

Bench Bar Conference

Best Summary Judgment Practices

United States District Court, District of Maine

May 2023

Pre-Filing Conferences

Local Rule 56(h) anticipates a pre-filing conference unless the parties inform the court that they have agreed on a motion schedule. For some judges, or for some cases, the Court may order the parties to confer and attend a conference.

For a successful conference with the Court, it is essential that the parties confer in advance of the conference to discuss the scope of the motion, the possibility for stipulations, the anticipated length of the fact statements and briefs, and workable and reasonable deadlines. (The Court strongly encourages counsel to achieve stipulations on undisputed factual matters that provide necessary background information, but recognizes that counsel likely will not achieve this before the Rule 56(h) conference.)

Local Rule 56(h) conferences with the Court result in a court-ordered schedule that may also include specific directions concerning the motion papers. Counsel should take care to heed any specific directions provided in the scheduling order. For example, the Court may instruct the parties how to it wants them to file the summary judgment record and may instruct the parties to refer to docket numbers and docket page numbers when citing the record.

Statements of Material Fact, Length

Local Rule 56(b), by its terms, anticipates short and concise statements of fact, with each asserted fact set out in its own “separately numbered paragraph” and “simply and directly stated in narrative.” By requiring a separately numbered paragraph, and by use of the term narrative, the Local Rule does not expect or encourage long-winded, multi-sentence statements. Rather, the Local Rule is meant to elicit a series of separately numbered assertions that are stated as succinctly as possible. Ideally, counsel will provide a simple and direct statement following each paragraph number that consists of one sentence, or perhaps two.

If you find that you are producing multiple sentence statements for each paragraph, you are unnecessarily complicating the process (not only for yourself, but for the court and the opposing party). Keep in mind that the opposing party must admit, deny, or qualify the statement, and therefore your statement should permit a ready response along those lines, not a competing response that admits in part, denies in part, and ends with its own long-winded qualification.

In particular, because each sentence should have its own citation(s), multiple sentence paragraphs followed by an omnibus string cite to the record are strongly disfavored by the court. As for multiple paragraph statements, these do not comply with the Local Rule. To be clear, as a general principle, shorter and simpler statements are better, even if there are more of them.

Response and Reply Statements

When preparing a response or a reply, keep in mind the following recommendations:

- Reproduce the original statement being responded to or replied to in the response or reply document so both the original and the response or reply can be reviewed together in one document.
- Remember that the point is to admit, deny, or qualify a statement and provide citation(s) to record evidence that resists the statement at issue. Do not narrate a long qualification that exceeds the scope of the original statement.
- Understand that a qualification is a partial admission. Be clear about what you are qualifying and what is otherwise admitted.
- Extraneous assertions are not helpful. If extraneous statements come to mind and are material, instead assert these in the additional statement of material fact. If extraneous statements come to mind when preparing a reply, they will likely violate the requirement that a reply be limited to replying to the other party's additional statement and may be disregarded.
- Like statements, responses and replies should be direct and succinct.
- Be clear in your denial and qualifications. Do not write qualified and then narrate a denial, or vice versa.
- Do not argue issues materiality in your response or reply statement. Save the arguments and citations to authority for your brief(s).

Additional Statements

When preparing an additional statement of material facts, keep in mind the following recommendations:

- Number your new statements of fact consecutively to the movant's statement. In other words, if the movant's statement ends with paragraph 50, begin your additional statement with paragraph 51. This simplifies the process of review and reduces the need for cumbersome shorthand citation forms such as DSMF, PSAMF, DRSMF, and the like.
- Because an additional statement is the non-movant's first opportunity to narrate their version of the case, it is acceptable to begin at the beginning and repeat matters previously asserted by the movant in the opening statement of material facts so that the non-movant can present a cohesive and independent narrative. However, the best practice is for counsel to confer so that they can present the undisputed background facts by stipulation, then cite the stipulation as record support for the background facts asserted in both the opening statement and the additional statement.

Summary Judgment Records and the Electronic Docket

Ideally, the parties should cooperate to produce the most logical and legible series of well-labeled docket entries to facilitate their production of quality statements and the Court's review process.

Ideally, the parties should cite documents in the summary judgment record not only according to their labels (e.g., Jane Doe Dep. at 23), but also according to their location on the docket (e.g., Jane Doe Dep. at 23, ECF No. 33-4), at least for the first instance in which the item is cited. Pin cites to the docket's consecutive page number system are also helpful (e.g., Jane Doe Dep at 23, ECF # 33-4, PageID # 412), as the electronic case files system permits a query that will open the exact document and page.

A separate document that itemizes stipulated facts is always appreciated and allows counsel to quickly cite the stipulation to support statements related to the background facts, without having to search the record in support of statements that are not disputed.

The best docketing practice is to file one copy of a complete document (e.g., a deposition transcript) rather than different parties filing different excerpts.

The foregoing practice guidelines related to producing the record are especially helpful in cases that are document intensive.

Motions to Strike are NOT Allowed

As the Local Rule says, motions to strike are not allowed. Instead, simply assert that the statement should be stricken, then succinctly state the nature of the evidentiary objection, then admit, deny, or qualify as usual.

Do not assert that a statement should be stricken because it is immaterial or irrelevant. Materiality and relevance are issues to argue in your brief(s). Similarly, do not assert that testimony should be stricken based on trial-style objections like "lack of foundation." If the witness has conceded a lack of knowledge, then a denial or qualification of the statement coupled with a record citation should suffice.

Do not forget that you must still admit, deny, or qualify a statement even though you have asserted that it should be stricken.

When the movant's reply asserts that an additional statement should be stricken, the nonmovant is permitted to respond to the assertion. However, the nonmovant is only permitted to respond to the movant's request that an additional statement be stricken. The best practice in this situation is to reproduce one final document that collects everything that has been stated and adds the response on the matter of striking an additional statement. For example, the following approach is required in Local Rule 56(h) orders issued by Judge Torresen:

The Plaintiff may file a "Plaintiff's Response to Defendant's Requests to Strike," pursuant to Local Rule 56(e). This document shall reproduce the text of the Defendant's facts, the Plaintiff's additional facts, all admissions, denials, and qualifications, all requests to strike, and the Defendant's responses to Plaintiff's requests to strike. The Plaintiff may add only appropriate responses under each of

the Defendant's requests to strike. This document should be a complete account of the parties' factual statements.

LOCAL RULE 56 - MOTIONS FOR SUMMARY JUDGMENT
(As amended July 1, 2016)

(a) Motions for Summary Judgment

In addition to the material required to be filed by Local Rule 7, a motion for summary judgment and opposition thereto shall comply with the requirements of this rule.

(b) Supporting Statement of Material Facts

A motion for summary judgment shall be supported by a separate, short, and concise statement of material facts, each set forth in a separately numbered paragraph(s), as to which the moving party contends there is no genuine issue of material fact to be tried. Each fact asserted in the statement shall be simply and directly stated in narrative without footnotes or tables and shall be supported by a record citation as required by subsection (f) of this rule.

Nothing in this Local Rule 56 precludes the parties from filing a stipulated statement of material facts as to all, or some, of the facts underlying a motion for summary judgment, or any opposition thereto. In the event the parties file a stipulated statement of material facts, such stipulated facts shall control and take precedence over any conflicting statement of fact filed by any party to the stipulation.

(c) Opposing Statement of Material Facts

A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule. Each such statement shall begin with the designation "Admitted," "Denied," or "Qualified" and, in the case of an admission, shall end with such designation. The opposing statement may contain in a separately titled section additional facts, each set forth in a separately numbered paragraph and supported by a record citation as required by subsection (f) of this rule.

(d) Reply Statement of Material Facts

A party replying to the opposition to a motion for summary judgment shall submit with its reply a separate, short, and concise statement of material facts which shall be limited to any additional facts submitted by the opposing party. The reply statement shall admit, deny or qualify such additional facts by reference to the numbered paragraphs of the opposing party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by subsection (f) of this rule. Each such reply statement shall begin with the designation "Admitted," "Denied," or "Qualified" and, in the case of an admission, shall end with such designation.

(e) Motions to Strike Not Allowed

Motions to strike statements of fact are not allowed. If a party contends that an individual statement of fact should not be considered by the court, the party may include as part of the response that the statement of fact "should be stricken" with a brief statement of the reason(s) and the authority or record citation in support. Without prejudice to the determination of the request to strike the party shall admit, deny or qualify

the statement as provided in this rule. A party may respond to a request to strike either in the reply statement of material facts as provided in this rule or, if the request was made in a reply statement of material facts, by filing a response within 14 days. A response to a request to strike shall be strictly limited to a brief statement of the reason(s) why the statement of fact should be considered and the authority or record citation in support.

(f) Statement of Facts Deemed Admitted Unless Properly Controverted; Specific Record of Citations Required

Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted. An assertion of fact set forth in a statement of material facts shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion. The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment. The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts.

(g) Facts Admitted for Purpose of Summary Judgment

Facts deemed admitted solely for purposes of summary judgment shall not be deemed admitted for purposes other than determining whether summary judgment is appropriate.

(h) Pre-filing Conference

In all Standard Track cases, except those categories of cases listed in Rule 26(a)(1)(B), F.R.Civ.P., a party intending to move for summary judgment shall file no later than seven (7) days after the close of discovery either (1) a joint motion setting forth a proposed schedule agreed to by all the parties and confirming that all of the parties agree that a pre-filing conference with a judicial officer would not be helpful, or (2) a notice of intent to move for summary judgment, and the need for a pre-filing conference with a judicial officer.

(1) By Joint Motion with Proposed Schedule

The parties must jointly propose a schedule for briefing all proposed motions for summary judgment. The proposed schedule shall include:

- (A) Proposed page limits and deadlines for filing. If the Motion proposes to exceed the limits set forth in LR 7, the parties shall include a brief statement explaining why good cause exists for allowing extra time and/or pages.
- (B) The estimated number of statements of material fact and the estimated number of additional statements by any party opposing the motion for summary judgment.
- (C) Any stipulations to be filed. The parties shall generally describe any stipulated record or factual stipulations they propose to file and indicate whether stipulations of fact are made solely pursuant to LR 56(b). If any such stipulated filings will be made, the proposed schedule shall first set a deadline for this stipulated filing, which shall be at least five (5) calendar days before the deadline for filing the motion for summary judgment.
- (D) Proposed page limits and deadlines for filing *Daubert* and/or *Kumho* motions, oppositions to *Daubert* and/or *Kumho* motions, and replies to oppositions to *Daubert* and/or *Kumho* motions.[footnote omitted] If the parties propose to exceed the time or page limits set forth

in Local Rule 7, the parties shall include a brief statement explaining why good cause exists for allowing extra time and/or pages.

The Court may adopt or modify the jointly proposed schedule, or instead may set the matter for a pre-filing conference.

(2) By Notice

Alternatively, absent agreement, the movant shall provide the Court and all other parties to the action with written notice of the intent to seek summary judgment and the need for a pre-filing conference with a judicial officer.

(3) Pre-Filing Conference

At any pre-filing conference, the parties shall be prepared to discuss, and the judicial officer shall consider:

- (A) The issues to be addressed by a motion for summary judgment;
- (B) The length of any statement of material facts filed pursuant to LR56(b) and (c);
- (C) The length of the memoranda filed pursuant to LR 7;
- (D) The time within which the motion for summary judgment shall be filed;
- (E) The use of a stipulated statement of material facts in addition to or in lieu of, separate statements of material fact; and
- (F) Whether either party intends to file any *Daubert* and/or *Kumho* motions, and, if so, the issues to be addressed by such motions, the length of any memoranda of law to be filed pursuant to Local Rule 7, and the time within which the *Daubert* and/or *Kumho* motions shall be filed.

Following any pre-filing conference, the judicial officer shall issue an order reciting the action taken at the conference.