (P.O.s) (Pa. R.C.P. No. 1028)**
  - P.O.s are akin to other jurisdictions' "Motion to Dismiss."
  - P.O.s are raised all at once, in response to a complaint.
  - P.O.s can be raised for eight specific grounds (see next slide).
  - Failure to raise P.O.s on many grounds constitutes waiver.
  - Fact-based P.O.s may trigger limited discovery.
  - P.O. procedures vary from county to county – Consult local rules.

# Grounds for Preliminary Objections under Rule 1028(a)

- (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
- (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
- (3) insufficient specificity in a pleading;
- (4) legal insufficiency of a pleading (demurrer);
- (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;
- (6) pendency of a prior action or agreement for alternative dispute resolution;
- (7) failure to exercise or exhaust a statutory remedy; and
- (8) full, complete and adequate non-statutory remedy at law.

# Effective Pretrial Motions Practice

- **Motion for Judgment on the Pleadings (Pa. R.C.P. No. 1034)**
  - A Motion for Judgment on the Pleadings is made after the close of pleadings.
  - The Motion is granted when, based on the facts plead, the moving party is entitled to judgment as a matter of law.
  - A successful Motion demonstrates that—even if all of the opposing party’s allegations are true—the moving party is entitled to the relief sought.
  - Consult local rules for county-specific procedures.

# Effective Pretrial Motions Practice

- **Motion for Summary Judgment (Pa. R.C.P. No. 1035.1-1035.5)**
  - An Motion for Summary Judgment is made at the close of discovery.
  - In assessing a Motion for Summary Judgment, the court reviews the “record,” including pleadings, depositions, interrogatories, and affidavits to determine whether moving party is entitled to judgment as a matter of law
  - A compelling Motion typically demonstrates that:
    - The facts are undisputed; and
    - The law requires that the moving party is entitled to judgment in its favor.
  - Consult local rules for county-specific procedures.

# Effective Pretrial Motions Practice

- **Best Practices for Pretrial Motions**

- Write a short, clear introduction.
- Draft a factually accurate, persuasive narrative.
- Know the standard that must be met and craft an explanation of the standard.
- Use the most persuasive components of the relative law.
- Apply the law to the facts in a convincing and credible manner.

# Preparing Motions *in Limine*

- **Select the Most Effective and Important Issues.**
  - Avoid the “shotgun approach.”
  - Focus on the most prejudicial, clearly inadmissible, inappropriate evidence.

# Preparing Motions *in Limine*

- **Keep the Motions Concise.**

- Simplify the complex issues and tell the court why the evidence you are attempting to exclude should be excluded.
- Keeping motions *in limine* narrow and succinct will help to ensure that the court fully understands the evidence you are hoping to exclude or admit.

# Preparing Motions *in Limine*

- **Remain Professional.**

- Do not let the contentious nature of the issues affect your professional demeanor.
- No name-calling, finger-pointing, or other unprofessional language.

# Preparing Motions *in Limine*

- **Consider the Consequences.**

- Think carefully about how the motion might affect your own evidence.
- Do not let a potential early ‘win’ on a motion *in limine* cloud your judgment with respect to your trial strategy.

# How to Prepare Persuasive Briefs and Exhibits

- **Know Your Audience.**

- Research the judge or panel that will hear your case.
  - Understand what the judge or panel will expect from your materials.
  - Assess how those judges have ruled on similar issues in the past.

# How to Prepare Persuasive Briefs and Exhibits

- **Start the Brief by Concisely Framing Your Argument.**
  - From the first paragraphs of your brief, convey the relevant issues, why they are important, and what actions you are asking the court to take.

# Concise Framing of the Argument

- Consider this excerpt from from Petitioner's brief in *New York Times Co. v. Sullivan*, a landmark, 9-0 U.S. Supreme Court decision in favor of the New York Times, establishing the constitutional boundaries of defamation law.

Under the doctrine of “libel per se” applied [by the courts] below, a public official is entitled to recover “presumed” and punitive damages for a publication found to be critical of the official conduct of a governmental agency under his general super-vision if a jury thinks the publication “tends” to “injure” him “in his reputation” or to “bring” him “into public contempt” as an official. The publisher has no defense unless he can persuade the jury that the publication is entirely true in all its factual, material particulars. The doctrine not only dispenses with proof of injury by the complaining official, but presumes malice and falsity as well. Such a rule of liability works an abridgment of the freedom of the press.

# How to Prepare Persuasive Briefs and Exhibits

- **Start with Your Strongest Argument.**

- Determine which argument is most likely to resolve the case in your client's favor.
- This may not always be the most "important" or weighty substantive issue.
- Example from *New York Times v. Sullivan*:
  - Petitioner opened with an argument that the state law in question violated the First Amendment by imposing liability that "tends" to "injure" a public official.
  - Petitioner argued that this was too broad, and restricted too much speech under the First Amendment.
  - Counsel focused on the key interest of the client: Broad freedom of speech.

# How to Prepare Persuasive Briefs and Exhibits

- **Use Headings and Sub-headings.**

- Headings and sub-headings are helpful to guide the court through your facts and arguments.
- The court will know exactly what to expect from each section.
- Headings and sub-headings make your brief easier to read.
- Example headings from *New York Times v. Sullivan*:

First: The State Court's Misconception of the Constitutional Issues

Second: Seditious Libel and the Constitution

Third: The Absence of Accommodation of Conflicting Interests

Fourth: The Relevancy of the Official's Privilege

# How to Prepare Persuasive Briefs and Exhibits

- **Present your Arguments in a Logical Order.**
  - Your arguments should flow naturally from one to the next.
  - In some cases, the order of your arguments may coincide with the chronological development of the facts.
  - In other cases, it may be most logical to present arguments in a cascading, “even if,” fashion, presenting your baseline argument first, followed by other arguments in the event that the court rules against you on the first issue.

# How to Prepare Persuasive Briefs and Exhibits

- **Be Professional.**

- Courts expect and prefer professionalism.
- Professionalism affects persuasiveness.
- Err on the side of being too formal rather than too informal.

# How to Prepare Persuasive Briefs and Exhibits

- **Use Plain Language.**

- Avoid dense, technical writing.
- Make the court's job easier by simplifying complex facts and issues.
- Avoid legalese: Write as if your reader were an intelligent person with little legal training.

# How to Prepare Persuasive Briefs and Exhibits

- **Repeat Key Facts and Arguments.**

- Identify the key set of facts and points of law that are essential to your arguments.
  - These may be, *inter alia*, a damaging statement from an opposing party, or an important public policy principle underlying the law at issue.
- Do not be afraid to repeat these key facts and issues throughout your brief.
- Be judicious, but strategic repetition will strengthen your argument.
- Example from *New York Times v. Sullivan*:
  - Petitioner repeated the theme that First Amendment jurisprudence favors more speech, rather than restrictions on speech.
  - *The First Amendment “must be taken as a command of the broadest scope that explicitly language, read in the context of a liberty-loving society, will allow,” and freedom of the press “need[s] breathing space to survive.”*

# Top Five Mistakes to Avoid with Pleadings, Motions, and Briefs

- **Avoid Writing in the Passive Voice.**
  - Passive voice sounds weak and can undermine your otherwise strong facts and arguments.
  - Ex. “The defendant purported to cancel the contract on March 15” instead of, “The contract was purportedly canceled on March 15”

# Top Five Mistakes to Avoid with Pleadings, Motions, and Briefs

- **Beware of Ambiguous Pronouns.**

- Excessive use of pronouns can confuse the reader.
- Restate proper party names instead of relying too heavily on “he,” “she,” “they,” or “it.”

# Top Five Mistakes to Avoid with Pleadings, Motions, and Briefs

- **Watch out for Unnecessary Wordiness.**

- You will likely be constrained by a word limit or page limit.
- Busy judges appreciate brevity.
- Striving for concision can make your writing more clear.

# Top Five Mistakes to Avoid with Pleadings, Motions, and Briefs

- **Do Not Over-use Legalese.**

- When you have the choice, opt for plain language rather than legalese.
- Certain terms of art are unavoidable (motion *in limine*, *res ipsa loquitor*, etc.).
- Allow the judge to *read* your brief, rather than *deciphering* the Latin phrases.

# Top Five Mistakes to Avoid with Pleadings, Motions, and Briefs

- **Proofread – Typos are Bad.**

- Typos and other errors can be confusing and distracting.
- Mistakes like these affect your credibility and professionalism.
- Typos are entirely within your control, and therefore entirely avoidable.