

Handbook on Motion Practice



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Chapter 1: Introduction

By Nan L. Haynes and Katrin C. Rowan

This book is about motions in civil practice, which are simply requests for a judge to do something. Lawyers make motions throughout the life of a lawsuit. They can make a motion to dismiss before they even answer a complaint. And they can make motions after a judgment is entered, such as a motion to vacate that judgment.

Sometimes, lawyers make a motion (make a request) asking the judge for something big—for example, to order dismissal of a claim. Other times, lawyers make a motion asking for something small—for example, to reschedule a court appearance. Generally, but not always, the other side will oppose the motion. If the parties agree but still need to request an order from the court, the moving party can file an unopposed motion.

The motion itself (sometimes titled a “notice of motion” or similar) is simply the form document that states the request. Writing that part is simple. More challenging is writing the brief (also called a memorandum of law) that explains the legal and factual reasons why the court should grant the request. The brief must clearly state the reasons for the request, provide the information the judge needs to make the decision, and attempt to persuade the judge to grant the motion. If the motion is opposed, the other side will write a brief (often called a response or opposition) attempting to persuade the judge to deny the motion. Sometimes, the other party may file a cross-motion, asking the court for related relief, that the other party must then respond to.¹

Understand the Applicable Procedural Rules and Use Them to Frame the Substantive Issue

The key to mastering motion practice is understanding that when judges decide a motion, they view the substantive issue through the procedural rules that govern that particular type of motion. Thus, for example, judges view a motion for summary judgment through the procedural rules that govern summary judgment. You must argue motions taking into account these procedural rules.

¹ See Chapter 5, Motions in Limine, for samples of a cross-motion and response.

When you learn about substantive areas of law in your classes, you probably view them as disconnected from the procedural posture in which these issues arose, focusing instead on the underlying legal question. In contrast, judges see substantive issues from the perspective of the procedural posture of the motion that brought the issue before the court—including which party has the burden of persuasion or proof and what that party must establish to prevail. For example, when a party asks the judge to dismiss a claim, the judge will view the facts before them in a certain way, depending on the particular moment in the litigation process. These procedural rules apply regardless of what the underlying claim may be, such as a contract claim, a civil rights claim, a negligence claim, or any other type of claim.

For example, suppose you are asked to prepare the defendant's motion for summary judgment in a negligence case, filed in federal court based on diversity jurisdiction, involving a plaintiff who slipped and fell on a broken stair. Your first task is to find the procedural rules that govern a motion for summary judgment. Because you are in federal court, you will look to the Federal Rules of Civil Procedure. You must also check the court's local rules and the judge's particular preferences (sometimes called standing orders), which may impose additional requirements.

You will find that Federal Rule of Civil Procedure 56 provides that a court will grant summary judgment if the moving party shows that there are no disputed material facts and it is entitled to judgment as a matter of law. But the rule says nothing about how the court views the evidence before it. You will have to do further research to find that answer. A good place to start would be the notes of decisions for the applicable rule or statute that sets forth the applicable rule (here, Rule 56). Secondary sources, such as treatises on civil procedure for your jurisdiction, may also be helpful. You should reference case law to fully understand (and be able to cite) the applicable procedural rule.

Once you find the procedural rules, you will know how to frame and argue the underlying substantive legal issue. For example: looking at the evidence in the light most favorable to the plaintiff as the non-moving party (the manner in which the court will view the evidence on a summary judgment motion), did the defendant (the party with the initial burden as the moving party) show that it was not negligent as a matter of law, based on the undisputed material facts, for failure to repair a broken stair (what the party must prove with respect to the substantive issue)?

Here are the general steps you will take when you draft a motion or response:

Step 1

Identify which procedural rules apply. If you are in federal court, the Federal Rules of Civil Procedure apply. If you are in state court, that state's rules apply. For example, if your claim were in Ohio state court, Ohio's Rules of Civil Procedure would apply.

Step 2

Consult the applicable procedure rules.

Step 3

Once you find the applicable rule, answer these questions:

- Which party has the burden of persuasion or proof?
- What must that party establish in order to prevail?
- How will the court view the evidence before it?

Step 4

If you cannot answer these questions by reading the rule, you will have to do further research, such as the notes of decision, secondary sources, and relevant case law.

Step 5

Once you find the procedural rules, use them to frame the substantive issue. When your case is in federal court, determine whether federal or state law (and which state's law) governs the substantive issue.

Comply With All Relevant Rules When Filing Your Motion

Before filing your motion, review:

- The relevant applicable procedural rules for the motion
- The applicable local rules, including rules related to electronic filing (located on court websites)

- The individual practice rules (standing orders) for the judge assigned to your case (located on court websites)

Some requirements are applicable to all kinds of motions in federal court, and usually similar rules apply to state courts as well. For example, under the Federal Rules of Civil Procedure:

- The motion must be in writing and “state with particularity the grounds for seeking the order,” as well as the requested relief. Fed. R. Civ. P. 7(b). The motion must include a caption identifying the court name, party names, case number, and title of filing. Fed. R. Civ. P. 10(a); Fed. R. Civ. P. 7(b)(2).
- An attorney of record must sign the motion and related documents and include that signor’s address, e-mail address and telephone number. Fed. R. Civ. P. 11(a). Check e-filing and local rules to see if any other information is required. By signing the filing, the attorney certifies:

that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b). If this rule is violated, the court may impose sanctions under Rule 11(c). Therefore, it is critically important that you act ethically with respect to filing motions.

- You must serve your motion on all other parties. Fed. R. Civ. P. 5(a)(1)(D). It is not necessary to file a certificate of service if your motion is served on all parties by filing it with the court's electronic-filing system. Fed. R. Civ. P. 5(d)(1)(B).

Some requirements apply only to particular kinds of motions. Consult the sources of rules outlined above for important information, such as:

- When the motion must be filed²
- When the response brief must be filed
- Whether a reply brief is permitted, and whether the moving party needs to indicate an intention to file a reply brief or request permission to do so
- Whether you should include a proposed order setting forth the relief sought
- Any page or word limits (and how compliance must be indicated and certified)
- Formatting requirements (e.g., font style and size, margins, spacing, etc.)
- Section requirements (e.g., whether particular sections of a brief are required, such as a table of contents, table of authorities, etc.)
- Whether the court prefers or requires hyperlinks to cited authorities
- Supporting documents that must be included, such as affidavits or declarations

² Consult Federal Rule of Civil Procedure 6 and related state or local rules for more information about computing and extending time. In addition, Rule 6(c)(1) provides that a non-ex parte motion must be served at least fourteen days before a hearing date, unless the court specifies otherwise.

- Whether the court prefers or requires a letter motion (a short, more informal request) rather than a formal motion³
- Whether the court permits the use of Generative Artificial Intelligence in preparing the documents and whether the use of these tools must be disclosed
- Whether oral argument must be requested and, if so, how to request oral argument

In short, before filing any motion or response, always check the federal or state procedural rules, local rules, and standing orders to learn the requirements applicable to all motions and your particular kind of motion. Don't assume anything—always check.

Additional Practical Tips

- **Ask for samples**

Most likely, someone in your firm or organization has drafted a similar motion in the same jurisdiction. It can be very helpful to have a sample as a reference, though always double check everything yourself to ensure that the document is up-to-date in terms of the law and filing requirements.

- **Know your judge**

In addition to carefully consulting procedural rules, it's important to develop an understanding of the preferences of the judge who has been assigned to your case. First check for standing orders from your assigned judge. These orders may include information such as whether and when the court holds oral argument on motions, whether the judge requires parties to bring certain matters (e.g., discovery disputes) to the court's attention before filing a formal motion, whether courtesy copies (paper or email copies of electronically filed materials for the court's convenience) are requested, and more. These preferences can vary widely between judges, and it's important not to overlook this source of rules. Always ask around to gain insight as to past experiences in front of this particular judge. You may find judicial directories to be helpful sources of background information, and you can use litigation analytics to conduct research about your assigned judge and similar cases in a particular

³ See Chapter 3.A, Motions to Compel, for samples of a letter motion and responsive letter.

jurisdiction. You should take such information into account when deciding whether to file a motion and how to frame it.

- **Be cautious using Generative Artificial Intelligence**

The world of Generative Artificial Intelligence (“Gen AI”) is rapidly changing. Stories abound of courts sanctioning lawyers for using Gen AI tools unethically. See, e.g., Michael Levenson, *Judge Fines Lawyers for MyPillow Founder for Error-Filled Court Filing*, N.Y. TIMES, July 8, 2025 (detailing sanctions imposed on attorneys for filing a brief that “misquoted court cases, misrepresented principles of law and, most egregiously, cited cases that do not exist”) (internal quotation marks omitted).

If you plan to use these tools to research, draft, or revise your motion or response, first check applicable procedural and ethical rules for any relevant prohibitions or required disclosures. For example, some jurisdictions and judges expressly permit the use of Gen AI in preparing filings but require that attorneys check the material and disclose the use of Gen AI tools. As of this writing, some jurisdictions and judges prohibit the use of Gen AI tools entirely. The ABA and local jurisdictions have issued ethical guidelines that must also be consulted. (See, for example, ABA Formal Opinion 512 on the subject.) If the use of Gen AI is permitted by your jurisdiction or judge, always carefully check and validate any material prepared by Gen AI to fulfill your ethical duties to your client and the legal system and include any required disclosures along with your filing.

- **Prepare for oral argument**

Depending on the court, many motions will be decided “on the papers” (without oral argument). Review the applicable rules to determine if and how you should request oral argument on your motion. If the court does schedule oral argument on a motion, make sure you know what to expect. Is this a formal oral argument dedicated just to your motion, or is the judge hearing many quick arguments in many cases that day? Is the judge likely to be fully familiar with your case before the argument? How much time will be allotted for the argument? Educate yourself about the assigned judge (see above) so that you know what to expect ahead of time. If you can, try to observe some arguments in the judge’s courtroom before the day your argument is scheduled. Even little things like knowing how to navigate the courthouse will reduce stress the day of the argument and ensure that the argument goes as smoothly as possible.

Come prepared to the oral argument with all the motion-related papers and relevant evidence, as well as anything else from the case you might need to reference. Review all the cases that both parties have cited, and make sure you know the relevant facts and applicable law inside and out. Be prepared to

address any questions the judge might have about your case and motion. Always be respectful to the judge and opposing party, and remember that your job is to represent your client as well as possible.

What You Will Find in the Following Chapters

Throughout the life of a lawsuit, motions help move a case from complaint to trial. In the following chapters, you will read about how to make a motion to dismiss for failure to state a claim; a motion to compel discovery material and a motion for a protective order related to discovery material; a motion for summary judgment; and a motion in limine. While sometimes the names and specific requirements of these motions vary by jurisdiction, and while there are other types of requests you can make to the court in the form of a motion, these are common types of motions that you're likely to encounter as a litigator.

In each chapter, you will read about why to make the motion, when to make the motion, the relevant procedural rules, and the necessary supporting documents. You will complete exercises to help you find the procedural rules necessary to frame the substantive issue. At the end of each chapter, you will find examples of documents from a sample case, including the motion or notice of motion itself; brief in support of the motion; brief in opposition to the motion; and supporting documents for both sides. You'll also find examples of a letter motion (Chapter 3.A), reply brief (Chapter 3.B), and cross-motions (Chapter 5). The samples include questions about the relevant procedural rules, as well as annotations with procedural and persuasive tips.

All sample cases are set in federal court and thus rely on the Federal Rules of Civil Procedure. You'll find links to each state's procedural rules in the appendix. Because this book focuses on civil motion practice, all samples are from civil, not criminal, cases. All citations are formatted according to the Bluebook, but always follow local rules and practice in terms of citation format. Please note that the samples are designed to demonstrate the form and persuasive technique of common types of motions; be sure to conduct your own research as to any pertinent procedural rules and legal issues to ensure that you're relying on an up-to-date statement of the procedural rules and substantive law.

Now that you've read the introduction and learned some basic considerations, this book is designed so that you can reference the remaining chapters out of order, depending on the information you need.

Chapter 2: Motions to Dismiss for Failure to State a Claim

By Katrin C. Rowan

Learning Outcomes

1. Understand:
 - a. the bases for a Rule 12(b) motion to dismiss;
 - b. the relevant procedural rules when making or opposing a Rule 12(b)(6) motion to dismiss; and
 - c. the documents required when making or opposing a Rule 12(b)(6) motion to dismiss.
2. Be able to:
 - a. apply the relevant procedural rules when making or opposing a Rule 12(b)(6) motion to dismiss; and
 - b. draft the documents required when making or opposing a Rule 12(b)(6) motion to dismiss.

Introduction

The basic procedure for moving to dismiss a claim in federal court is set out in Federal Rule of Civil Procedure 12. See the appendix for links to each state's rules.

Instead of filing an answer to a plaintiff's complaint (see Rules 8 and 12), the defendant¹ may choose to move to dismiss the claim(s) instead. (Note that the plaintiff's complaint will state one or more legal claims to relief, some or all of which may be the basis for a motion to dismiss.)

Rule 12(b) lists seven bases on which the defendant may move to dismiss:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;

¹ For simplicity, this chapter will refer throughout to the defendant as the moving party. However, any party may move to dismiss a claim asserted against it, such as a counterclaim or crossclaim.

- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

When there is a non-frivolous argument that the court lacks subject-matter or personal jurisdiction (see 28 U.S.C. §§ 1331, 1332 and Fed. R. Civ. P. 4(k)), or that the case was filed in the improper venue (see 28 U.S.C. § 1391), or that there are defects or insufficiencies with process or service of process (see Fed. R. Civ. P. 4) or non-joinder (see Fed. R. Civ. P. 19), the defendant may move to dismiss one or more claims rather than filing an answer. See also Rule 12(g) and (h) for additional provisions on joining motions and waiving certain defenses, and note that Rule 12(h)(3) provides: “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” For more information on motions to dismiss under Rules 12(b)(1-5) and 12(b)(7), see 5B Wright & Miller, FEDERAL PRACTICE & PROCEDURE §§ 1350-53, 1359.

When there is a non-frivolous argument that even if all the factual allegations are true, there would be no relief available under the applicable law for one or more claims, the defendant may move to dismiss the claim(s) for failure to state a claim under Rule 12(b)(6). This chapter focuses on these kinds of motions.

Why Move to Dismiss under Rule 12(b)(6)

A Rule 12(b)(6) motion attacks the sufficiency of the allegations—not the truth of those allegations. Unlike a motion for summary judgment, which is generally filed later in the litigation and considers discovery material outside of the complaint, a 12(b)(6) motion is focused on the allegations themselves, before discovery has been conducted.²

Consider your litigation strategy when deciding whether to file a 12(b)(6) motion to dismiss instead of an answer, which can and should include defenses under Rules 8 and 12. A successful motion to dismiss may end the entire case or one of several claims advanced, saving your client time, money, and litigation exposure. However, if the motion prompts the plaintiff to file an amended

² Note that Rule 12(c) governs motions for judgment on the pleadings, which would be filed after the pleadings have closed (so after the defendant files its answer) but usually still early in the litigation.

complaint (see Rule 15(a), allowing the plaintiff to amend its pleading “once as a matter of course”), or if the court grants your motion and dismisses the case without prejudice (see Rule 41), allowing the plaintiff to file an amended complaint, then the plaintiff may have the opportunity to strengthen its case with a preview of your legal arguments.

When to Move to Dismiss

After the plaintiff serves a complaint, the defendant will need to decide whether to answer the complaint (with defenses) or move to dismiss one or more claims. If the defendant files an answer, the case will proceed, with further pleadings (if applicable), discovery, motion practice, and trial. If the defendant files a motion to dismiss, then the parties will brief the issue and the court will decide whether to grant or deny the motion. In general, the defendant must file the motion to dismiss within 21 days after service of the complaint, the same deadline as the answer. See Fed. R. Civ. P. 12(a), (b).

Check local rules to determine the deadline for responding to a motion to dismiss. For example, in the Western District of New York, the responding party must file a brief in opposition to the motion to dismiss within 14 days. The court may or may not request oral argument on the motion; many motions to dismiss will be decided on the briefs (without oral argument).

Procedural Rules

As you learned in your Civil Procedure class, Rule 8(a)(2) requires that the complaint contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” In the landmark decisions of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court instructed courts to evaluate not just whether the defendant was on “notice” of the plaintiff’s allegations but instead whether there is a “plausible” claim for relief.

Exercise 2-1

Question: When are factual allegations sufficient to defeat a 12(b)(6) motion according to the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*? Write two or three sentences to answer this question. You may quote or paraphrase the *Twombly* opinion.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=28#h5p-1>

Some claims and allegations require special pleading. Rule 9, “Pleading Special Matters,” outlines requirements for allegations of fraud, mistake, and conditions of mind; special damages; and other specific circumstances. Certain causes of action might require particularized pleading, so always check the requirements for each claim before drafting a complaint, answering a complaint, or moving to dismiss.

In assessing a claim on a motion to dismiss, the court assumes that all factual allegations—but not legal conclusions—are true. Therefore, the moving party should point out any legal conclusions masked as factual allegations in the complaint. The court must “draw all reasonable inferences in [the plaintiff’s] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief.” *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks and citation omitted). Based on these facts as connected to the underlying claim, the claims must be not only “conceivable” but instead “plausible.” *Twombly*, 550 U.S. at 555. Courts must use “judicial experience and common sense” in evaluating whether there is a plausible claim for relief. *Iqbal*, 556 U.S. at 679.

The motion to dismiss generally focuses only on the sufficiency of the allegations in the complaint. In addition, in assessing a motion to dismiss, courts “consider documents that are attached to or submitted with the complaint and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, and items appearing in the record of the case.” *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (citation modified); see also Fed. R. Civ. P. 10(c) (“A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”). Courts may take judicial notice of undisputed, common knowledge facts outside the complaint, such as “(1) scientific facts: for instance, when does the sun rise or set; (2) matters of geography: for instance, what are the boundaries of a state; or (3) matters of political history: for instance, who was president in 1958.” *Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997).

If the moving party attaches materials to a motion to dismiss that are outside the scope of the pleadings, the court “has discretion to either exclude these materials or convert the motion to dismiss into a motion for summary judgment.” *Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC*, 151 F. Supp. 3d 287, 291 (E.D.N.Y. 2015) (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 154 (2d Cir. 2002), *aff’d*, 670 F. App’x 731 (2d Cir. 2016)). If the court chooses to proceed under Rule 56 (summary judgment), “all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d).

Exercise 2-2

Question 1: In assessing a Rule 12(b)(6) motion to dismiss, what does a court assume about the factual allegations for a claim? Find a Supreme Court case to support your answer.

Question 2: In assessing a Rule 12(b)(6) motion to dismiss, what inferences will a court draw? Find a Court of Appeals case to support your answer.

Question 3: Which of the following is an accurate statement about the Rule 12(b)(6) procedural rules?

- A. A Rule 12(b)(6) motion to dismiss a claim will be granted if there is a plausible claim for relief. In deciding whether to grant the motion, courts must assume that the factual allegations pled in the complaint are true and will draw all reasonable inferences in the non-moving party's favor.
- B. A Rule 12(b)(6) motion to dismiss a claim will be denied if there is a plausible claim for relief. In deciding whether to grant the motion, courts must assume that the legal allegations pled in the complaint are true and will draw all reasonable inferences in the moving party's favor.
- C. A Rule 12(b)(6) motion to dismiss a claim will be granted if there is no plausible claim for relief. In deciding whether to grant the motion, courts must assume that the factual allegations pled in the complaint are true and will draw all reasonable inferences in the non-moving party's favor.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view them online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=28#h5p-4>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=28#h5p-5>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=28#h5p-6>

Supporting Documents

The defendant will file a motion or notice of motion and supporting memorandum of law (also called a brief). See Rule 7(b), which requires that motions be in writing and “state with particularity the grounds for seeking the order,” as well as the relief sought. The plaintiff will respond with a memorandum of law (brief) in opposition to the motion. Depending on local

rules, the defendant may file a reply. Always check local rules to confirm page/word limits and other formatting requirements, courtesy copies, and other details. In addition to the example documents below, you can ask your supervisor or colleague for a sample filing in the same jurisdiction, to give you an idea what this brief should look like conforming to local standards.

Because the court will view the substantive issue through the procedural lens of a motion to dismiss, the underlying arguments in the supporting and opposing briefs must be framed in accordance with this standard. For a review of how to organize and write a persuasive memorandum of law, see Nan Haynes, *Legal Writing Handbook for Clinical Students* (CALI eLangdell Press 2023).

Checklist

- ✓ Consider your litigation strategy, in terms of deciding whether to answer the complaint or move to dismiss for failure to state a claim.
- ✓ Identify the jurisdiction whose procedural rules apply, which may be federal or state.
- ✓ Find the applicable procedural rules, including the jurisdiction's pleading standard and how the court will view the factual allegations in the complaint.
- ✓ If you are in federal court, determine whether state or federal substantive law applies.
- ✓ Identify the required supporting documents.
- ✓ Review the filing rules for your jurisdiction, your local court, and for the judge assigned to your case.

Sample Documents

In the first sample, defendant Charles Martin moves to dismiss a claim alleging that he defamed plaintiff Dorothy Anderson. Martin argues that his words are protected speech as “opinions” and thus cannot be defamatory.

In the second sample, plaintiff Lucy Emmett has alleged in her complaint that the defendant school district violated her First Amendment rights when it prohibited her from speaking at a meeting without first submitting a written comment in accordance with the school district policy. The school district has moved to dismiss the claim, arguing that its enforcement of the policy complied

with relevant First Amendment requirements as a reasonable, viewpoint-neutral restriction.

In both samples, the defendant as the moving party accepts as true the factual allegations pled in the plaintiff's complaint. The defendant argues that, even if these facts are true, the plaintiff has no right to relief under governing law, and thus the court should dismiss the claim.

Sample Document 1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DOROTHY ANDERSON,

Plaintiff,

25-cv-260

v.

CHARLES MARTIN,

Defendant.

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT

Defendant, Charles Martin, respectfully requests that the Court dismiss the complaint of Plaintiff, Dorothy Anderson, for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). In support of this motion, Defendant relies on the attached memorandum of law, filed pursuant to Local Rule of Civil Procedure 7(a).

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sample Document 2

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DOROTHY ANDERSON,

Plaintiff,

25-cv-260

v.

CHARLES MARTIN,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT

This dispute arises out of a highly contentious local election for New York City Council. Displeased with her loss last November, plaintiff Dorothy Anderson now seeks to blame her former campaign manager, Charles Martin, for her failure to win a tight race. Because Martin's statement about Anderson was constitutionally protected opinion, Anderson's defamation claim must fail as a matter of law. Accordingly, Martin requests that the Court grant his motion to dismiss Anderson's complaint.³

³ Throughout the brief, notice how the substantive argument (statement is protected opinion) is connected to the procedural relief requested (motion should be granted).

STATEMENT OF FACTS⁴

Charles Martin has nearly twenty years of experience in local politics. Compl. ¶ 12. Anderson, a New York resident, is a former political candidate for New York City Council. Compl. ¶ 10. Martin, a New Jersey resident, was Anderson's campaign manager until the events at issue in this lawsuit transpired in October 2024. Compl. ¶ 14. At that point, the parties began disagreeing about Anderson's affiliation with a particular local interest group, Reform NYC. Compl. ¶ 30. Martin became disenchanted with Anderson's candidacy and resigned as her campaign manager on October 29, 2024. Compl. ¶ 34. Martin then sent an email to a group of four top advisors at Anderson's opponent's campaign, stating: "Dorothy Anderson is a traitor to the citizens of New York. She's not interested in helping anyone but herself." Compl. ¶ 36.

On Election Day 2024, Anderson did not win her race. Compl. ¶ 45. She promptly sued Martin for defamation, blaming him for her loss. Compl. ¶ 56.

ARGUMENT

THIS COURT SHOULD DISMISS THE COMPLAINT BECAUSE, BASED ON THE FACTS AS PLED, IT DOES NOT STATE A CLAIM FOR DEFAMATION.

When the plaintiff has failed to "state a claim upon which relief can be granted," the defendant may move to dismiss the complaint.⁵ Fed. R. Civ. P. 12(b)(6). In deciding the motion, the court must "draw all reasonable inferences in Plaintiff[s] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks and citations omitted). If the complaint has not stated "enough facts to state a claim to relief that is plausible on its face," the court should dismiss the complaint. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). As courts have made clear, "[b]ecause a defamation suit 'may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself,' courts should, where possible, resolve defamation actions at the pleading

⁴ Because this is a motion to dismiss, the writer must tell the story from the facts provided in the complaint, which must be taken as true at this point in the litigation. Nevertheless, the writer works with these facts to tell the story from their client's (the defendant's) point of view. For more on framing facts persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 9 and 10 (CALI eLangdell Press 2023).

⁵ Throughout this section, the writer frames the procedural standard persuasively by describing the instances in which the motion should be granted and the complaint dismissed—the procedural outcome that the defendant seeks here.

stage.” *Adelson v. Harris*, 973 F. Supp. 2d 467, 481 (S.D.N.Y. 2013) (quoting *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)), *aff’d*, 876 F.3d 413 (2d Cir. 2017).

In this diversity action,⁶ this Court will apply the forum state’s—New York’s—choice of law rules. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). New York law provides that the substantive law of the “state with the most significant relationship to the issues in dispute” should be applied. *Reeves v. Am. Broad. Cos.*, 719 F.2d 602, 605 (2d Cir. 1983) (citing *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 768 (N.Y. 1970)). Here, the parties agree that New York substantive law applies to govern this dispute.

New York’s defamation law has been developed to comply with federal constitutional requirements.⁷ See, e.g., *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1274-75 (N.Y. 1991) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)). It is axiomatic that opinions are protected by the First Amendment of the United States Constitution. *Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1167 (N.Y. 1993). As the New York Court of Appeals has made clear: “The rule to be applied may be simply stated. An expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be.” *Steinhilber v. Alphonse*, 501 N.E.2d 550, 552 (N.Y. 1986).

Therefore, a plaintiff cannot state a claim for defamation, and the lawsuit cannot proceed, if the statement at issue constitutes a “pure opinion.”⁸ See *Davis v. Boenheim*, 22 N.E.3d 999, 1003 (N.Y. 2014). To assess whether a statement constitutes a protected opinion as a matter of law, courts apply a factor-based test to determine “what the average person hearing or reading the communication would take it to mean.” *Steinhilber*, 501 N.E.2d at 553. Courts consider:

- (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full

⁶ Now that the procedural standard has been established, the writer makes clear which jurisdiction’s substantive law should be applied.

⁷The writer is now getting into a description of the substantive law that underlies this legal question, persuasively framed. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

⁸ The writer here again connects the procedural and substantive questions.

context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal [to] readers or listeners that what is being read or heard is likely to be opinion, not fact.

Mann v. Abel, 885 N.E.2d 884, 886 (N.Y. 2008) (citations omitted).

Courts typically focus on the third factor—the full context of the statement and the broader social context—in concluding that a statement constitutes protected opinion. See *Brian v. Richardson*, 660 N.E.2d 1126, 1129 (N.Y. 1995) (noting that the context-based third factor “lends both depth and difficulty to the analysis”). In assessing context, courts have repeatedly highlighted the heated rhetoric featured in political and similar contexts as a sign that readers or listeners would understand the sentiment expressed to be opinion in nature. As the New York Court of Appeals has stated in a case involving a labor dispute, in concluding that a related offensive statement constituted protected opinion, “even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole.” *Steinhilber*, 501 N.E.2d at 556 (internal quotation marks and citation omitted). See also *Mann*, 885 N.E.2d at 886 (noting the “tenor” of political comments against a town attorney in concluding that statements were nonactionable opinion); *600 W. 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 938 (N.Y. 1992) (emphasizing the public hearing forum at issue and “the skepticism a reasonable listener brings to such proceeding” in holding that the statement was protected opinion).

As for the first two factors of the test—whether the statement contains precise language that could be proven true or false—courts have consistently dismissed defamation claims consisting of hyperbolic language which a reasonable reader would recognize as constituting opinion. See, e.g., *id.* at 937 (holding that use of “colloquial and loose terms ‘smells of’ and ‘fraudulent as you can get’ . . . conveys to listeners that he has no hard facts, only generalized suspicions”); *Brian*, 660 N.E.2d at 1131 (noting “the predominant tone of the article, which was rife with rumor, speculation and seemingly tenuous inferences” and affirming dismissal of complaint); *Mann*, 885 N.E.2d at 277 (holding that “the tenor of the column, including allegations that Mann was a ‘political hatchet Mann’ who appeared to ‘pull[] the strings,’ clearly signals the reader that the piece is likely to be opinion, not fact”).

Here, Martin’s statement—hyperbolic rhetoric communicated in the context of a heated political campaign—is a protected opinion that cannot be the basis of a

defamation claim.⁹ Paramount to this case is the political context in which Martin issued his statement. A reasonable reader of the statement would recognize, by its very nature, that the dispute arose between two individuals in a hotly contested political race. As with the labor dispute at issue in *Steinhilber*, the local political scuffle in *Mann*, and the public hearing in *600 W. 115th Street*, just to name a few, the statement in this case was inextricably connected with an ongoing election.¹⁰ Such a situation is inherently heated and full of opinionated rhetoric, and a reasonable reader would interpret the statement as such.

With respect to the first two factors of the test, the language of the statement itself is imprecise and not capable of being proven true or false. Martin stated that Anderson is a “traitor,” but reasonable minds could differ as to what constitutes a “traitor”; it is not a concrete factual allegation. Additionally, Martin’s statement that Anderson is “not interested in helping anyone but herself” is impossible to prove, given that the reasonable reader does not have access to the internal thoughts of Anderson’s mind.

For all these reasons, Martin’s statement about Anderson was a constitutionally protected opinion and cannot be the basis of a defamation claim.

⁹The writer again connects the procedural and substantive standards here.

¹⁰ Here the writer uses analogical reasoning to support their argument. For more on writing analogies, see Nan Haynes, *Legal Writing for Clinical Students*, Ch. 2 (CALI eLangdell Press 2023).

CONCLUSION

As a matter of law, based on the facts as pled by Anderson that establish that Martin's statement cannot be defamatory, this Court should conclude that Anderson has failed to state a claim. Accordingly, Martin respectfully requests that the Court grant this motion and dismiss the defamation claim, with prejudice.¹¹

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

¹¹ This conclusion section again connects, for a final time, the substantive argument with the requested procedural relief.

Sample Document 3

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DOROTHY ANDERSON,

Plaintiff,

25-cv-260

v.

CHARLES MARTIN,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT

This is a case about significant harm caused to a public servant's reputation, caused by a defamatory statement with devastating impact. Because the plaintiff has satisfied the minimal pleading standards at this early stage of the litigation, this Court should deny the defendant's motion to dismiss and allow this case to proceed for a full resolution of the issue.¹²

¹² Throughout the brief, notice how the substantive argument (statement is not protected opinion) is connected to the procedural relief requested (motion should be denied).

FACTS¹³

Dorothy Anderson, a lifelong New York resident, has devoted her career to serving the residents of New York City. Compl. ¶ 8. After working for a series of non-profit agencies and elected officials, Anderson decided to run for office herself. Compl. ¶ 9. In January 2024, Anderson declared her candidacy for New York City Council and began mounting her campaign. Compl. ¶ 10. She entrusted her longtime friend and frequent collaborator, New Jersey resident Charles Martin, to serve as her campaign manager. Compl. ¶ 14.

Unfortunately, the relationship soured in October 2024 when Martin became incensed about Anderson's connections with an established local non-profit called Reform NYC. Compl. ¶ 30. Without first fully discussing his concerns with Anderson, Martin resigned as campaign manager on October 29, 2024. Compl. ¶ 34. That same day, while still sitting in the campaign office, Martin sent out an email to four top advisors at Anderson's opponent's campaign, announcing his resignation and including the statement: "Dorothy Anderson is a traitor to the citizens of New York. She's not interested in helping anyone but herself." Compl. ¶ 36.

Less than a week after Martin's statement, Anderson lost her bid for New York City Council. Compl. ¶ 45. She now seeks a remedy for the harm Martin caused to her reputation under the protections afforded by New York defamation law. Compl. ¶ 56.

ARGUMENT

THE COMPLAINT SHOULD NOT BE DISMISSED BECAUSE, DRAWING ALL REASONABLE INFERENCES IN THE PLAINTIFF'S FAVOR,¹⁴ IT STATES A CLAIM FOR DEFAMATION SINCE THE DEFENDANT'S REMARKS UTILIZED SPECIFIC LANGUAGE THAT CAN BE PROVEN FALSE.

The Federal Rules of Civil Procedure require only "a short and plain statement of the claim" in the complaint, demonstrating entitlement to relief. Fed. R. Civ. P.

¹³ In this version of the facts, the story is told from the plaintiff's perspective, working from the same facts as the defendant—those alleged in the complaint—but this time framed persuasively in favor of the plaintiff. Take a few minutes to reread the defendant's version and notice the difference.

For more on framing facts persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 9 and 10 (CALI eLangdell Press 2023).

¹⁴ See [Exercise 2-3](#) at the end of the document.

8(a)(2).¹⁵ To survive a motion to dismiss under Rule 12(b)(6), a complaint must include “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Determining whether a complaint states a claim for relief is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. Courts “must accept as true” all well-pled factual allegations in evaluating whether the plaintiff has shown “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. “A motion brought under Rule 12(b)(6) challenges only the ‘legal feasibility’ of a complaint. The test of a claim’s ‘substantive merits’ is ‘reserved for the summary judgment procedure, governed by [Rule] 56, where both parties may conduct appropriate discovery and submit the additional supporting material contemplated by that rule.’” *Fairstein v. Netflix, Inc.*, 553 F. Supp. 3d 48, 62 (S.D.N.Y. 2021) (quoting *Goel v. Bunge, Ltd.*, 820 F.3d 554, 558-59 (2d Cir. 2016)).

The parties agree that New York substantive law governs this dispute. While federal and New York law recognize the constitutional protections afforded to opinions, people are not afforded free reign in making harmful statements about others. *Davis v. Boenheim*, 22 N.E.3d 999, 1003 (N.Y. 2014). At the motion to dismiss stage, this Court need consider only whether the complaint has included “enough facts to state a claim to relief that is plausible on its face.”¹⁶ *Moraes v. White*, 571 F. Supp. 3d 77, 91 (S.D.N.Y. 2021) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In assessing whether a statement contains actionable factual allegations, courts employ a “holistic approach,” evaluating how a reasonable reader would perceive “the over-all context” of the statement “rather than sifting through a communication” word by word. *Brian v. Richardson*, 660 N.E.2d 1126, 1130 (N.Y. 1995). Courts apply a three-factor test in making this determination. *Davis*, 24 N.Y.3d at 1005. First, courts consider “whether the specific language has a precise meaning which is readily understood.” *Id.* The use of “specific[,] easily

¹⁵ Throughout this section, the writer emphasizes the minimal standard required at this early stage of the litigation. To use the procedural standard persuasively and thematically, the writer argues that the litigation should proceed to allow the plaintiff her day in court.

While both the plaintiff and defendant are working from the same rules and case law in crafting these procedural standards, they are framed very differently as an important use of persuasive technique.

¹⁶ The writer explains the procedural rule in ways that are helpful to their client’s position. For more on writing rules persuasively, see Nan Haynes, *Legal Writing for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

understood language” rather than vague or ambiguous language suggests that a reasonable reader would perceive the statement to be fact, rather than opinion. *Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1167 (N.Y. 1993). Second, courts evaluate “whether the statements are capable of being proven true or false.” *Davis*, 22 N.E.3d at 1005. The inclusion of verifiable facts as opposed to “mere, nonactionable ‘rhetorical hyperbole’ or ‘vigorous epithet[s]’” indicates a fact-based statement. *Gross*, 623 N.E.2d at 1169 (quoting *Greenbelt Publ. Assn. v. Bresler*, 398 U.S. 6, 14 (1970)).

Third, and most importantly, courts consider “whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such to signal readers or listeners that what is being read or heard is likely to be opinion, not fact.” *Davis*, 24 N.Y.3d at 1005. In evaluating this factor, courts “consider the content of the communication as a whole, its tone and apparent purpose.” *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1278 (N.Y. 1991) (citing *Steinhilber v. Alphonse*, 501 N.E.2d 550, 555 (N.Y. 1986)).

Here, all three factors weigh in favor of holding Martin’s statement to be actionable as defamatory. Martin called Anderson a “traitor” who is “not interested in helping anyone but herself.” The term “traitor” has a commonly understood meaning¹⁷: a person who has betrayed someone or something. Anderson deserves the opportunity to conduct discovery and make substantive arguments as to why this statement is false and thus defamatory. Similarly, Anderson can demonstrate that she is indeed interested in helping others, hence her run for political office. The mere fact that the statement was made in the context of a political campaign does not insulate it from a defamation claim, and no court has ever so held.

Because a reasonable reader would conclude that Martin used specific language that could be proven false, Anderson has pled a “plausible” defamation claim that should survive this motion to dismiss.¹⁸

¹⁷ Notice that the parties addressed the factors in different orders in their briefs, based on which arguments are strongest.

¹⁸ The writer here reminds the reader of the applicable procedural standard.

CONCLUSION

Anderson has successfully stated a claim for defamation because Martin's statement is not a "pure opinion." Accordingly, the Court should deny the motion to dismiss and allow this lawsuit to proceed.¹⁹

Respectfully submitted,

Attorney Signature

Attorney Name

Address

Email address

Phone number

Date

¹⁹ In the conclusion section, we see a final connection between the substantive question and the procedural relief requested.

Exercise 2-3

Question: Why does the writer use the phrase “drawing all reasonable inferences in the plaintiff’s favor” in their argument? Choose the best answer.

- A. Because it supports their client’s position.
- B. Because courts must make all reasonable inferences in the non-moving party’s favor when deciding a Rule 12(b)(6) motion.
- C. Because courts resolve factual disputes on a Rule 12(b)(6) motion.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=28#h5p-7>

Sample Document 4

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LUCY EMMETT,

Plaintiff,

25-cv-62

v.

SUNNYDALE UNIFIED SCHOOL DISTRICT,

Defendant.

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT

Defendant, Sunnydale Unified School District, respectfully requests that the Court dismiss the complaint of Plaintiff, Lucy Emmett, for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). In support of this motion, Defendant relies on the attached memorandum of law and declaration with exhibit, filed pursuant to Local Rule of Civil Procedure 7.1(a).

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sample Document 5

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LUCY EMMETT,

25-cv-62

Plaintiff,

v.

SUNNYDALE UNIFIED SCHOOL DISTRICT,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT

This case involves a school district's policy to require community members to submit written comments before speaking orally at district meetings. Because this reasonable, viewpoint-neutral policy complies with constitutional requirements, this Court should grant the motion and dismiss the complaint with prejudice.²⁰

²⁰ Notice how the writer frames the case at the outset in a favorable way for their client. Compare this brief statement to the opening portion of the plaintiff's brief to see the different story told there.

STATEMENT OF FACTS²¹

During the 2023-2024 school year, defendant Sunnydale Unified School District (the “District”) began exploring possible curricular changes to its art and music programs, in response to a looming budget crisis. Compl. ¶ 15. To ensure transparency, the District held a series of meetings at various schools within the District, *id.* ¶ 16, that were conducted in accordance with its publicly available policy on school-related meetings (the “Policy”), attached to the Declaration of Luke Lawson as Exhibit A.

The Policy provides that any interested community members, including but not limited to parents and other caregivers, must submit a written comment 24 hours or longer before a scheduled meeting, in order to be permitted to speak at the meeting. Ex. A ¶ 3. For District employees, including but not limited to teachers, no such requirement exists, and they may speak at a meeting without submitting a written comment ahead of time. *Id.* ¶ 4. The Policy provides: “These rules are designed to ensure that the District has an opportunity to thoughtfully consider community feedback, questions, and concerns in advance of a meeting and facilitate the orderly functioning of the meeting.” *Id.* ¶ 5.

On March 13, 2024, the District held a meeting at Sunnydale Elementary to discuss the proposed curricular changes. Compl. ¶ 17. Plaintiff Lucy Emmett, a parent of a child at Sunnydale Elementary, who is not employed by the District, did not submit a written comment in advance of the meeting. *Id.* ¶ 19. Nevertheless, Ms. Emmett attended the meeting and attempted to contribute a spoken comment during the meeting. *Id.* ¶ 20. In accordance with the District’s Policy requiring the submission of a written comment before a meeting, the District administrators running the meeting did not permit her to speak. *Id.* ¶ 24. This lawsuit followed.

ARGUMENT

This Court should dismiss Ms. Emmett’s complaint with prejudice, because the facts as pled establish that the District did not violate her First Amendment

²¹ Although the defendant must rely on the facts as pled in the plaintiff’s complaint (and the policy at issue in this case, which is a publicly available document), the writer uses persuasive techniques to tell the story in a compelling way. For more on framing facts persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 9 and 10 (CALI eLangdell Press 2023).

rights. Rather, the District was well within constitutional parameters in establishing and following its Policy to ensure orderly meetings.

When a plaintiff has failed to “state a claim upon which relief can be granted,” a defendant may move to dismiss the complaint.²² Fed. R. Civ. P. 12(b)(6). In deciding the motion, the court must “draw all reasonable inferences in Plaintiff[s] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief.”

Faber v. Metro. Life Ins. Co., 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks and citations omitted). If the complaint has not stated “enough facts to state a claim to relief that is plausible on its face,” the court should dismiss the complaint. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In deciding a Rule 12(b)(6) motion to dismiss, the court should consider “facts stated on the face of the complaint, documents appended to the complaint or incorporated in the complaint by reference, matters of which judicial notice may be taken, . . . [and] documents not expressly incorporated by reference in the complaint that are nevertheless integral to the complaint.” *Clark v. Hanley*, 89 F.4th 78, 93 (2d Cir. 2023) (citation modified). In this case, Ms. Emmett extensively references the Policy in her complaint, and the Policy is publicly available on the District’s official website. Thus, this Court should deem the Policy as integral to the complaint, of which it can also take judicial notice, and thus consider the Policy when deciding this motion to dismiss. See, e.g., *Missere v. Gross*, 826 F. Supp. 2d 542, 553 (S.D.N.Y. 2011) (noting that a district court may “take judicial notice of all documents in the public record”).

The meeting at issue was a “limited public forum” for purposes of the First Amendment analysis, which is “where the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.” *Hotel Emps. & Rest. Emps. Union, Loc. 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dep’t of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002). The government entity may restrict speaker identity, provided that these restrictions are²³ (1) “reasonable in light of the purpose served by the forum” and (2) “are viewpoint neutral.” *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 211-12 (2d Cir. 1997) (citation modified). In limited public fora, “government entities are permitted to restrict the

²² Throughout this section, the writer frames the procedural standard persuasively by describing the instances in which the motion should be granted and the complaint dismissed—the procedural outcome that the defendant seeks here. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

²³ Notice how the framing of this rule is both positive (the government may do this) and broad (making it seem like these two criteria are not difficult to meet).

form or manner of speech offered by members of the public, even if such speech addresses the topic or agenda of that forum. Such restrictions on the form of speech are not subject to strict scrutiny; courts need only assess whether the restrictions are reasonable and viewpoint neutral.” *Tyler v. City of Kingston*, 74 F.4th 57, 63 (2d Cir. 2023).

A. The District imposed reasonable limitations in accordance with its Policy in light of the District’s interest in maintaining order at its meetings.

First, the restrictions placed on the District meeting pertaining to possible curricular changes were eminently reasonable. The reasonableness inquiry “turns on the particular purpose and characteristics of the forum and the extent to which the restrictions on speech are reasonably related to maintaining the environment the government intended to create in that forum.” *Id.* (citation modified).

Importantly, the First Amendment does not require that the restriction implemented be the *most* or the *only* reasonable restriction,²⁴ but instead “simply consistent²⁵ with the government’s legitimate interest in preserving the property for the use to which it is lawfully dedicated.” *Id.* (citation modified). Courts consider whether there are “alternative channels” of communication, which weigh in favor of a finding of reasonableness.²⁶ *Id.*

Here, the District has a strong interest in meaningfully receiving feedback and maintaining order at its meetings. See Ex. A ¶ 5 (providing that the Policy is “designed to ensure that the District has an opportunity to thoughtfully consider community feedback, questions, and concerns in advance of a meeting and facilitate the orderly functioning of the meeting”). Indeed, “many courts have recognized that preventing disruptive activity is a legitimate and common-sense government interest that can justify restrictions on speech in limited public fora.” *Tyler*, 74 F.4th at 64. Interested community members have the opportunity to submit written comments—and then the opportunity to speak at the meeting, once they comply with this requirement—which is an effective “alternative channel” for expressing their thoughts. The Second Circuit has expressly approved of such provisions:

²⁴ The writer here selectively uses emphasis to draw attention to these terms.

²⁵ Notice how the writer tries to make these rules seem easy to satisfy, since that angle supports their argument.

²⁶ The writer here frames the rule in a favorable direction.

Suppose [a governmental body] adopted rules permitting meeting attendees to contribute only by way of written remarks or requiring meeting attendees to limit their verbal remarks to a fixed amount of time. Such restrictions would limit the form or manner of speech, but plainly they would be upheld as reasonable in a limited public forum, and they would not be subject to strict scrutiny.

Id. at 63. Ms. Emmett had the opportunity to share her speech through a written comment (and then, at the meeting) and chose not to do so.

While the Policy requiring prior written comments does not apply to District employees, it is reasonable to treat these two groups of people (District employees vs. non-District employees) separately.²⁷ District employees may already have access to the information required to make a public comment, and employees are familiar with the requirements of District meetings. Courts have approved of such distinctions in similar cases. See, e.g., *Mallett v. Town of Huntington*, 799 F. Supp. 3d 117, 126 (E.D.N.Y. 2025) (holding that it was reasonable to restrict speakers to lawyers at a zoning board hearing so the meeting could proceed in “an orderly and effective fashion in light of these complicated legal issues and the legendary misinformation”) (citation modified).

Therefore, under established law, this Court should conclude that the District’s actions in accordance with its Policy were reasonable.

B. The District’s actions in accordance with its Policy were viewpoint neutral, because it drew no distinction based on perspective.

Second, the restrictions are also viewpoint neutral. Courts conclude that any restrictions on speech are viewpoint neutral when policies or practices “draw[] no distinction between groups based on their message or perspective.”²⁸ *Christian Legal Soc’y Chapter of the Univ of. Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 694 (2010). For a restriction to be viewpoint neutral, the government may not target “particular views taken by speakers on a subject.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

²⁷ The writer here explores the counter-analysis. Notice how the plaintiff’s brief takes a very different approach to this issue. For more on writing rebuttals assertively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 5 (CALI eLangdell Press 2023).

²⁸ Again, these rules are framed in a positive light in the direction that the writer is urging the court to conclude.

Here, the District's Policy, and its enforcement of its Policy at the March 13, 2024 meeting, provides a textbook example of a viewpoint-neutral restriction. The Policy requires non-District employees to submit a written comment prior to speaking at a meeting. The content of that comment is irrelevant. Indeed, as Ms. Emmett's complaint admits,²⁹ District employees and non-employees alike spoke both in support of and in opposition to the proposed curricular changes at the meeting. Compl. ¶ 26. The District's Policy requiring a prior written comment before a non-District employee could speak at the meeting was enforced regardless of view on the proposed changes. Therefore, the District's Policy and the implementation of this Policy at the March 13, 2024 meeting was viewpoint neutral.

CONCLUSION

For these reasons, the District respectfully requests that the Court grant its motion and dismiss Ms. Emmett's complaint with prejudice.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

²⁹ See [Exercise 2-4](#) at the end of the document.

Exercise 2-4

Question: Regarding the last paragraph of the argument section in defendant's memorandum of law in support of the motion to dismiss the complaint, why is the writer focusing on their opponent's pleading in addressing this legal issue?

- A. The allegation in the complaint supports their point.
- B. The moving party must frame their argument based on the well-pled facts in the complaint.
- C. The moving party wanted to point out this admission in the complaint.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=28#h5p-8>

Sample Document 6

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LUCY EMMETT,

Plaintiff,

25-cv-62

v.

SUNNYDALE UNIFIED SCHOOL DISTRICT,

Defendant.

DECLARATION OF LUKE LAWSON, ESQ. IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

I, Luke Lawson, an attorney admitted to practice in the United States District Court for the Southern District of New York, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746,³⁰ as follows:

1. This declaration and attached exhibit are submitted in support of defendant Sunnydale Unified School District's (the "District") motion to dismiss plaintiff Lucy Emmett's complaint in the above-captioned matter.
2. I am a partner in the law firm of Smith and Howe LLP, which represents the District in this matter; therefore, I am fully familiar with the facts of this case.

³⁰ Always check local rules to see what kinds of supporting documents you can or must file. In the Southern District of New York, declarations under penalty of perjury are an acceptable substitute for notarized affidavits. S.D.N.Y. Civ. R. 1.9.

3. The District has developed a policy on school-related meetings (the "Policy"), effective August 30, 2022.
4. At all times relevant to this action, this Policy has been publicly available on the District's website at [link] and accessible in paper form by request at the District's offices.
5. A copy of the Policy is attached to this declaration as Exhibit A.
6. For the reasons set forth in the District's motion to dismiss, the District respectfully requests that the Court grant its motion and dismiss the plaintiff's complaint.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sample Document 7

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LUCY EMMETT,

Plaintiff,

25-cv-62

v.

SUNNYDALE UNIFIED SCHOOL DISTRICT,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO DISMISS COMPLAINT

This case involves one of the most fundamental rights guaranteed by the United States Constitution: the right to free speech.³¹ Due to a nonsensical policy that restricts the rights of parents and other interested parties from speaking freely about matters that affect their children, a parent was denied her right to address a critical issue concerning her child's education. Because this restriction violated the parent's constitutional rights, the Court should deny the motion to dismiss and allow this lawsuit to proceed for a full resolution of the important issues presented.

³¹ Compare this opening section with the defendant's brief to see the different framing of this case.

STATEMENT OF FACTS³²

Beginning in fall 2023, defendant Sunnydale Unified School District (the “District”) publicized its efforts to cut student access to art and music programs throughout the District. Compl. ¶ 15. Many parents expressed concerns about these cuts at a series of meetings that the District held throughout the 2023-2024 school year. *Id.* ¶ 16. At these meetings, the District enforced its policy requiring parents and other caregivers to submit a written comment 24 hours or longer before a meeting (the “Policy”). Ex. A ¶ 3; Compl. ¶ 24. The Policy does not apply to teachers or other District employees. Ex. A ¶ 4.

Plaintiff Lucy Emmett is the mother of a child at Sunnydale Elementary and active in the school’s parent-teacher organization. Compl. ¶ 14. Ms. Emmett attended a meeting at the school on March 13, 2024 to share her concerns about the planned cuts to her child’s education. *Id.* ¶¶ 17, 20. However, she was not permitted to speak. *Id.* ¶ 24. Relying on the Policy that requires parents—but not teachers or other District employees—to submit written comments before a meeting in order to be able to speak at the meeting, District administrators refused to allow Ms. Emmett to share her concerns at the meeting. *Id.* Ms. Emmett then brought this action.

ARGUMENT

The³³ Federal Rules of Civil Procedure require only “a short and plain statement of the claim” in the complaint, demonstrating entitlement to relief. Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss under Rule 12(b)(6), a complaint must include “factual content that allows the court to draw the reasonable inference

³² Even though the parties are working from the same facts - those pled in the complaint - notice how the stories are framed differently (though both fairly).

For example, the defendant’s brief describes “curricular changes,” while the plaintiff’s brief focuses on “cuts” to certain programming. The plaintiff’s brief also foregrounds negative reaction to the proposed cuts early in this section.

For more on framing facts persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 9 and 10 (CALI eLangdell Press 2023).

³³ Throughout this section, the writer emphasizes the minimal standard required at this early stage of the litigation. To use the procedural standard persuasively and thematically, the writer argues that the litigation should proceed to allow the plaintiff her day in court.

While both the plaintiff and defendant are working from the same rules and case law in crafting these procedural standards, they are framed very differently as an important use of persuasive technique.

that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts “must accept as true” all well-pled factual allegations in evaluating whether the plaintiff has shown “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678.

Here, the District’s restrictions on speaking at the meeting—on the basis of District employees versus non-employees—is a violation of Ms. Emmett’s constitutional rights. Courts have made clear that governmental bodies may not create and enforce such limits if these restrictions are not reasonable and are not viewpoint neutral.³⁴ *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 211-12 (2d Cir. 1997). Because the District’s Policy is not reasonable and is not viewpoint neutral, this Court should deny the District’s motion to dismiss and allow this lawsuit to proceed.

- A. The District’s Policy requiring advance submission of written comments is unreasonable, as it furthers no logical purpose and discriminates between groups of people.

In assessing the reasonableness of a restriction on speech, courts evaluate the “particular purpose and characteristics of the forum and the extent to which the restrictions on speech are reasonably related to maintaining the environment the government intended to create in that forum.” *Tyler v. City of Kingston*, 74 F.4th 57, 63 (2d Cir. 2023) (citation modified). While the government has a “legitimate interest in preserving the property for the use to which it is lawfully dedicated,” it must provide sufficient “alternative channels” of communication if restrictions are in place. *Id.* Importantly, “once [the government] allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre.” *Tyler*, 74 F.4th at 61 (citation modified).

Here, while the District has an interest in the orderly functioning of its meetings, there is simply no indication that the Policy at issue furthers this interest. Concerned community members are permitted to speak at meetings if they provide a written comment ahead of time. Community members could certainly cause a disruption at the meeting even if they submitted a written comment before the meeting. Requiring written comments is not a sufficient “alternative channel” of communication because people should be able to speak in the moment to respond to other comments made at the meeting.

³⁴ Notice how the framing of this rule is negative (focusing on what governmental bodies may not do), as opposed to the defendant’s positive framing. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

Moreover, the Policy discriminates between District and non-District employees, which is unreasonable. Although the District relies on a recent case that approved of a distinction between concerned community members and attorneys, the rationale the court relied upon in that case is inapposite here.³⁵ See *Mallett v. Town of Huntington*, 799 F. Supp. 3d 117, 126 (E.D.N.Y. 2025). *Mallett* involved a zoning board hearing that featured “complicated legal issues” and a “novel issue of law.” *Id.* No such complicated, novel, or specialized issues exist here that would justify this distinction between District and non-District employees. Instead, parents, caregivers, and other concerned community members were deprived of their opportunity to adequately express their views on the proposed cuts to the District’s art and music programming. Thus, the restriction on speech is unreasonable.

- B. The District’s refusal to allow Ms. Emmett to speak at the meeting was not viewpoint neutral, since the Policy discriminated against speakers on the basis of their employment status.

It is axiomatic that the government may not discriminate against speakers based on their views.³⁶ See, e.g., *Christian Legal Soc’y Chapter of the Univ of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 694 (2010); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp. Rels. Comm’n*, 429 U.S. 167, 175-76 (1976). Yet that is precisely what the District has done here. Nearly 75 percent of the non-District employees who submitted written comments prior to the meeting at issue were opposed to the curricular cuts. Compl. ¶ 25. At the meeting itself, approximately half of the District employees who spoke—unencumbered by the prior written comment requirement—supported the cuts. *Id.* Given this discrepancy, the distinction between the two groups of people is functionally viewpoint based. At this early stage in the litigation, the Court should deny the motion to dismiss and permit discovery for further investigation of the District’s viewpoint-based distinction.³⁷

³⁵ The writer here explores the counter-analysis. Notice how the plaintiff’s brief takes a very different approach to this issue. For more on writing rebuttals assertively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 5 (CALI eLangdell Press 2023).

³⁶ Notice how these rules are framed negatively--what the government may not do--to help further the writer’s argument and desired outcome.

³⁷ The writer here emphasizes the procedural posture of the legal question to persuade the court to allow further factual development before deciding the legal issue.

CONCLUSION

Accordingly, Ms. Emmett respectfully requests that the Court deny the District's motion and allow her to proceed with her First Amendment claim.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Coming Up Next

Once any motion to dismiss or motion for judgment on the pleadings has been denied, or if the plaintiff has successfully filed an amended complaint, and the pleadings are complete, the parties provide initial disclosures and undertake discovery. Discovery motions are the subject of the next chapter.

Chapter 3: Discovery Motions

Introduction

Once any motion to dismiss or motion for judgment on the pleadings has been decided and the pleadings are complete, the parties must confer and develop a discovery plan under Rule 26(f) and exchange initial disclosures under Rule 26(a).¹ The parties then undertake discovery.

Title V of the Federal Rules of Civil Procedure, Rules 26-37, govern discovery, including depositions, interrogatories, document requests, physical and mental examinations, and requests for admission. For a general overview of the discovery rules and processes, see the CALI lessons on these topics. The timing and extent of discovery will be set by the judge in the scheduling order issued pursuant to Rule 16. Most states have similar approaches; see the appendix for links to each state's rules.

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).

“Information is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Relevance is a matter of degree, and the standard is applied more liberally in discovery than it is at trial.” *N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc.*, 325 F.R.D. 36, 47 (E.D.N.Y. 2018) (citation omitted). In assessing proportionality, courts balance the considerations identified in Rule 26(b)(1) (see above). Thus, be prepared with specific information, including financial figures, to argue about the relative costs and importance of the requested discovery material. Note that information “need not be admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b)(1).

¹ Rule 26(a)(1)(B) provides that certain kinds of proceedings are exempt from the initial disclosure requirement.

Exercise 3-1

Question: What material is relevant for purposes of discovery under Rule 26(b)(1)?

- A. Relevant material under Rule 26(b)(1) is strictly confined to evidence that is admissible at trial.
- B. Relevant material includes any information a party unilaterally believes might help their case, regardless of whether it relates to a claim or defense.
- C. Relevant material is construed relatively liberally and includes information bearing on any claim or defense.
- D. Relevant material includes only information that is essential to proving or disproving the elements of a cause of action

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=146#h5p-9>

Frequently, conflict will develop during discovery. For example, a party may refuse to answer (or fully answer) an interrogatory or request for admission; refuse to produce certain documents or other discovery materials; or fail to appear at a deposition or refuse to answer certain questions at a deposition. Parties may also fail to timely comply with any of these requests. When these disputes arise and the parties are unable to resolve the conflict themselves, the party seeking discovery may seek an order to compel discovery, which is the subject of Chapter 3A.

A conflict may also develop when one party uses discovery to what the other party perceives as an effort to annoy, embarrass, oppress, or unduly burden. In this event, if the parties are unable to resolve the conflict themselves, the party from whom discovery is sought may seek an order of protection, which is the subject of Chapter 3B.

A discovery dispute can arise with a non-party, such as the sample in Chapter 3B. For example, a non-party may refuse to produce documents in response to a subpoena. Rule 37(a)(2) requires that “[a] motion for an order to a nonparty must be made in the court where the discovery is or will be taken” and Rule 26(c)(1) provides that “any person from whom discovery is sought may move for a protective order in the court where the action is pending” or where a

deposition will be taken. See *also* Fed. R. Civ. P. 24 (governing intervention); Fed. R. Civ. P. 45 (governing subpoenas).

Discovery-related disputes are highly fact- and context-specific, and resolution is subject to the court's discretion. "A trial court enjoys wide discretion in its handling of pre-trial discovery, and its rulings with regard to discovery are reversed only upon a clear showing of an abuse of discretion." *In re DG Acquisition Corp*, 151 F.3d 75, 79 (2d Cir. 1998) (citation omitted).

Chapter 3A: Motions to Compel

By Katrin C. Rowan

Learning Outcomes

1. Understand:
 - a. why and when to file a motion to compel;
 - b. the relevant procedural rules when making or opposing a motion to compel; and
 - c. the documents required when making or opposing a motion to compel.

2. Be able to:
 - a. apply the relevant procedural rules when making or opposing a motion to compel; and
 - b. draft the documents required when making or opposing a motion to compel.

Introduction

In the event of a discovery-related conflict, the party seeking discovery may move to compel discovery from another party under Rule 37.¹ (See the appendix for links to each state's rules.) However, because Rule 37 requires that parties first attempt to resolve the conflict themselves—and provides for attorney's fees to the prevailing party—these motions should be approached with caution. Many judges prefer that the parties sort out discovery disputes on their own and may look unfavorably on parties that cannot resolve the issue without judicial intervention. Therefore, you must exercise excellent judgment in bringing such disputes to the court's attention.

¹ For more information about compelling discovery from non-parties through subpoenas, see Rule 45.

Why Move to Compel

If a party has issued a discovery request to which the opposing party has objected, the parties must then confer to attempt to resolve the dispute. Fed. R. Civ. P. 37(a)(1). If the parties are unable to resolve the dispute, Rule 37 provides a mechanism by which to bring this dispute to the court's attention for resolution.² The party seeking the discovery will need to argue that the discovery sought is relevant and proportional under Rule 26(b)(1).

When to File a Motion to Compel

The timing of a motion to compel is governed by the court's Rule 16 scheduling order, which sets forth discovery deadlines for a particular case, rather than Rule 37 itself. Generally, a motion to compel should be made before the close of discovery, absent good cause. *See, e.g., Gucci Am., Inc. v. Guess?, Inc.*, 790 F. Supp. 2d 136, 139-40 (S.D.N.Y. 2011). Always check local rules and standing orders to see if your jurisdiction or judge requires the motion to be filed within a certain timeframe.

Procedural Rules

Federal Rule of Civil Procedure 37(a) governs motions seeking an order compelling discovery. The federal rule includes a variety of provisions specific to different forms of discovery, as well as required disclosures. Very importantly, Rule 37 requires that parties to attempt to resolve the discovery-related conflict in good faith, without involving the court, before resorting to a motion to compel. Rule 37(a)(1) provides that:

On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification 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

² If, rather than seeking to compel discovery, your client seeks to not comply with a discovery request, you should consider filing a motion for a protective order—the subject of the next chapter.

action.

Local rules may impose additional requirements. Some courts may require a letter, a letter motion,³ or telephone or in-person conference, either before or instead of a formal motion. In addition to local rules and standing orders, the Rule 16 scheduling order may provide information about how a judge prefers to handle discovery-related issues. See Fed. R. Civ. P. 16(b)(3)(A)(v) (providing that the court may “direct that before moving for an order relating to discovery, the movant must request a conference with the court”). Accordingly, you should carefully research the applicable rules and orders and develop an understanding of your judge’s preferences before involving the court.

Exercise 3A-1

Question: Which E.D.N.Y. local rule relates to motions to compel, and what does it provide?

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=162#h5p-10>

If the discovery dispute remains unresolved, Rule 37 identifies specific motions that a party may file to compel disclosure or discovery:

- A. *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.
- B. *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:
 - i. a deponent fails to answer a question asked under Rule 30 or 31;
 - ii. a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

³ A letter motion is a request, just like a formal motion, but framed instead as a letter to the court, cc’ing opposing counsel. Follow local rules and judicial preferences as to whether this letter motion should be filed or simply mailed, emailed, etc. to judicial chambers. See the samples at the end of this chapter for examples of a letter motion and response.

- iii. a party fails to answer an interrogatory submitted under Rule 33; or
- iv. a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

C. *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

Fed. R. Civ. P. 37(a)(3). For purposes of this rule, “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” Fed. R. Civ. P. 37(a)(4).

Carefully research the rules in your jurisdiction to assess which party has the burden in a discovery-related dispute. Generally, the party moving to compel “bears the initial burden of demonstrating relevance and proportionality.” *N.Y. Times Co. v. Microsoft Corp.*, 757 F. Supp. 3d 594, 597 (S.D.N.Y. 2024) (citation omitted). Once the requesting party has made a *prima facie* showing of relevance, “it is up to the responding party to justify curtailing discovery.” *N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc.*, 325 F.R.D. 36, 48 (E.D.N.Y. 2018). “However, general and conclusory objections as to relevance, overbreadth, or burden are insufficient to exclude discovery of requested information. Rather, a party resisting discovery has the burden of showing specifically how, despite the broad and liberal construction afforded the federal discovery rules, [the requested discovery material] is not relevant or how each question is overly broad, burdensome or oppressive.” *Id.* (citation modified).

Parties must proceed carefully in bringing discovery-related disputes to the court’s attention, not only to avoid aggravating the judge, but also to avoid the imposition of attorney’s fees and costs. Rule 37(a)(5) requires the court to award “reasonable expenses,” including attorney’s fees, to the party that prevails on a motion to compel, under certain circumstances. Note also that Rule 37(b) provides for sanctions for failure to comply with a discovery-related court order.⁴

⁴ Rule 37 also outlines remedies for failure to disclose, supplement a response, or admit information (Fed. R. Civ. P. 37(c)); failure to attend a deposition, answer interrogatories, or respond to an inspection request (Fed. R. Civ. P. 37(d)); failure to preserve electronically stored information (Fed. R. Civ. P. 37(e)); or failure to participate in the development of the discovery plan (Fed. R. Civ. P. 37(f)).

Supporting Documents

A motion to compel should include the motion or notice of motion itself; supporting brief (memorandum of law); attorney declarations or other evidence related to the discovery sought and nature of the dispute; a certification that the parties attempted in good faith to first resolve the dispute without involving the court; and a request for attorney's fees. For a review of how to organize and write a persuasive memorandum of law, see Nan Haynes, *Legal Writing Handbook for Clinical Students* (CALI eLangdell Press 2023).

Since requirements for discovery-related filings vary significantly among jurisdictions, carefully check local rules and standing orders to determine the content and form of the documents required for this kind of motion. You can ask your supervisor or colleague for a sample filing in the same jurisdiction, to give you an idea what these documents should look like conforming to local standards.

Checklist

To Determine Whether to Move to Compel in Federal Court

- ✓ You have issued a proper discovery request (i.e., that is timely, specific, relevant, and proportional to the needs of the case).
- ✓ The other party has opposed the request.
- ✓ The parties have conferred about the issue in good faith, or you have attempted to do so with opposing counsel, as required by Rule 37(a)(1).
- ✓ You can make a well-founded argument that the discovery sought is relevant to any party's claim or defense and proportional to the needs of the case per Rule 26(b)(1).
- ✓ You have made a strategic decision that the discovery sought is worth seeking judicial intervention and risking the imposition of attorney's fees.

When Moving to Compel in Federal Court

- ✓ Check the local rules, judicial standing orders, and Rule 16 scheduling order to identify requirements or preferences for bringing the dispute to the

court's attention. For example, does the court require that you first request a conference with the court before filing a motion? Does the court require a letter motion or formal motion?

√ In addition to a motion and brief, attach supporting documents as necessary, such as affidavits/declarations/affirmations (including about the good faith effort to confer with opposing counsel) with the pertinent discovery request and other related materials.

Sample Documents

The following sample is a letter motion (and response), rather than a full formal brief, as required by the local rules in the Eastern District of New York. In addition to illustrating what a letter motion might look like, this sample demonstrates the importance of checking local rules, to ensure that your submission complies with all applicable procedural rules.

Sample Document 1

[Firm letterhead]

Hon. Lucy Grimsby, U.S.D.J.⁵
United States District Court for the Eastern District of New York
225 Cadman Plaza E
Brooklyn, NY 11201

[Date]

Re: Alexander Reynolds v. Elizabeth Seabury, No. 25-cv-103

Dear Judge Grimsby:

I write regarding a discovery issue that has arisen in this matter, *Reynolds v. Seabury*, No. 25-cv-103. Pursuant to Federal Rule of Civil Procedure 37(a)(1), I certify⁶ that the parties attempted in good faith to settle this dispute before bringing this matter to the Court's attention. Specifically, I called [Lawyer Name], counsel for defendant, on [date], to discuss the matter, and I sent a follow-up email on [date]. I raised the arguments contained within this letter, but counsel still declined to supply the requested discovery material.

As the Court is aware, plaintiff Alexander Reynolds has filed a copyright infringement lawsuit against defendant Elizabeth Seabury, related to Seabury's

⁵ In lieu of a formal motion, the local rules for the Eastern District of New York require that the party notify the court of the discovery dispute by letter motion requesting a pre-discovery conference. E.D.N.Y. Civ. R. 37.2.

Note that Rule 37.2 expressly provides that individual judges may set other procedures, which is an important reminder to always check standing orders in addition to local rules. Local rules and judicial standing orders change regularly, so always carefully consult the most up-to-date versions of these rules before proceeding.

⁶ If filing a formal motion rather than submitting a letter motion to the court, you may instead attach a formal certification and/or attorney declaration, depending on local requirements. You may also need or choose to submit copies of any related correspondence between the attorneys.

use of Reynolds' copyrighted photograph in her mural design. Seabury has raised the affirmative defense of fair use, 17 U.S.C. § 107.

Per the Court's scheduling order, the parties are in the process of conducting discovery. Reynolds has propounded written discovery, including interrogatories and requests for production of documents. Seabury has objected to certain of these requests, including portions of Interrogatory #13 and Request for Production of Documents #6, reproduced⁷ below:

Interrogatory #13: Identify any profits directly or indirectly made from the commission of the "Park Slope mural" and the "Brooklyn Heights mural."

Request for Production of Documents #6: All documents that relate to the answer supplied in Interrogatory #13.

Both queries relate to profits that Seabury has made from the mural that featured Reynolds' photograph (the "Park Slope mural") as well as a second mural (the "Brooklyn Heights mural"), which did not feature Reynolds' photo but was apparently inspired by it. However, Seabury has objected to the Brooklyn Heights mural portions of these discovery requests on the grounds that they are "overly broad and not relevant to the claims or defenses at issue in this litigation." Because Reynolds is entitled to this relevant discovery material, he requests a discovery conference to resolve this dispute, so that Seabury will respond to these reasonable discovery requests.

The federal rules provide that parties may undertake discovery⁸ into "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "Rule 26(b)(1) recognizes that information is discoverable . . . if it is relevant to any party's claim or defense and is proportional to the needs of the case." *Sabhnani v. Mirage Brands, LLC*, No. 22-cv-00936, 2023 WL 1451563, at *1 (E.D.N.Y. Feb.

⁷ Depending on local rules, judicial preferences, and the scope of the dispute, you may also attach the requests themselves, as well as other relevant information. Per local rules, the verbatim text of the discovery request is set forth in the document. See E.D.N.Y. Civ. R. 37.1.

⁸ The rule is stated persuasively by framing it positively and broadly. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

1, 2023) (internal quotation marks and citation omitted). Rule 26 makes clear that such evidence need not be admissible at trial in order to be discoverable. Fed. R. Civ. P. 26(b)(1).

These requests are relevant⁹ to Reynolds’ argument against Seabury’s fair use defense. The fair use statute outlines four factors for the Court to consider in determining whether a defendant has fairly used the plaintiff’s copyrighted material, including “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Seabury does not dispute that she utilized Reynolds’ photograph in her Park Slope mural, and she has not objected to this portion of the discovery requests. However, these queries are also relevant—and permissible under the broad discovery rules—because the Brooklyn Heights mural is quite similar in nature to the Park Slope mural.

Specifically, Reynolds’ photograph features two children posed peacefully in an apple orchard, symbolizing childhood innocence. Seabury’s Park Slope mural features portions of this photograph, but now in an apocalyptic setting designed to draw viewers’ attention to climate change. Just months after creating the Park Slope mural, Seabury also completed the Brooklyn Heights mural, which does not directly incorporate Reynolds’ photograph but features different children picking strawberries, with similar features as the Park Slope mural.

Reynolds argues, under the relevant portion of the fair use test, that Seabury’s murals have usurped the market for his photograph (and thus that Seabury’s Park Slope mural is not fair use and instead copyright infringement). To develop this argument, Reynolds seeks access to discovery material, including interrogatory answers and document production, about Seabury’s mural-related profits. Given that only two murals are at issue, these requests are not unduly burdensome. Nor are they overly broad, since the requests relate directly to one of the statutory factors. Indeed, these requests are directly relevant to Seabury’s fair use defense.

Accordingly, plaintiff Alexander Reynolds respectfully requests that the Court schedule a discovery conference to resolve this dispute and ultimately enter an Order directing defendant Elizabeth Seabury to fully answer Interrogatory #13 and supply all related documents as requested in Request for Production of

⁹ Here, the writer frames the dispute in terms of relevance—with reference to the underlying substantive law as well as general discovery standards—which is how the court will decide whether the party is entitled to production of these discovery materials.

Documents #6, as well as an award of reasonable attorney's fees and costs under Federal Rule of Civil Procedure 37(a)(5).

Respectfully,

Attorney Signature
Attorney Name
Attorney for Plaintiff Alexander Reynolds

cc: [Counsel for defendant]

Sample Document 2

[Firm letterhead]

Hon. Lucy Grimsby, U.S.D.J.
United States District Court for the Eastern District of New York
225 Cadman Plaza E
Brooklyn, NY 11201

[Date]

Re: Alexander Reynolds v. Elizabeth Seabury, No. 25-cv-103

Dear Judge Grimsby:

Pursuant to Local Rule 37.2, I write in response to the plaintiff's letter¹⁰ dated [X], in the matter of *Reynolds v. Seabury*, No. 25-cv-103. Defendant Elizabeth Seabury maintains that portions of the discovery material sought in Plaintiff Alexander Reynolds' Interrogatory #13 and Request for Production of Documents #6 are completely irrelevant to the matter at hand, and thus her objections should be sustained.

As Reynolds' counsel admits, portions of these requests relate to one of Seabury's artistic creations (the "Brooklyn Heights mural") that is entirely unrelated to the mural at issue in this litigation (the "Park Slope" mural). Reynolds does not claim that Seabury used his photograph in the Brooklyn Heights mural, nor that this mural could have somehow infringed on his copyrighted photo. Rather, Reynolds maintains that Seabury's second mural includes merely "similar features" as the first. Such a request does not satisfy the relevance standard in Federal Rule of Civil Procedure 26(b)(1) with respect to Reynolds' copyright infringement claim or Seabury's fair use defense. Instead, the request is completely irrelevant to this particular claim and defense.

Reynolds cites no legal authority permitting such a fishing expedition.¹¹ Indeed, he cannot, because profits related to the second mural project have absolutely

¹⁰ Even though the court will likely schedule a discovery conference in response to the plaintiff's request, this letter gives the other party a chance to preview their substantive arguments to the court.

¹¹ Pointing to the absence of supporting legal authority can be a useful persuasive technique.

no bearing on whether Seabury's first mural infringed on Reynolds' copyright or usurped the market for Reynolds' photograph under the statutory fair use factors. Where discovery material is "wholly unrelated" to the complaint's allegations, "their relevance has been found too tenuous to allow discovery." *Barrett v. City of New York*, 237 F.R.D. 39, 40 (E.D.N.Y. 2006) (internal quotation marks and citation omitted). As an artist at the beginning of her career in a competitive market, Seabury should not be required to share confidential profits-related information or documents about an art project wholly unrelated to the matter being litigated.

I can confirm that I spoke with [Lawyer Name], counsel for Reynolds, on [date] in an effort to reach a good-faith resolution of this matter, and that we exchanged further emails about the subject on [date], but the parties were unable to come to agreement.¹²

For these reasons, following the Court's discovery conference, defendant Elizabeth Seabury respectfully requests that the Court reject plaintiff Alexander Reynolds' irrelevant, unreasonable, and overbroad discovery requests and allow Seabury's properly formed objections to stand. Seabury also requests that the Court award reasonable attorney's fees and costs under Federal Rule of Civil Procedure 37(a)(5) in defending against this impermissible discovery request.

Respectfully,

Attorney Signature
Attorney Name
Attorney for Defendant Elizabeth Seabury

cc: [Counsel for plaintiff]

¹² If opposing counsel disagreed with the moving party's characterization of the attempted resolution, that should be noted as part of the response.

Coming Up Next

You just read about how to proceed when a party opposes a proper request for discovery. In the next chapter, you will read about how to proceed when your opponent demands discovery in an effort to annoy, embarrass, oppress, or unduly burden your client.

Chapter 3B: Motions for a Protective Order

By Nan L. Haynes

Learning Outcomes

1. Understand:
 - a. why and when to file a motion for a protective order;
 - b. the relevant procedural rules when making or opposing a motion for a protective order; and
 - c. the documents required when making or opposing a motion for a protective order.
2. Be able to:
 - a. apply the relevant procedural rules when making or opposing a motion for a protective order; and
 - b. draft the documents required when making or opposing a motion for a protective order.

Introduction

When a party or non-party does not want to produce material in response to a discovery request or subpoena because it is not relevant or not proportional to the needs of the case, or wants to limit the dissemination or use of certain material, they may seek a protective order from the court in which the litigation is pending. Fed. R. Civ. P. 26(c)(1). As with a motion to compel discovery, Rule 26 requires that the “affected parties” first confer (or attempt to confer) in good faith to resolve the issue before filing a motion for a protective order. *Id.* A court may grant a protective order upon a showing of “good cause” to protect a party or non-party from “annoyance, embarrassment, oppression, or undue burden or expense.” *Id.* Because Rule 37(a)(5) also applies to the award of expenses related to motions for a protective order per Rule 26(c)(3), carefully consider your litigation strategy before moving for a protective order.

Why Move for a Protective Order

Protective orders can be used to protect a party or non-party from excessive burden or expense in producing requested material. For example, the court might deny requests to produce documents or to disclose information that is irrelevant to the case, not proportional, or unduly burdensome to locate or produce. Fed. R. Civ. P. 26(c)(1)(A). To limit burden or expense, the court may specify terms or discovery methods. Fed. R. Civ. P. 26(c)(1)(B), (C). Protective orders can also limit the disclosure of discoverable material to certain matters or to certain individuals under certain conditions, Fed. R. Civ. P. 26(c)(1)(D)-(H), which may be fashioned as a confidentiality order.¹³ The court may order a receiving party not to disclose or disseminate certain confidential or proprietary information. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984) (rejecting the argument that “a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery”). For example, courts routinely enter confidentiality orders that limit disclosure of trade secrets. Such information must be identified by the disclosing party and is often called “attorneys’ eyes only” (“AEO”) information.

When to Move for a Protective Order

A party or non-party may move for a protective order only after it has in good faith tried to resolve the issue with the party seeking the discovery. See Fed. R. Civ. P. 26(c)(1). Be sure to consult local rules for any additional, specific “meet and confer” requirements. See Fed. R. Civ. P. 16(b)(3)(B)(v) (providing that the court may “direct that before moving for an order relating to discovery, the movant must request a conference with the court”).

Rule 26 does not include a deadline for moving for a protective order. Still, it’s important to be cognizant of the timing because the motion may be denied if made before discovery is sought or after the discovery deadline. See, e.g., *Ayers v. Continental Cas. Co.*, 240 F.R.D. 216, 221-22 (N.D. W. Va. 2007) (denying motion for protective order as untimely when made eight months after defendant served discovery request and two months after response was due).

¹³ Sometimes, parties might enter into a confidentiality agreement themselves, without needing to engage the court. Alternatively, parties could jointly propose a stipulated confidentiality order for the court to enter to limit the use or disclosure of the discovery material produced in the case.

Always consult the Rule 16 scheduling order, local rules, and standing orders for additional requirements.

Procedural Rules

Federal Rule of Civil Procedure 26(c) governs protective orders in federal court and outlines several different actions that the court can take in limiting discovery or setting specific requirements. (See the appendix for links to each state's rules.) The federal rule provides:

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

The movant must demonstrate “good cause” for the protective order and identify specifically the “annoyance, embarrassment, oppression, or undue burden or expense” they will suffer if the order is not entered. Fed. R. Civ. P. 26(c)(1)(A). Courts have held that “Rule 26(c)’s good cause requirement for the issuance of a protective order means that the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *Harris v. Clay County*, 514 F. Supp. 3d 880, 881 (N.D. Miss. 2021) (quoting *In re Terra Intern, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (internal quotation marks and alteration omitted)). See also, e.g., *Phillips ex rel. Ests. of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002) (“For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted.”)

The court will “balance[] the public and private interests to decide whether a protective order is necessary.” *Id.* When conducting this balancing test, courts consider a variety of factors. For example, in assessing whether a confidentiality order is appropriate, courts within the Third Circuit consider: “(1) the interest in privacy of the party seeking protection; (2) whether the information is being sought for a legitimate purpose or an improper purpose; (3) the prevention of embarrassment, and whether that embarrassment would be particularly serious; (4) whether the information sought is important to public health and safety; (5) whether sharing of the information among litigants would promote fairness and efficiency; (6) whether the party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.” *Arnold v. Pa. Dep’t of Transp.*, 477 F.3d 105, 108 (3d Cir. 2007). As another example, in assessing whether a document request poses an undue burden, a court may consider “relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.” *W. Bay One, Inc. v. Does 1-1,653*, 270 F.R.D. 13, 14 (D.D.C. 2010) (citation omitted). Carefully research the issue in your jurisdiction to identify relevant considerations for the particular discovery request and proposed remedy and frame your argument accordingly.

Given the trial court’s authority over the discovery process in general, it has broad discretion to fashion an appropriate remedy in a particular case. *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 194 (2d Cir. 2010). Per Rule 26(c)(3), the court may award expenses pursuant to Rule 37(a)(5).

Supporting Documents

The movant must include a motion or notice of motion and certification that “the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.” Fed. R. Civ. P. 26(c)(1). The movant may also submit a proposed protective order. Both the movant and responding party will file a memorandum of law in support of or in opposition to the motion, as well as supporting evidence, affidavits, or other such materials. Depending on local rules, the movant may file a memorandum in reply. Always check local rules and standing orders to confirm page/word limits and other formatting requirements, courtesy copies, and other details. For a review of how to organize and write a persuasive memorandum of law, see Nan Haynes, *Legal Writing Handbook for Clinical Students* (CALI eLangdell Press 2023).

Exercise 3B-1

Question 1: What type of certification must the movant include with a motion for a protective order?

Question 2: In federal court, who has the burden of persuasion on a motion for a protective order?

Question 3: What must the movant show?

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view them online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=98#h5p-11>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=98#h5p-12>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=98#h5p-13>

Checklist

To Determine Whether to Move for a Protective Order in Federal Court

√ You can make a well-founded argument (and sustain your burden of showing) that “good cause” exists to protect your client from a discovery request that would cause “annoyance, embarrassment, oppression, or undue burden or expense” under Rule 26(c)(1).

√ In framing this argument, carefully research the applicable test in your jurisdiction for the specific kind of discovery request and objection at issue.

√ The parties have conferred about the issue in good faith, or you have attempted to do so with opposing counsel, as required by Rule 26(c)(1).

√ You have made a strategic decision that the discovery sought is worth seeking judicial intervention and risking the imposition of attorney's fees.

When Moving for a Protective Order in Federal Court

√ Check the local rules, judicial standing orders, and Rule 16 scheduling order to identify requirements or preferences for bringing the dispute to the court's attention. For example, does the court require that you first request a conference with the court before filing a motion? Does the court require a letter motion or formal motion?

√ In addition to a motion and brief, attach supporting documents as necessary, such as affidavits/declarations/affirmations (including about the good faith effort to confer with opposing counsel) with the pertinent discovery request and other related materials.

Sample Documents

To illustrate the application of the federal rules and procedures described in this chapter, below is a notice of motion for a protective order, with supporting affidavits and memorandum of law; a memorandum of law in opposition to the motion; and a reply brief in support of the motion. All are annotated with explanations and relate to the claim of plaintiff Molly McBride, a child who alleges she was exposed to and poisoned by lead paint while living with her family in an apartment owned by defendant Brendan Tomaselli. The defendant demanded access to the IQ test results of the plaintiff's mother who took the test while she was in sixth grade. The non-party mother moves for a protective order to prevent disclosure of those test results. Note that the action is in federal court based on diversity jurisdiction and is therefore governed by the Federal Rules of Civil Procedure.

Exercise 3B-2

Question 1: What language in Rule 26(c)(1) gives the plaintiff's mother, who is a non-party, authority to move for a protective order?

Question 2: Who has the burden of persuasion in the McBride motion for a protective order?

Question 3: What must the movant show?

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=98#h5p-14>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=98#h5p-15>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=98#h5p-16>

Sample Document 1

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

DAISY MCBRIDE, as parent and
natural guardian of Molly McBride,
an infant under the age of eighteen,

Plaintiff,

25-cv-2101

v.

BRENDON TOMASELLI,

NOTICE OF MOTION
FOR PROTECTIVE ORDER

Defendant.

NON-PARTY'S MOTION FOR PROTECTIVE ORDER

PLEASE TAKE NOTICE that Daisy McBride, by undersigned counsel, will move this Court on a date to be scheduled by the Court, for an order to protect her from the defendant's discovery demands for her educational records. Ms. McBride is a non-party who appears in this action solely as the parental and natural guardian of the infant plaintiff. This relief is requested pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.¹⁴

This motion is filed after the undersigned counsel's written and verbal attempts to settle the issue with the defendant's attorney in a good faith effort to resolve this conflict without Court action.¹⁵

¹⁴ Fed. R. Civ. P. 7(b) requires that a motion must state the grounds for relief.

¹⁵ See [Exercise 3B-3](#) at the end of the document.

Please take notice that Ms. McBride intends to serve reply papers pursuant to Local Rule 7(a)(1).¹⁶

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Exercise 3B-3

Question: Why does the writer include that the motion was filed after attempts to settle the issue with the defendant in the notice of motion? (See paragraph 2.)

- A. They want to appear reasonable.
- B. The Federal Rules of Civil Procedure and Local Rules of the Western District of New York require them to make such a good faith attempt.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=98#h5p-17>

¹⁶ Always check your court's local rules. In the Western District of New York, Local Rule 7(a)(1) requires the movant to state its intention to file a reply in the notice of motion.

Sample Document 2

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

DAISY MCBRIDE, as parent and
natural guardian of Molly McBride,
an infant under the age of eighteen,

Plaintiff,

25-cv-210

v.

AFFIDAVIT OF
GOOD FAITH¹⁷

BRENDON TOMASELLI,

Defendant.

I, [Attorney Name], state the following:

1. I am the attorney of record for the infant plaintiff and represent her non-party mother in a motion for an order of protection from the defendant's demand that she disclose the results of an IQ test administered to her when she was a student in sixth grade.
2. I submit this affirmation pursuant to Federal Rule of Civil Procedure 26(c)(1) and W.D.N.Y. Local Rule 7(d)(3).
3. I made several attempts to confer with defense counsel in a good faith effort to resolve this discovery dispute.

¹⁷ WDNY local rules require this motion to be accompanied by an affidavit showing a good faith effort to resolve discovery disputes before seeking court intervention. W.D.N.Y. Civ. R. 7(d)(3).

4. More specifically, I called defense counsel on May 23, 2025, and on May 30, 2025. Moreover, I followed up the phone calls with a letter dated June 2, 2025 (attached hereto).¹⁸
5. Unfortunately, we were unable to resolve the dispute; thus, I now seek Court action.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sworn to before me this

---day of --, 20--

[notary signature]

¹⁸ Be sure to attach any related written correspondence to support your request.

Sample Document 3

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

DAISY MCBRIDE, as parent and
natural guardian of Molly McBride,
an infant under the age of eighteen,

Plaintiff,

25-cv-2101

v.

AFFIDAVIT¹⁹ IN
SUPPORT OF
MOTION FOR
PROTECTIVE ORDER

BRENDON TOMASELLI,

Defendant

I, [Attorney Name], state the following:

1. I am the attorney of record for the infant plaintiff and represent her non-party mother in a motion for an order of protection from the defendant's demand that she disclose the results of an IQ test administered to her when she was a student in sixth grade.
2. I submit this affidavit pursuant to W.D.N.Y. Local Rule 7(a)(3).
3. This action is for damages caused by the infant plaintiff's exposure to lead paint when she resided with her family in an apartment owned and managed by the defendant.
4. The plaintiff's mother (Ms. McBride) initiated the present action against the defendant on her daughter Molly's behalf. Among the injuries claimed as a result of Molly's lead poisoning is a reduction in Molly's IQ. Compl. ¶ 40.

¹⁹ See [Exercise 3B-4](#) at the end of the document.

5. According to the plaintiff's expert, Molly's IQ has been reduced by 10 to 15 points solely because of her lead poisoning. Aff. of neuropsychologist Russell Macaluso, Ph.D., attached as Exhibit A, at 10. The expert has opined that the loss is not complicated by background or genetic factors. *Id.*
6. When diagnosed with lead poisoning, Molly's blood-lead level was 46 mcg/dL. McBride Dep., attached as Exhibit B, at 17:4-12.
7. Molly's pediatrician deemed this blood-lead level a medical emergency and hospitalized her the same day. Ex. B at 20:9-12. While hospitalized, she underwent chelation, a treatment that removes lead from the blood in an effort to limit the damage caused by lead poisoning. *Id.* Molly had just turned two when she was diagnosed with and hospitalized for lead poisoning. *Id.*
8. The day after Molly was diagnosed, the County Department of Health inspected 617 Mariner Street, upper, where Molly lived with her mother. County Health Department Report of Inspection, attached as Exhibit C, at 2. The inspector found multiple lead paint violations. *Id.* at 3. More specifically, the inspector found deteriorating lead paint on six windowsills and the porch floor. *Id.*
9. Molly is in special education at Chapin Elementary School. Ex. B. at 33:2-3. It is the same school that her mother attended. *Id.* 33:20-23.
10. Chapin students are administered an IQ test upon admission. *Id.* 34:12-13. The test results are used to determine if students should be assigned to a special education program. *Id.*
11. In his affidavit, the defendant's expert has called Molly's mother an "underemployed, mentally unstable, and dysfunctional mother." Aff. of Nevin McGurt, attached as Exhibit D, at 27.
12. The parties are currently undergoing discovery in the pending matter, and the defendant has demanded that Molly's mother disclose the results of an IQ test she took when she was in sixth grade. Def.'s Req. for Produc. of Doc. #12, attached as Exhibit E.
13. When Molly's mother read McGurt's affidavit, she was "upset and deeply hurt" and it made her "question her value as a parent." Ex. B at 39:2-4.

14. Molly's mother does not want her IQ test results disclosed. *Id.* 44:2-23. The disclosure of such private, personal, and confidential information would be very embarrassing for her. *Id.*
15. She brought this action seeking no benefit for herself, and she desires only to recover for Molly's injuries. *Id.* 51:23-52:8.
16. The plaintiff's expert has opined that a child's IQ will be reduced solely because of exposure to lead poisoning, regardless of the child's IQ before exposure. Ex. A at 23, 49.
17. In addition, while intelligence is heritable, there is no one-to-one relationship between a particular child's intelligence and that of a parent or sibling. *Id.* at 52. This is especially true because environmental factors have a strong influence on intelligence regardless of genetics. *Id.* at 53.
18. Nevertheless, the defendant asserts his expert cannot opine on the cause of Molly's reduced IQ without the IQ test results of her mother. Ex. D at 5.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sworn to before me this

---day of --, 20---

[notary signature]

Exercise 3B-4

Question: What is the difference between an affidavit and a declaration or affirmation?

- A. There is no difference.
- B. Affirmations and declarations must be notarized.
- C. Affidavits must be notarized.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=98#h5p-18>

Sample Document 4

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

DAISY MCBRIDE, as parent and
natural guardian of Molly McBride,
an infant under the age of eighteen,

Plaintiff,

25-cv-2101

v.

MEMORANDUM OF LAW IN
SUPPORT OF NON-PARTY'S
MOTION FOR PROTECTIVE
ORDER

BRENDON TOMASELLI,

Defendant.

This memorandum of law is submitted in support of Daisy McBride for an order to protect her from the defendant's demand for the results of an IQ test administered to her when she was a student in sixth grade. Ms. McBride is a non-party who appears in this action solely as the parent and natural guardian of the infant plaintiff.

In this negligence action based on diversity jurisdiction, the infant plaintiff alleges the defendant property owner, Brendon Tomaselli, was negligent because the infant plaintiff developed lead poisoning as a result of her exposure to deteriorating lead paint when she lived with her family at a rental unit owned by the defendant.

The facts are set forth in the attorney affidavit that accompanies this memorandum.

THIS COURT SHOULD GRANT DAISY McBRIDE’S MOTION FOR A
PROTECTIVE ORDER FROM DISCLOSURE OF HER IQ TEST RESULTS
BECAUSE DISCLOSURE OF THESE IRRELEVANT RESULTS WOULD
CAUSE HER EMBARRASSMENT AND UNNECESSARILY BROADEN THE
SCOPE OF LITIGATION.²⁰

This²¹ Court should grant Ms. McBride’s motion for a protective order for two reasons. First, as Ms. McBride testified, disclosure of such private and personal information would cause her great embarrassment. Second, the results are not relevant and permitting discovery of this non-party’s test results would unnecessarily broaden the scope of litigation and further complicate an already complex issue.

Rule 26(c)(1) permits a court to issue an order “for good cause” to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” The “grant and nature of such protection is singularly within the discretion of the district court and may be reversed only on a clear showing of abuse of discretion.” *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).²² This Court should use its discretion to grant Ms. McBride an order of protection against the defendant’s intrusive demand because disclosure would intrude on her privacy and because the test results are not relevant.

A. Disclosure of Ms. McBride’s IQ test results would intrude on her privacy and cause her embarrassment.

Rule 26(c)(1) applies not only to parties, but also to “any person from whom discovery is sought.” In evaluating a non-party’s request for a protective order, the court considers the fact of non-party status in weighing the burdens imposed under the circumstances. *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 739 (Fed. Cir. 1987) (affirming order restricting discovery in part because non-party status weighted against disclosure). More specifically, discovery directed to

²⁰ This point heading includes the action the writer wants the court to take, plus the reasons why it should take that action. For more on point headings, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 7 (CALI eLangdell Press 2023).

²¹ The paragraphs between the point heading and sub-point A are umbrella paragraphs, which introduce the reader to what follows and help organize the brief. For more on umbrella paragraphs, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 3 (CALI eLangdell Press 2023).

²² Note that the writer, who argues in support of the motion, portrays the rule in a way that supports their position by focusing on when a protective order will be granted. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

non-parties can be limited to protect them from disclosure of confidential documents. *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980) (suggesting that appropriate description is “non-party” discovery, not “third-party” discovery, as “the word non-party serves as a constant reminder of the reasons for the limitations that characterize ‘third-party’ discovery”) (citation omitted).

Privacy interests of innocent non-parties such as Ms. McBride should “weigh heavily in a court’s balancing equation.” *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) (internal quotations and citations omitted) (considering privacy rights in the context of sealing court documents).²³ In gauging the weight to be given to privacy rights, “courts should first consider the degree to which the subject matter is traditionally considered private rather than public.” *Id.* at 1051. Intrusion into the private records of a non-party—such as Ms. McBride’s test results—is a burden on the non-party and an invasion into their “protected zone of privacy.” See *In re N.Y. Cnty. DES Litig.*, 570 N.Y.S. 2d 804, 806 (App. Div. 1991) (noting that the United States Supreme Court has recognized that “the protected zone of privacy encompasses the avoidance of disclosure of personal matters”). Thus, “[d]iscovery requests that tend to broaden the scope of litigation and intrude upon rights to privacy should not be permitted unless there is a showing that the need for disclosure outweighs the importance of protecting non-parties’ privacy.” *Van Epps v. County of Albany*, 706 N.Y.S.2d 855, 860 (Sup. Ct. 2000) (finding educational records of lead poisoned infant plaintiff’s parents are not discoverable).

The defendant’s demand for Ms. McBride’s IQ test results is an attempt to harass Ms. McBride and must not be sanctioned by this Court. The defendant’s expert unabashedly and without reason suggests that Ms. McBride is underemployed, mentally unhealthy, and dysfunctional as a parent. Ex. D at 27-29. When Ms. McBride read the expert’s affidavit, she was “upset” and “deeply hurt.” Ex. B at 39:2-4. It made this hard-working single parent “question her value” as Molly’s mother. *Id.*

These unfounded accusations serve no other purpose but to further embarrass and harass Ms. McBride into compliance. The burden on Ms. McBride is significant. She brought this action seeking no benefit for herself, and she desires only to recover for Molly’s injuries. Ex. B at 51:23-52:8. Ms. McBride should not be forced to decide between fighting for her young daughter and divulging personal information to the defendant. This unwarranted attack on

²³ The writer grounds the rule in binding authority. For more on grounding rules, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 1 (CALI eLangdell Press 2023).

Molly's mother serves as a ground for this Court to shield her from this abuse with the issuance of an order of protection.

- B. The results of Ms. McBride's IQ test are not relevant because her daughter's IQ was reduced solely because of her lead poisoning, and if disclosed will result in unfettered litigation.

There are few, if any, federal cases determining if IQ results are relevant in a lead paint case. *Caban v. 600 E. 21st Street Co.*, 200 F.R.D. 176, 179 (E.D.N.Y. 2001) (citing defense counsel's letter that they are "not aware of any federal cases" dealing with the issue of compelling parental IQ upon a proper showing of relevance). However, the New York Court of Appeals, in a case cited by the Eastern District of New York in its *Caban* decision, formulated a test to determine if IQ results are relevant. *Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 746-47 (2000). The court weighs the defendant's need for information against its possible relevance, the burden on the plaintiff, and the potential for undue delay and unfettered litigation. *Id.* at 747.

First, that the record sought is not relevant boils down to a simple syllogism. Evidence is not relevant unless "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. The reduction in Molly's IQ is solely the result of her exposure to lead-based paint and is not complicated by background or genetic factors. Ex. A. at 22. Therefore, the results of Daisy McBride's IQ testing are not relevant to the cause of her daughter's loss of IQ.

Based on Dr. Macaluso's expert opinion, the IQ test results have no relevance at all. Dr. Macaluso's opinion is based on his thirty years experience studying the effects of childhood lead exposure on IQ, his examination and testing of over fifty lead-poisoned children, and five peer reviewed medical studies. *Id.* at 3-8.

As opined by Dr. Macaluso, scientific and medical literature reflects that an individual's IQ will be reduced solely by exposure to lead poisoning. *Id.* at 32-33. This is true regardless of the individual's socioeconomic background or genetic predisposition. *Id.* at 38-39. In addition, the impact of exposure to lead is not related to the medical or educational history of family members. *Id.* A child's IQ will be lowered by exposure to lead regardless of her level pre-exposure. *Id.* at 39-41. Thus, Dr. Macaluso was able to conclude with a reasonable degree of medical certainty after examining Molly that her IQ had been reduced by 10-15 points. *Id.* at 10. Because the harm to Molly's IQ is determinable without any other records, the IQ results of her mother is irrelevant.

Second, a decision denying the infant plaintiff's mother an order of protection would unnecessarily broaden the scope of litigation and further complicate an

already complex issue. See *Andon*, 731 N.E.2d at 592. In *Andon*, the New York Court of Appeals affirmed a decision denying a motion to compel an infant plaintiff's mother to take an IQ test in an action for personal injury resulting from her infant son's exposure to lead-based paint. *Id.* at 591. The court evaluated competing interests, including the potential for confusion and delay, New York's policy favoring open discovery, the risk of "unfettered litigation," and "the need to avoid undue delay created by battling experts." *Id.* at 592-93. The court held that allowing this IQ test would have the effect of "turning the fact-finding process into a series of mini-trials regarding the mother's IQ." *Id.* (citation omitted).

Similarly, the Supreme Court of Albany County denied the defendants' demand to compel parents of a lead-poisoned child to undergo IQ testing, stating that the defendants would "embark on a highly intrusive . . . never ending foray into the realm of speculation, that offers no hope of achieving a resolution of any causality issue." *Van Epps*, 706 N.Y.S. 2d at 865. This Court should reach the same conclusion in this case and protect the infant plaintiff's mother's privacy rights.

CONCLUSION

For the foregoing reasons, this Court should use its discretion to grant Ms. McBride's motion for a protective order.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sample Document 5

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

DAISY MCBRIDE, as parent and
natural guardian of Molly McBride,
an infant under the age of eighteen,

Plaintiff,

25-cv-2101

v.

BRENDON TOMASELLI,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO NON-PARTY'S MOTION FOR A PROTECTIVE ORDER

The plaintiff, through her mother (Ms. McBride), initiated this claim against the defendant, Brendan Tomaselli, as the landlord of the property where the plaintiff lived with her family when she was allegedly exposed to lead-based paint. The plaintiff alleges that because of her exposure, her IQ has been diminished. During her deposition, Ms. McBride testified that she took an IQ test when she was in sixth grade. The defendant then sought to discover the IQ test results, since his expert cannot complete his evaluation of the plaintiff without this information. See Aff. of neuropsychologist Nevin McGurt, PhD., attached as Exhibit A.

According to Dr. McGurt, the IQ results are "material, relevant, and crucial to a full and reasoned analysis of why the infant plaintiff is the way she is and how she may turn out to be." Ex. A at 10-11. He further opined that a comparative analysis of family members is "vitally necessary" and would likely lessen the probability that the plaintiff's claimed lead exposure "is a significant, primary, or complete cause of the alleged IQ loss and behavioral and learning deficits." *Id.* at 31. He stated: "Parents and siblings provide the only 'controls' available in evaluating the behavioral and cognitive deficiencies alleged by the plaintiff because there is no baseline pre-exposure IQ for the child . . . It is well-

recognized that an evaluator's access to [these] records . . . is not merely relevant, but absolutely crucial . . ." *Id.* at 32. Dr. McGurt submitted an index of published peer-reviewed medical authorities in support of his opinions. *Id.* at 44-52.

He correctly notes that most children with cognitive problems have not been exposed to lead paint, which necessarily means there are other causes of developmental problems in children. *Id.* at 34. He cites the 2002 CDC report *Managing Elevated Blood Lead Levels Among Young Children* for the proposition that "an EBLL [elevated blood lead level] should be viewed as a risk factor for neurodevelopmental problems, not a diagnosis." *Id.* at 43. Other risk factors must be carefully considered when attempting to understand the contribution of a single risk factor to the results of a neuropsychological evaluation. *Id.* at 44.

Even the plaintiff's expert recognizes that heredity is a factor contributing to a person's IQ. Aff. of Russell Macaluso, attached as Exhibit B. The plaintiff's expert concedes that intelligence is "known to be highly heritable." *Id.* at 29.

Based on his review of Ms. McBride's deposition testimony, Dr. McGurt opined that she is underemployed, mentally unhealthy, and dysfunctional as a parent. Ex. A at 27-29. His opinion is based on her testimony that while she has an associate's degree in business, she has worked only as a cook at fast-food restaurants, that she feels anxious or depressed at least three out of seven days, and that occasionally she is unsure where her daughter is located. *Id.* at 45-50. Because Ms. McBride's IQ test results are relevant to this action and disclosure would not cause an undue burden, this Court should deny the motion for a protective order.

THIS COURT SHOULD DENY THE MOTION BECAUSE MS. McBRIDE'S IQ TEST RESULTS ARE RELEVANT TO THE EVALUATION OF THE PLAINTIFF'S DAMAGES AND BECAUSE NEITHER THE DISCOVERY DEMAND NOR THE DEFENDANT'S EXPERT'S OPINION ARE AN ATTEMPT TO HARASS OR EMBARRASS.²⁴

This Court should deny the motion for two reasons. One, the IQ test results of the plaintiff's biological mother are relevant to an evaluation of the plaintiff's claim that her IQ was diminished solely as a result of her alleged exposure to lead paint when she lived in an apartment owned by the defendant. See Ex. B at 29 (agreeing with defense expert that intelligence is "known to be highly heritable"). And two, contrary to Ms. McBride's assertion, neither the discovery demand nor Dr. McGurt's comments about Ms. McBride are intended to harass or embarrass her; rather, both are based on her own testimony.

This Court has wide discretion when deciding disputes over pre-trial discovery. *In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir. 2003). This Court should exercise its discretion to allow this relevant discovery material in this case.

- A. The plaintiff's mother's IQ test result is relevant to an evaluation of the plaintiff's claim that her IQ was diminished because of her alleged exposure to lead paint, because intelligence is highly inheritable.

The federal rules provide that parties may undertake discovery²⁵ into:

any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

²⁴ This heading is a major contention, which is supported by sub-headings A and B. It includes the action the writer wants the court to take and two reasons why the court should take the action. For more on headings, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 7 (CALI eLangdell Press 2023).

²⁵ The rule is stated persuasively by keeping the focus leaning the same way the rule application will lean. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

Fed. R. Civ. P. 26(b)(1). “Information is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Relevance is a matter of degree, and the standard is applied more liberally in discovery than it is at trial.” *N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc.*, 325 F.R.D. 36, 47 (E.D.N.Y. 2018) (citation omitted). Importantly, evidence need not be admissible at trial in order to be discoverable. Fed. R. Civ. P. 26(b)(1).

Other courts have held that academic records of a lead-paint plaintiff’s family are discoverable. See, e.g., *Caban ex rel. Crespo v. 600 E. 21st Street Co.*, 200 F.R.D. 176, 183 (E.D.N.Y. 2001) (allowing discovery of sibling’s academic records); *Tripp v. Giroux*, 742 N.Y.S.2d 742, 743-44 (App. Div. 2002) (allowing discovery of parents’ and siblings’ academic records but not discovery of family members’ medical records). *Caban* is the only published federal case concerning the relevance of academic records of a lead-paint plaintiff’s family. In *Caban*, the Eastern District of New York reasoned that the academic records of non-party siblings might lead to evidence related to a lead-paint plaintiff’s cause of action. 200 F.R.D. at 183. It therefore ordered an in-camera examination of the records to determine their probative value. *Id.*²⁶

The New York Court of Appeals has held that “discovery determinations are discretionary; each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure.” *Andon v. Mott*, 731 N.E.2d 589, 594 (N.Y. 2000). The *Andon* court established a balancing test to determine whether the movant’s need for the requested discovery outweighs the burden imposed on the non-party family member’s privacy interest in the information sought. *Id.* at 593. In that case, the defendants sought to subject the infant plaintiff’s mother to an IQ test, which the court found was a significant burden. *Id.* It also noted that the defendant’s expert failed to identify any scientific articles in support of his opinion that the mother’s IQ was relevant. *Id.* Thus, the court determined that the records were not discoverable, but noted its decision was far from a “blanket prohibition” against discovery of non-party IQ results in all lead-paint cases. *Id.* at 592.

In this case, the results of the infant plaintiff’s mother’s IQ test are discoverable because they bear on the issue of whether the plaintiff’s IQ was diminished solely because of her alleged exposure to lead paint. Both the plaintiff’s expert

²⁶ This paragraph includes rule illustrations written as parentheticals and in-text illustrations. For more on writing rule illustrations, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 2 (CALI eLangdell Press 2023).

Russell Macaluso and the defendant's expert McGurt agree that heredity is a factor contributing to a person's IQ.

Moreover, Dr. McGurt, a certified clinical neuropsychologist, has established that test results bear on the issue of the cause of the plaintiff's IQ. Ex. A at 10-11. Dr. McGurt's report establishes a causal connection between the plaintiff's cognitive deficiencies and genetic factors, thus supporting the defense that the plaintiff's injuries were caused by genetics. *Id.* at 10. Dr. McGurt provides an extensive analysis of possible causes of behavioral and cognitive problems in young school-aged children like the plaintiff. *Id.* at 10-18. He explains that a valid assessment of the plaintiff's alleged cognitive developmental problems "requires a careful analysis of the many significant hereditary, biological, environmental, and socio-economic conditions that may impact her." *Id.* at 36.

He further explains that analysis of these factors would likely lessen the probability that plaintiff's claimed lead exposure "is a significant, primary, or complete cause of the alleged IQ loss and behavioral and learning deficits." *Id.* at 42. He explains the necessity of comparing parent and sibling information to plaintiff's, stating: "Parents and siblings provide the only 'controls' available in evaluating the behavioral and cognitive deficiencies alleged by the plaintiff because there is never a baseline pre-exposure IQ for the child . . . It is well-recognized that an evaluator's access to [these] records . . . is not merely relevant, but absolutely crucial . . ." *Id.* at 22. In support of his opinions, Dr. McGurt cites several medical and scientific studies, making the basis of these conclusions clear for this Court. *Id.* at 5, 15, 29, 34.

Contrary to Ms. McBride's assertion, the defendant's reasonable demand for the test results will not dramatically broaden the scope of litigation. Indeed, the very purpose of discovery is to answer the questions posed in the litigation. Therefore, because the requested IQ test is relevant to the resolution of this case, it should be discoverable.

B. The request for the IQ test results is based on the plaintiff's mother's own testimony, not an effort to embarrass or unduly burden her.

A court should deny a protective order absent good cause "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1).²⁷ Although Ms. McBride speculates that the request for her IQ test results and Dr. McGurt's opinion of her are an attempt to

²⁷ Notice that the writer, who argues against the motion, portrays the rule in a way that supports their client's position by focusing on when a protective order will be denied.

harass and embarrass, the request and expert opinion are directly related to Ms. McBride's own testimony.

Ms. McBride testified about the test results at her deposition. The defendant's expert then opined that he needs the test results to fully evaluate the plaintiff's claim that her IQ was diminished solely because of her exposure to lead paint. The discovery demand is simply a rational consequence of these two events. Moreover, Dr. McGurt's opinion that Ms. McBride is underemployed, mentally unhealthy, and dysfunctional as a parent is based on Ms. McBride's testimony that while she has an associate's degree in business, she has worked only as a cook at fast food restaurants, that she feels anxious or depressed at least three out of seven days and that occasionally she is unsure where her daughter is located. The doctor's opinion is reasonably based on Ms. McBride's testimony.

Unlike the undue burden placed on the non-party mother to submit to an IQ test in *Andon*, the burden placed on Ms. McBride to produce *existing* results is minimal, if a true burden at all.²⁸ The relevance of Ms. McBride's IQ test results and the defendant's crucial need for them far outweigh any burden that may be placed on the plaintiff to obtain the records. Unlike in *Andon*, production of existing records to establish a well-documented causal connection to the plaintiff's injuries in this case would not cause any confusion or undue delay.

CONCLUSION

For the foregoing reasons, this Court should use its discretion to deny the motion for a protective order.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

²⁸ This is a rebuttal to the adversary's argument. Note that it follows the main part of the application, because the writer wants to show why they are right before they show why their adversary is wrong. For more on writing rebuttals, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 5 (CALI eLangdell Press 2023).

Sample Document 6

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

DAISY MCBRIDE, as parent and natural
guardian of Molly McBride,
an infant under the age of eighteen,

25-cv-2101

Plaintiff,

v.

BRENDON TOMASELLI,

Defendant.

NON-PARTY'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HER MOTION FOR A PROTECTIVE ORDER

This memorandum of law is submitted in reply to the defendant's opposition to Daisy McBride's motion for an order to protect her from the defendant's demand for the results of an IQ test administered to her when she was a student in sixth grade. Ms. McBride appears in this action solely as the parent and natural guardian of the infant plaintiff.

Both the plaintiff's expert, Dr. Macaluso, and the defendant's expert, Dr. McGurt, agree that heredity is a factor contributing to a person's IQ, so a mother's IQ will affect her child's IQ. But Dr. Macaluso opines that if that child is exposed to lead, the child's IQ will be reduced *solely* because of the exposure. For example, hypothetically, if Molly McBride took an IQ test at age three and her IQ was measured at 110, both experts agree that the number was affected by Daisy McBride's IQ. Then, after Molly was exposed to lead at age four, if she hypothetically took another IQ test, and result was 100, according to Dr. Macaluso, the reduction was solely the result of her exposure. Therefore, the mother's IQ test is totally irrelevant to the *reduction* in the child's IQ. Thus, the

defendant's opinion fails to rebut Dr. Macaluso's opinion that the plaintiff's IQ was diminished solely because of her exposure to lead paint. Absent evidence to rebut Dr. Macaluso's scientifically supported opinion, that the plaintiff's IQ was reduced solely because of her exposure to lead-based paint while she resided in a property owned by the defendant, the defendant cannot establish the relevance of an IQ test administered to the plaintiff's mother when she was a student in sixth grade.

Under New York law in the context of an infant plaintiff's claim for damages caused by lead-paint poisoning, when "a party seeking disclosure from a non-party fails to establish the relevance of the information sought, disclosure must be denied." *Van Epps v. County of Albany*, 706 N.Y.S.2d 855, 859-60 (Sup. Ct. 2000). Given Ms. McBride's status as a non-party, and the defendant's failure to demonstrate relevance, the only remaining consideration is whether disclosure of confidential documents would impose a burden on non-party Ms. McBride. The privacy interests of non-parties such as Ms. McBride should weigh in a court's decision. *United States v. Amodeo*, 71 F.2d 1044, 1050 (2d Cir. 1995). That factor lies solidly in Ms. McBride's favor. She stated unequivocally that she does not want the defendant to have access to her IQ test results. McBride Dep. at 44:2-23. The disclosure of this private, personal, and confidential information would be very embarrassing for her. *Id.* She brought this action seeking no benefit for herself, and she desires only to recover for Molly's injuries. *Id.* 51:23-52:8.

For the foregoing reasons and the reasons stated in the memorandum of law submitted in support of the motion, this Court should use its discretion to grant Ms. McBride's motion for a protective order.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Coming Up Next

When discovery is complete, parties have 30 days to move for summary judgment (unless a different deadline is set by local rule or judicial order), which is the subject of the next chapter.

Chapter 4: Motions for Summary Judgment

By Nan L. Haynes

Learning Outcomes

1. Understand:
 - a. why and when to file a motion for summary judgment;
 - b. the relevant procedural rules when making or opposing a motion for summary judgment; and
 - c. the documents required when making or opposing a motion for summary judgment.
2. Be able to:
 - a. apply the relevant procedural rules when making or opposing a motion for summary judgment; and
 - b. draft the documents required when making or opposing a motion for summary judgment.

Introduction

Motions for summary judgment are requests for a court to enter judgment against a party's claim or defense without going to trial. Lawyers moving for summary judgment argue that, based on the undisputed admissible facts before the court, their client is entitled to win a claim or defense as a matter of law; there is no reason to proceed to a trial.

Any party can move for summary judgment on particular claims, defenses, counterclaims, or crossclaims. Sometimes, both parties will move for summary judgment (called cross-motions), but the court will separately consider each motion. Here are some examples of various bases for moving for summary judgment:

1. The plaintiff moves for summary judgment on their own claim, e.g., that they were injured by the defendant's negligent operation of a motor vehicle or failure to warn about a dangerous product, by arguing that, based on the undisputed facts, they are entitled to win the claim as a

matter of law.

2. The plaintiff moves for summary judgment on an affirmative defense of the defendant, e.g., that the statute of limitations had expired on the plaintiff's claim for negligence, arguing that, based on the undisputed facts, the defense fails as a matter of law.
3. The defendant moves for summary judgment on the plaintiff's claim, e.g., arguing that, based on the undisputed facts, the defendant's actions or omissions did not breach any duty, because defendant at all times obeyed the rules of the road or because they issued an adequate and conspicuous warning about the product; thus, they are entitled to judgment as a matter of law.
4. The defendant moves for summary judgment on their defense, e.g., that the statute of limitations had expired on the plaintiff's claim for negligence, by arguing that, based on the undisputed facts, the plaintiff failed to file suit within the required time; thus, the defendant is entitled to win the statute of limitations defense as a matter of law.

Summary judgment can be granted only if under the undisputed material facts the movant is entitled to judgment as a matter of law. Sometimes, the parties agree about the facts—both that they're undisputed and what the material facts are—but disagree about how the law should apply to those facts. Other times, the parties disagree about the facts—what certain evidence means—and therefore about whether there are disputed facts precluding summary judgment. In that case, a party opposing summary judgment may argue that because there are disputed material facts, summary judgment is not appropriate, and the case must instead go to trial.

The purpose of a trial is for the parties to present evidence in order to prove their claim or defense to a trier of fact. So, when a claim or defense can be decided on a summary judgment motion based on undisputed facts—that is, as a matter of law—there is no need for a trier of fact (a jury or a judge) to evaluate the facts, and a court will grant the motion and issue judgment summarily. If the court denies the motion, then the claim or defense will proceed to trial where the non-moving party (the party that opposed the motion for summary judgment) has the opportunity to prove the claim or defense to a trier of fact. That's why courts may not decide issues of fact when determining whether to grant summary judgment; rather, the court's task is to examine the admissible record evidence and decide whether this evidence, if true, entitles the moving party to judgment as a matter of law.

Sometimes, parties may move for partial summary judgment, which is a ruling on one claim or defense or even just a part of a claim or defense. In that situation, the same standard applies, but the procedural effect of the ruling may be different. For example, if the court grants summary judgment as to one of two claims, then the other claim will proceed to trial.

Why Move for Summary Judgment

Early in the case, lawyers carefully analyze the claims and defenses before engaging in discovery to identify facts that are in reality not in dispute. These steps help to identify whether there are claims or defenses that can be resolved by the court, without a trial, as a matter of law, and can lead to filing a motion for summary judgment on some or all issues in a case.

If a summary judgment motion is successful, then the moving party can avoid trial on that claim or defense. If the motion is granted in part, then the issues will be limited accordingly at trial. (For example, the court may determine that a defendant breached a contract, leaving for trial only the matter of damages.)

Parties may move for summary judgment even suspecting that they probably will not succeed. This is a strategic move to force the other side to “lay bare their proof.” This strategy reflects the fact that the filing of a motion for summary judgment can speed settlement. Therefore, the summary judgment procedure allows lawyers to effectively and efficiently manage litigation.

Still, lawyers can misuse the procedure by filing the motion before conducting adequate discovery, leading to unnecessary or perhaps even frivolous motions to burden opponents with needless work. Be mindful of this, because if you misuse summary judgment, or any other motion, you will lose credibility with the court and with opposing counsel. Moreover, it is unethical to file a frivolous motion and is sanctionable under Federal Rule of Civil Procedure 11.

When to Move for Summary Judgment

Parties may move for summary judgment at any time until 30 days after the close of discovery. Fed. R. Civ. P. 56(b). Carefully check local rules and judicial orders for any additional timing-related requirements, since Rule 56(b) provides a default rule that can be modified. See *id.* (setting the 30-day rule “[u]nless a different time is set by local rule or the court orders otherwise”). For example, the court may impose a deadline for moving for summary judgment in its scheduling order. Courts may also set other requirements before filing for summary judgment, such as requiring the parties to first meet with each other and/or the court.

Procedural Rules

The basic procedure for moving for summary judgment in federal court is set forth in Federal Rule of Civil Procedure 56. See the appendix for links to each state's rules.

The party moving for summary judgment has the burden of demonstrating there is “no genuine dispute as to any material fact” and that it is “entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A dispute is “genuine” “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is “material” if it “might affect the outcome of the suit under the governing law . . . [and] properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.*

If the moving party will bear the burden of proof at trial as to particular claims or defenses, it must demonstrate its entitlement to relief based on the undisputed facts when moving for summary judgment. *Id.* at 255. If the non-moving party will bear the burden of proof at trial, then the moving party can point to the absence of evidence supporting the non-moving party's claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In either circumstance, the opponent will file a response. If the moving party has satisfied its burden, then the non-movant must point to disputed material facts that preclude summary judgment and require resolution at trial. *Id.* at 324.

The court's role in deciding a motion for summary judgment is not to resolve any disputed facts, but instead to assess whether there is a genuine dispute of material fact. *Anderson*, 477 U.S. at 249 (“[A]t the summary judgment stage the judge's function is not [themselves] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”). In making this determination, the court must draw any inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (internal quotation marks and citation omitted).

Exercise 4-1

Question 1: Assume you're in federal court. In what light will the court view the evidence before it? Provide a United States Supreme Court decision that supports your answer.

Question 2: If the moving party successfully demonstrates the absence of genuine disputed facts and entitlement to judgment as a matter of law, what must the non-moving party prove in order to defeat the motion for summary judgment? Provide a United States Supreme Court decision that supports your answer.

Question 3: Assume your case is in federal court on a diversity basis. The defendant in a premises liability claim moves for summary judgment because they were not the owner of the property and thus owed the plaintiff no duty. What must the defendant prove to win the motion? Choose the best answer.

- A. There are questions of fact about whether the defendant owed the plaintiff a duty.
- B. The plaintiff's claim against the defendant must go to trial because as a matter of law the defendant did not owe the plaintiff a duty.
- C. There is no genuine dispute as to any material fact about whether the defendant owed the plaintiff a duty; thus, the defendant is entitled to judgment as a matter of law.

Question 4: Assume your case is in federal court on a diversity basis. The plaintiff in a motor vehicle accident case moves for summary judgment, arguing that the defendant was negligent when he drove into the rear of the plaintiff's vehicle while it was stopped at a red light. What must the plaintiff prove to win the motion? Choose the best answer.

- A. The defendant was negligent as a matter of law, based on the undisputed facts.
- B. Looking at the evidence in the light most favorable to the plaintiff, the defendant was negligent as a matter of law.
- C. There are questions of fact about whether the defendant was negligent.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-19>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-20>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-21>

As with all motions, the court may or may not hold oral argument on a motion for summary judgment. Depending on local rules, a party may request the court hear oral argument on the motion.

Supporting Documents

1. Moving party: the notice of motion

The moving party must submit a written notice of motion or motion setting forth the particular grounds for seeking summary judgment (that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law) and the relief sought (an order granting summary judgment). See Fed. R. Civ. P. 7(b) (setting forth general requirements for motions).

2. Both parties: a statement of undisputed facts and/or affidavit or attorney affirmation with exhibits

Moving parties argue that they are entitled to judgment based on the admissible evidence before the court; thus, each party must submit their evidence to the court with the motion or response. The procedure for doing so varies by court; some courts require a statement of undisputed facts, while others might require attorney affidavits or affirmations (which are substantially the same, but an affidavit must be signed before a notary). Other jurisdictions or courts require that each party not submit separate statements of fact but instead incorporate that information into its brief. In any event, each party will submit the pertinent evidence along with their filing.

The statement, affidavit, or affirmation includes facts only. Do not include opinions, emotions, or conclusions. Facts are about the physical world. They can be seen or heard and can be verified through objective evidence. In contrast are conclusions and opinions that tell the reader what to think.

For example, here the writer *tells* the reader to think the defendant driver was reckless through use of conclusions (in bold):

“The defendant driver **barreled down** the road at **breakneck speed without any thought to the blizzard-like conditions.**”

In contrast, here the writer *shows* the reader that the driver was reckless through facts. (References to “Cite” indicate the writer would cite to evidence that supports that fact):

“The defendant was driving south on Route 16 during the early morning hours of December 26. The streetlights were fifty yards apart. Cite. The wind was blowing from the south at 45 mph, with gusts up to 65 mph, and it was snowing at a rate of 2 inches an hour. Cite. The posted speed limit was 45 mph, yet the defendant drove his truck at a rate of about fifty mph. Cite.”¹

In addition to supporting a motion with an affidavit or affirmation from their attorney, a party might also submit their own affidavit, that of a fact witness, or that of an expert.

Parties may submit evidence to support their argument by citation to “depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.” Fed. R. Civ. P. 56(c)(1)(A). As indicated by the ending reference to “other materials,” the particular forms of evidence mentioned in the rule are not the exclusive means of presenting evidence on a Rule 56 motion. The court may consider any material that would be admissible or usable at trial.

3. Both parties: a brief in support of or in opposition to the motion

You learned how to write a brief in your legal writing class. For a review of how to organize and write a persuasive memorandum of law, see Nan Haynes, *Legal Writing Handbook for Clinical Students* (CALI eLangdell Press 2023).

4. Moving party: reply brief

Depending on local rules, the moving party may file a memorandum in reply.

Always check local rules for page/word limits and other formatting requirements, courtesy copies, and other details. In addition to the example documents below, you can ask your supervisor or colleague for a sample filing in the same jurisdiction, to give you an idea what these materials should look like conforming to local standards.

¹ Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 10 (CALI eLangdell Press 2023).

Checklist

- √ Identify the jurisdiction whose procedural rules apply, which may be federal or state.
- √ Find the applicable procedural rules, including:
 - a. Identify who has the burden of proof
 - b. Identify what the party must prove to prevail
 - c. Identify how the court will view the evidence before it
- √ If you are in federal court, determine whether state or federal substantive law applies.
- √ Identify the required supporting documents.
- √ Review the filing rules for your jurisdiction, your local court, and for the judge assigned to your case.

Sample Documents

To illustrate application of the rules and procedures described in this chapter, below you'll find sample documents in two separate cases, both set in the Western District of New York. For each sample, you'll find a notice of motion, a statement of undisputed facts in support of the motion (which for a real filing would include an attorney affirmation with exhibits attached), a brief in support of the motion, a responsive statement of undisputed facts (which for a real filing would also include an attorney affirmation with exhibits attached), and a brief in opposition to the motion. All are annotated with explanations.

First Sample

The first sample relates to the civil rights claim of George Chaplin, a diabetic former detainee housed in a county jail, against Joy Curvin, a nurse employed by the jail. Chaplin alleges that Curvin violated his civil rights when she failed to provide him with insulin during his detention. The substantive rule is that medical providers, such as Curvin, violate a pretrial detainee's right to adequate medical treatment when they show "deliberate indifference" to the detainee's serious medical needs. The defendant, Curvin, moves for summary judgment against the plaintiff, Chaplin, arguing that as a matter of law Curvin did not act with deliberate indifference to Chaplin's serious medical needs.

Exercise 4-2

Answer the following questions to identify the procedural rules that will apply to Curvin's motion.

Question 1: Who has the initial burden with respect to Curvin's motion for summary judgment, and what must that party prove?

Question 2: In what light will the court view the evidence before it?

Question 3: If Curvin successfully meets this burden, what must Chaplin demonstrate to defeat the motion?

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-23>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-24>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-25>

Once you know the procedural rules, you combine them with the substantive issue to form the issue before the court. Here's an effective formula:

(insert the way the court will view the evidence) (insert party with burden of proof) (insert what that party must prove) (insert substantive issue)

For example, consider this hypothetical. Assume Dave sued Joe for negligence when he fell on a broken stair at Joe's house. Joe moves for summary judgment, arguing that the undisputed material facts establish that he was not

negligent as a matter of law. Applying the formula to state the issue before the court, the question will be: reviewing the evidence in the light most favorable to Dave as the non-moving party, did Joe sustain his burden to show that he was not negligent as a matter of law for failure to repair a broken stair?

Exercise 4-3

Question: The substantive issue in *Chaplin v. Curvin* is whether Curvin was deliberately indifferent to Chaplin's medical needs. Apply the formula to the procedural rules and substantive issue in this case related to Curvin's motion for summary judgment.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-26>

Sample Document 1

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

GEORGE CHAPLIN,

Plaintiff,

25-cv-1501

v.

JOY CURVIN,

Defendant.

DEFENDANT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, defendant Joy Curvin, through her undersigned attorneys, respectfully moves for summary judgment on plaintiff George Chaplin's claim that he received constitutionally inadequate medical care while in county jail. In support of this motion, Curvin submits the attached statement of undisputed facts, with exhibits, and accompanying memorandum of law. Because there is no genuine dispute as to any material fact and Curvin is entitled to judgment as a matter of law, Curvin respectfully requests that the Court grant her motion and dismiss this case.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sample Document 2

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

GEORGE CHAPLIN,

Plaintiff,

25-cv-1501

v.

JOY CURVIN,

Defendant.

DEFENDANT'S STATEMENT OF UNDISPUTED FACTS²

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56(a)(1), defendant Joy Curvin hereby submits this statement of undisputed facts. The record establishes that the defendant did not violate the plaintiff's Fourteenth Amendment right to adequate medical care because she was not deliberately indifferent to the plaintiff's medical needs. As fully explained in the accompanying memorandum of law, she is entitled to judgment as a matter of law based on the following undisputed material facts.

² In compliance with Federal Rule of Civil Procedure 56 and the local rules for this district, the parties have submitted statements of undisputed facts along with memoranda of law. Also include affidavits/affirmations/declarations, which will include the supporting evidence as attachments, as appropriate. Remember to always check local rules for particular requirements, which vary by court.

THE UNDISPUTED FACTS³

1. The county jail's medical department staff's shift ended at 7:00 pm on Friday, April 14, 2023. Pertinent portions of the deposition testimony of defendant Joy Curvin, R.N. are attached as Exhibit A. Ex. A at 6:10-11.
2. The plaintiff was arrested by a sheriff's deputy at approximately 8:00 p.m. that day and was booked at the county jail at approximately 11:40 p.m. that night. Pertinent portions of the county jail records of George Chaplin are attached as Exhibit B. Ex. B at 1.
3. During the booking interview, the plaintiff was identified as a diabetic who received shots for his medication. *Id.* at 20-21.
4. The following morning, the plaintiff's booking papers were brought to the medical department. Pertinent portions of the deposition testimony of Sally Shell, the medical department secretary at the time of the incident, are attached as Exhibit C. Ex. C at 4:8-10.
5. When Nurse Curvin saw the plaintiff's chart at approximately 2:00 p.m. on April 15, 2023, she requested that he be brought to the medical department. Ex. A at 15:15-18.
6. Only fifteen minutes later, Nurse Curvin interviewed the plaintiff about his medical condition, obtained his medical history, and contacted the jail physician to obtain an order for insulin. She then administered the insulin as ordered and gave the plaintiff water to drink. *Id.* at 16:5-7.
7. Nurse Curvin then put the plaintiff's medical chart in the sick call box, so eight hours later he would be seen to check his insulin level. *Id.* at 16:17-19.
8. At about 6:30 p.m. that day, a deputy transported the plaintiff to town court, where he arrived at approximately 6:49 p.m. He returned to the county jail at approximately 8:00 p.m. A copy of the transportation log is attached as Exhibit D. Ex. D at 3.
9. By 10:30 p.m., just thirty minutes after he was scheduled for an insulin level check in the medical department, a nurse called a sergeant to ask why the plaintiff had not appeared for his medical check. The sergeant erroneously told her he was still in court. Pertinent portions of the deposition testimony of Selma Polvino, the nurse that made the call, are attached as Exhibit E. Ex. E at 3:2-12.

³ Each of the paragraphs is limited to facts. Facts are about the physical world and can be verified through objective evidence. In contrast are opinions, conclusions, and emotions, which have no place in a statement of undisputed facts. See [Exercise 4-4](#) at the end of the document.

10. At about 11:45 p.m., the plaintiff was assigned to housing unit Delta. Ex. B at 4.
11. Approximately fifteen hours later, the plaintiff was observed to be in distress in his cell, and an emergency was called. The Delta Block notes are attached as Exhibit F. Ex. F at 6.
12. Nurse Curvin responded to the emergency call, and the plaintiff was taken to the medical department in a wheelchair. Ex. A at 22:10-15.
13. The jail physician on call was contacted; the plaintiff was administered insulin and taken by ambulance to the medical center. Ex. B at 15. The plaintiff was admitted to the hospital where he was treated. He returned to county jail three days later. *Id.* at 25.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Exercise 4-4

Question: Which of the following is a fact? Remember that facts are about the physical world. They can be seen or heard and can be verified through objective evidence. In contrast are conclusions and opinions that tell the reader what to think.

- A. A witness saw the defendant run east away from the scene of the crime.
- B. The defendant drove away recklessly.
- C. After assaulting the victim, the defendant fled the scene of the crime.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-27>

Sample Document 3

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

GEORGE CHAPLIN,

Plaintiff,

25-cv-1501

v.

JOY CURVIN,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT⁴

Because the undisputed material facts establish that plaintiff George Chaplin received constitutionally adequate medical treatment from defendant Joy Curvin, the Court should grant summary judgment in favor of the defendant and dismiss this case.

STATEMENT OF FACTS

The facts material to this motion for summary judgment are fully set forth in the attached Statement of Undisputed Facts.

SUMMARY JUDGMENT STANDARD

Summary judgment will be granted if the moving party establishes, through affidavits and other evidence, that there is no genuine dispute of material fact

⁴ This memorandum of law is based on the defendant's motion for summary judgment in *Beatty v. Davison, et al.*, W.D.N.Y. 06-cv-0571.

and that they are, therefore, entitled to judgment as a matter of law.⁵ Fed. R. Civ. P. 56(a). “Once the movant meets its burden, the non-movant may defeat summary judgment only by producing evidence of specific facts that raise a genuine issue for trial.” *Music Royalty Consultants, Inc. v. Reservoir Media Mgmt., Inc.*, 598 F. Supp. 3d 158, 172 (S.D.N.Y. 2022) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “To survive summary judgment, the non-movant must present concrete evidence and rely on more than conclusory or speculative claims.” *Id.* (citing *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980)).

ARGUMENT

AS A MATTER OF LAW, NURSE CURVIN DID NOT VIOLATE THE PLAINTIFF’S RIGHT TO ADEQUATE MEDICAL CARE BECAUSE ANY FAILURE TO PROVIDE HIM CARE WAS NOT SUFFICIENTLY SERIOUS AND NURSE CURVIN WAS NOT INDIFFERENT TO THE PLAINTIFF’S MEDICAL NEEDS.⁶

The⁷ plaintiff has failed to submit sufficient evidence to raise a question of fact⁸ about whether Curvin violated his right to adequate medical care. To establish a claim for failure to provide adequate medical care to medical needs under the Due Process Clause of the Fourteenth Amendment, a pretrial detainee plaintiff must satisfy two elements: first, that the plaintiff had a “serious medical

⁵ As the attorney supporting summary judgment, the writer focuses on what satisfies the standard. Their purpose is to be persuasive by keeping the reader’s focus leaning the same way they will apply the standard.

⁶ A persuasive heading should include a legal conclusion or the action you’re asking the court to take, plus the reason supporting this conclusion or requested action. For more on headings, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 7 (CALI eLangdell Press 2023).

⁷ These are umbrella paragraphs, which are introductory paragraphs that inform a reader of what follows. They are usually found under a point heading that is further divided into sub-points. For more on umbrella paragraphs, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 3 (CALI eLangdell Press 2023).

⁸ See [Exercise 4-5](#) at the end of the document.

need,” and second, that the defendant “acted with deliberate indifference to such needs.” *Charles v. Orange County*, 925 F.3d 73, 86 (2d Cir. 2019).⁹

The evidence before this Court fails to raise a question of fact about either element. Therefore, Nurse Curvin is entitled to summary judgment on the plaintiff’s claim.

A. The short-term interruption in the administration of the plaintiff’s insulin is not a “serious medical need.”

To satisfy the first element, the plaintiff must show that he “was actually deprived of adequate medical care” for a condition that “posed an unreasonable risk of serious damage to his health.” *Dumel v. Westchester County*, 656 F. Supp. 3d 454, 464 (S.D.N.Y. 2023) (citations omitted). The alleged inadequate care must be “sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists.” *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996) (internal quotation marks and citation omitted). That condition is absent unless the “failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain.” *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) (citation omitted).

Courts consider several factors when determining whether a plaintiff has established a serious medical need. Among them are “the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain.” *Id.* (citation omitted). In contrast, “an assertion of pain sensation alone, unaccompanied by any large medical complications, does not amount to a serious medical need” *Evan v. Manos*, 336 F. Supp. 2d 255, 260 (W.D.N.Y. 2004). “Courts have consistently rejected deliberate indifference claims . . . involving relatively brief delays or interruptions in treatment and a dearth of evidence that the plaintiff’s pain or medical condition worsened as a result.” *Ridge v. Davis*, No. 18-CV-8958, 2022 WL 357020, at *15 (S.D.N.Y. Feb. 7, 2022) (collecting cases).

In this case, even looking at the facts in the light most favorable to the plaintiff,¹⁰ the facts before this Court do not raise a question of fact that the plaintiff had a

⁹ The writer grounds the rule in binding authority. You can read about grounding rules in binding authority in Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 1 (CALI eLangdell Press 2023).

¹⁰ See [Exercise 4-6](#) at the end of the document.

serious medical need. Rather, it shows merely a short delay in the administration of his insulin.

When the plaintiff first arrived at the county jail at about midnight, he was asked a number of questions related to his health. He calmly and coherently responded that his doctor prescribed medication to treat his pain and for diabetes. He also indicated that he wanted to be seen in the medical department. Ex. B at 4-5. Early the next afternoon, he was taken to the medical department where Nurse Curvin took the plaintiff's blood pressure and pulse and interviewed him about his medical condition. In response, he identified his treating physician and the medications his physician prescribed. *Id.* at 6. Nurse Curvin then called the jail physician who ordered insulin, which she immediately administered. Ex. A at 51:19. Approximately twenty-five hours later, an emergency was called once the plaintiff was discovered to be in distress. Ex. B at 7. Such a short-term interruption in the administration of insulin is not a serious medical need.

- B. The evidence before this court does not raise a question of fact about whether Nurse Curvin was deliberately indifferent to the plaintiff's medical needs because she took reasonable steps to ensure he would be treated.

Neither do the facts before this Court raise a question of fact with respect to the second element. Prison officials, like Nurse Curvin, do not violate the Fourteenth Amendment unless they have evinced a "deliberate indifference" to serious medical needs of prisoners. *Charles*, 925 F.3d at 86. Deliberate indifference in the Fourteenth Amendment context is akin to recklessness. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). "Thus, a detainee asserting a Fourteenth Amendment claim for deliberate indifference to his medical needs can allege either that the defendants *knew* that failing to provide the complained of medical treatment would pose a substantial risk to his health or that the defendants *should have known* that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health." *Charles*, 925 F.3d at 87. "[P]rison officials and medical officers have wide discretion in treating prisoners, and Section 1983 is not designed to permit federal courts to interfere in the ordinary medical practices of state prisons." *Sonds v. St. Barnabas Hosp. Corr. Health Servs.*, 151 F. Supp. 2d 303, 311 (S.D.N.Y. 2001).

The mere delay in providing medical treatment does not establish a defendant's deliberate to a prisoner's medical needs.¹¹ *Peachey v. Zayaz*, No. 23-06409, 2024 WL 4932527, at *4 (S.D.N.Y. Dec. 2, 2024). In *Peachey*, the court held that a pretrial detainee plaintiff failed to state a claim for failure to provide adequate medical care even though he did not see a physician until four days after his request. *Id.* at *1, 4. The plaintiff told a facility nurse he was in severe pain from his elbow, which was very swollen. *Id.* at *1. The nurse referred him to a facility physician, but he was not seen for four days. *Id.* In the interim, he asked to be taken to the emergency room. *Id.* When he was finally treated at an outside hospital for his elbow pain, he was prescribed antibiotics. *Id.* at *2. He alleged that the antibiotics were ineffective, and he later received surgery on his elbow. *Id.* In rejecting his deliberate indifference claim, the court emphasized that a "difference of opinion between a prisoner and prison officials regarding medical treatment does not, as a matter of law, constitute deliberate indifference." *Id.* at *4 (citation omitted).

Even if the brief interruption in the administration of insulin was sufficient to raise a question of fact about whether the plaintiff had a serious medical need, the plaintiff's claim fails because Nurse Curvin's actions do not raise a question about whether she was deliberately indifferent¹² to this need. The undisputed facts establish that Nurse Curvin evaluated him in the medical department and administered insulin immediately after the jail physician ordered it. Moreover, she explicitly wrote in his chart for the next shift that he should be seen in sick call for a physical later that day, with a scheduled glucose check.

Nurse Curvin's actions demonstrate that she took every reasonable step to ensure that the plaintiff would be seen only eight hours after she cared for him. Ex. A at 29:16-22; Ex. B at 6. Nurse Curvin responded to the plaintiff's needs when she evaluated him, when she contacted the physician on call, and when she administered insulin as ordered by the jail. She reasonably believed that if and when the plaintiff was returned to jail after his court appearance, medical staff would continue appropriate medical care. Ex. A at 50:22, 54:2.

When Nurse Curvin was at work the following day, she did not know that the plaintiff was not released on bail during his court appearance, so she did not

¹¹ As the party that argues the rule is not satisfied, the writer explains the rule persuasively by focusing on what does not satisfy it. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

¹² The writer applies the rule to the facts of the case after they have explained the rule through key terms. They do this by applying the key terms of the rule as explained in the rule section. For more on applying rules, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 1 (CALI eLangdell Press 2023).

know that he was back in the jail. Moreover, she had no reason to believe that he had not been seen in the medical department as she had ordered. When she was notified that the plaintiff was in distress, without delay she ordered that he be brought to the medical department. Upon his arrival, she took care of his immediate needs by testing his glucose level, calling the jail physician, administering insulin as the doctor ordered, and facilitating his transport to the hospital. She acted without delay. Ex. A at 88:16-23, 89:4-12. Since the *Peachey* plaintiff failed to demonstrate deliberate indifference even though he was not treated until four full days after his request, these undisputed facts demonstrate, as a matter of law, that Nurse Curvin was not deliberately indifferent to the plaintiff's medical needs.

CONCLUSION

For these reasons, Curvin respectfully requests that her motion for summary judgment be granted in all respects.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone Number
Date

Exercise 4-5

Question: Why does the writer argue that the plaintiff failed to submit sufficient evidence to raise a question of fact, in defendant's memorandum of law in support of summary judgment?

- A. It's the procedural standard for summary judgment imposed on the moving party.
- B. The non-moving party must point to genuine disputes of material fact in order to survive a motion for summary judgment, so the writer is arguing that the plaintiff has failed to do so.
- C. They want to make the plaintiff look bad.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-28>

Exercise 4-6

Question: Why does the writer include this phrase “even looking at the facts in the light most favorable to the plaintiff?”

- A. Their motion is so strong that they invite the court to give the plaintiff the benefit of all favorable inferences.
- B. A court deciding a motion for summary judgment must construe the facts in favor of the party opposing the motion.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-29>

Sample Document 4

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

GEORGE CHAPLIN,

Plaintiff,

25-cv-1501

v.

JOY CURVIN,

Defendant.

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS¹³

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56(a)(2), plaintiff George Chaplin respectfully submits this statement of undisputed facts. The plaintiff opposes summary judgment because he argues that the defendant violated his Fourteenth Amendment rights since she was “deliberately indifferent” to his medical needs. As fully explained in the accompanying memorandum of law, questions of fact about this issue preclude a grant of summary judgment.

¹³ Here is plaintiff Chaplin's statement of undisputed facts. Take a few minutes to compare it to the undisputed facts as told by defendant Curvin's attorney. Each tells the story behind the claim from their own point of view.

As the party opposing summary judgment and under the local rules for the WDNY, the plaintiff must include a response to each numbered paragraph in the moving party's statement, in correspondingly numbered paragraphs.

RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

1. Agree
2. Agree that the defendant so testified
3. Agree
4. Agree that Sally Shell so testified
5. Agree that the defendant so testified
6. Agree that the defendant so testified
7. Agree that the defendant so testified
8. Agree
9. Agree that Selma Polvino so testified
10. Agree
11. Agree
12. Agree that the defendant so testified

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS¹⁴

13. On April 14, 2023, Chaplin was detained at the county jail. Upon his admission at 11:40 PM, he identified himself to the booking officer as a diabetic who required insulin injections and requested medical care. See Chaplin Dep., attached as Exhibit A, at 88:19-23; Chaplin's County Jail Records, attached as Exhibit B, at 4.
14. While in the booking area, Chaplin stated that he was "in desperate need of insulin." Ex. A at 88:5-10. He was told that the medical staff would see him. *Id.* at 88:16-27. That happened on April 15 at approximately 2:15 p.m., when he was seen by Nurse Curvin in the medical department. Ex. B at 13.
15. Chaplin was detained in the county jail until approximately 3:00 PM on Sunday, April 16, when he was transported by ambulance from the county jail to the county hospital. Ex. B at 30.
16. When admitted, Chaplin was diagnosed with a "diabetic coma." Ex. B at 31.
17. Chaplin does not recall receiving any medication at the county jail between the time of his initial booking on Friday, April 14 and his transfer to the hospital. Ex. A at 125:9-14.
18. The county jail's medical department operates under a Medical Policy and Procedures Manual (hereinafter "Manual") to "ensure consistent and uniform methods of operation and to establish clear guidelines for the communication and implementation of the policies and goals of the county

¹⁴ Here the plaintiff tells their version of the story using the undisputed case file facts. Carefully check all applicable rules to see if the moving party is permitted or required to reply to these facts that the non-moving party considers undisputed.

- jail.” See Medical Policy and Procedures Manual, relevant portions attached as Exhibit C, at Policy and Procedure 01.00.00.
19. The Manual identifies diabetes as a chronic disease. Ex. C, Policy and Procedure 16.06.00.
 20. When Curvin saw Chaplin in the medical department on April 15, he had last received insulin at about 1:00 PM on April 14, when he self-administered a dose while at work. Ex. A at 73:1-25, 74:1-10.
 21. He was about to administer another dose when he was arrested at 8:00 PM that evening. *Id.* at 78:18-80:10. He was thus unable to administer the dose. The arresting officer told him he would receive his insulin at the county jail. *Id.* at 84:13-18.
 22. Under county policy, which requires that diabetic inmates be escorted to the medical department when booked, if insulin is ordered, an insulin administration sheet must be started, a 2,200-calorie diabetic diet must be ordered, and daily blood sugar tests must be ordered for 8:00 AM and for 4:00 PM. Ex. C, Policy and Procedure 16.07.00.
 23. Curvin did not start an insulin administration sheet or order him a diabetic diet, nor did she order the twice daily tests specified in the policy. Curvin Dep., attached as Exhibit D, at 22:8-23.
 24. She did give him “a cup” of water. *Id.* at 20:11.
 25. Curvin was not trained in the diabetes policy. *Id.* at 22:21.
 26. When asked at her deposition whether she remembered ever reading the policy prior to her deposition, she stated that she did not. *Id.* at 23:12.
 27. She also testified that even if she had had the procedure in front of her when she saw Chaplin on April 15, she “would not have done anything different than the way I did it because I met his needs as they had arisen, and he was going to court.” *Id.* at 26:5-10.
 28. She made no provision for his care the next day. *Id.* at 27:12.
 29. Chaplin returned from town court to county jail at 6:30 PM on Saturday, April 15. Transport Log, attached as Exhibit E, at 3.
 30. Chaplin was put in either a booking cell or a court hold cell. Ex. B at 41. He was placed in a cell on Delta Block at approximately 11:45 PM that night. Delta Block Log, attached as Exhibit F, at 1.
 31. Chaplin told the deputy in charge of the cell block that he was “in desperate need of insulin” and that he was “getting sick” and “becoming dehydrated.” Ex. A at 91:22-23.
 32. Chaplin stated that the sink in his cell was inoperable and that he “was forced to cup [his] hands and drink out of the toilet.” Ex. A at 92:10-20.
 33. He testified that he was feeling “dizzy, delusional” and that he “feared for his life” because nobody from the medical staff saw him or talked to him. *Id.*
 34. He said that he tried to stay awake and on his feet because he was afraid that if he laid down, the cell would be his “final resting place.” *Id.* at 92:18-19.

35. Curvin did not inquire about Chaplin when she got to work the next morning, April 16. Ex. D at 75:1-3.
36. She testified that no one in the medical department was assigned to check on Chaplin that morning; that there was no follow-up system in place to make sure that Chaplin would be seen by the medical department that morning; and that no one in the medical department was assigned the responsibility to make sure Chaplin received insulin that morning. *Id.* at 76:5-15.
37. Curvin went to Delta Block, where Chaplin was housed, at 10:05 AM that morning to distribute medication. Ex. D at 72:13-73:18.
38. She returned to Alpha Block to pass medication again at 1:40 PM that afternoon. *Id.* at 79:4-12.
39. On both occasions, she walked past the cells on the gallery. *Id.* at 80:9-13.
40. Chaplin received no medical attention from Curvin when she was on Delta Block that day at either 10:05 AM or at 1:40 PM. *Id.* at 82:12-16.
41. At approximately 2:30 PM that afternoon, Chaplin was found by a deputy unresponsive on the floor of his Delta Block cell. Ex. F at 2.
42. Chaplin was already in diabetic ketoacidosis—a well-known and potentially fatal complication of Type I diabetes. Janice Wyatt Aff., attached as Exhibit G, at ¶ 15.
43. Curvin returned to Delta Block, where she observed Chaplin slumping over. Ex. D at 83:22-84:1.
44. She transported Chaplin to the medical department where she measured his blood sugar level and found that it was higher than the jail glucometer could read. *Id.* at 85:13.
45. She then called the jail physician who ordered ten units subcutaneous insulin which Curvin administered to Chaplin. *Id.* at 85:20-23.
46. According to plaintiff's medical expert, a board-certified emergency medicine physician, this amount of insulin was "too little and too late." Ex. G at ¶ 15.
47. There is no indication in Chaplin's county jail medical chart that he had received any medical attention since Curvin had seen him in the medical department the prior afternoon at 2:15. See Chaplin's County Jail Medical Records, attached as Exhibit H.
48. Chaplin was transported by ambulance to the county hospital. Chaplin arrived at in the emergency room at about 4:00 PM. Carol Popen Dep., attached as Exhibit I, at 9:14-21.
49. Shortly after he arrived at the emergency room, Chaplin's blood glucose level was close to 800 mg/dl, and his acidotic reading was 6.94. Ex. I at 17:1-9.
50. A sustained pH of 6.94 is not "compatible with life." Ex. G ¶ 17.
51. A reading of 6.94 is categorized as severe acidosis; if not corrected, it can lead to death. Ex. I at 18:10.

52. Chaplin came under the care of a medical intern in the Intensive Care Unit, at about 7:30 PM that evening. *Id.* at 17:26-18:1.
53. The intern found Chaplin to be unresponsive, dehydrated, and hypothermic with a body temperature of 94 degrees. *Id.* at 22:10-24.
54. He diagnosed his condition as diabetic ketoacidosis, a condition that develops in diabetics who are not receiving insulin. *Id.* at 27:4-9.
55. Chaplin's diabetic ketoacidosis was a direct result of not receiving regular blood sugar checks and adequate insulin dosages at the county jail. Ex. G ¶ 6.
56. The intern explained that when diabetics do not receive insulin, they cannot metabolize glucose, so the glucose accumulates in their blood and in their body. When glucose is unavailable, the body starts to use other substances, the biproduct of which is ketones, which are toxic substances. Ex. I at 27:14-22.
57. The condition can be fatal if not treated. *Id.* at 28:4.
58. The intern found that Chaplin was "severely acidotic and dehydrated" and that he could have died or suffered other consequences such as organ failure. *Id.* at 28:15-29:7.
59. The treatment required for Chaplin's ketoacidosis had a potential side effect of brain swelling. *Id.* at 35:12-20.
60. The plaintiff's corrections specialist opines that Curvin's practices in April of 2023 fell "far below the standard of correctional care" because, although Chaplin exhibited signs of uncontrolled diabetes on April 15, Curvin did not order him a special diet, nor did she order 8:00 AM and 4:00 PM blood sugar tests as required by the county jail's own policy. And, while she testified that she gave him a dose of insulin, there is no medication administration record supporting her testimony. See Susan Randall Aff., attached as Exhibit J.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sample Document 5

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

GEORGE CHAPLIN,

Plaintiff,

25-cv-1501

v.

JOY CURVIN,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT¹⁵

Plaintiff George Chaplin was booked into the county jail on the night of Friday, April 14, 2023. He immediately identified himself as an insulin-dependent diabetic who was “in desperate need of insulin.” By Sunday, April 16, he had lapsed into diabetic ketoacidosis, a life-threatening condition that develops in diabetics deprived of insulin. His injuries were the inevitable result of defendant Joy Curvin’s deliberate indifference to plaintiff’s serious medical needs.

In this memorandum of law, Chaplin establishes in detail Joy Curvin’s deliberate indifference to Plaintiff’s medical needs. Curvin, a nurse who saw the plaintiff in

¹⁵ It’s a good idea to include a persuasive preliminary statement that sets the stage for your argument. Always check local rules and practices to see which sections of the brief are required or preferred.

the medical department on Saturday, April 15, 2023, the day before he lapsed into diabetic ketoacidosis, knew that Chaplin had a continuing need for insulin, knew that he needed to be placed on a diabetic diet, and knew that he needed to be scheduled for follow-up treatment the next day. Still, she neither ordered him to have a diabetic diet nor ordered him to receive follow-up care the next day. While she testified that she did administer insulin to him on April 15, there is no medication administration record supporting her testimony.¹⁶ Accordingly, the plaintiff is entitled to a trial to resolve his Fourteenth Amendment claim and receive a remedy for the injuries he has suffered.

STATEMENT OF FACTS

The plaintiff respectfully refers the Court to the Statement of Undisputed Facts submitted by the plaintiff pursuant to Local Rule 56(a)(2), and the exhibits to the statement of facts, for a complete recitation of the facts material to the present motion.

ARGUMENT

THE MATERIAL FACTS RAISED BY THE PLAINTIFF IN SUPPORT OF HIS CLAIM AGAINST THE DEFENDANT PRECLUDE SUMMARY JUDGMENT BECAUSE THEY RAISE QUESTIONS OF FACT ABOUT THE DEFENDANT'S DELIBERATE INDIFFERENCE TO THE PLAINTIFF'S SERIOUS MEDICAL NEEDS.

The rights of pretrial detainees to adequate medical care are protected by the Due Process Clause of the Fourteenth Amendment. *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996). Medical providers, such as Curvin, violate a pretrial detainee's Fourteenth Amendment right to adequate medical treatment when they show "deliberate indifference" to the detainee's serious medical needs.¹⁷ *Id.* The Second Circuit has clarified that this standard is met when the provider "recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell v. Pineiro*, 849 F.3d 17, 34 (2d Cir. 2017). "In other words, the

¹⁶ Let the court know when there is a lack of evidence in the record to support an opposing party's assertions.

¹⁷ As the party that argues the opposing party violated this right, the writer focuses on what satisfies this legal rule. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

‘subjective prong’ . . . of a deliberate indifference claim is defined objectively.” *Id.*

The state of the defendant’s knowledge is normally a question of fact to be determined at trial. See *Weyant*, 101 F.3d at 856-57 (reversing grant of summary judgment to prison officials sued by diabetic pre-trial detainee for failure to provide adequate medical care); *Archer v. Dutcher*, 733 F.2d 14, 17 (2d Cir. 1984) (reversing grant of summary judgment where, though the prisoner-plaintiff eventually received medical attention, there was a question as to whether prison officials’ five-hour delay in securing that attention constituted deliberate indifference to the plaintiff’s needs and suffering); cf. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (“Whether a prison official had the requisite knowledge of a substantial risk to a convicted prisoner is a question of fact subject to demonstration in the usual ways . . .”).

Looking at the evidence in the light most favorable to Chaplin,¹⁸ it raises questions of fact¹⁹ about whether Curvin acted with deliberate indifference to Chaplin’s serious medical needs. On the afternoon of Saturday, April 15, the medical department policy and procedure for treating diabetic prisoners required Curvin to put Chaplin on a diabetic diet, but she chose not to. Ex.C at Policy and Procedure 16.07.00; Ex. D at 22:8-23. The same procedure required her to start an insulin administration sheet, but she chose not to. *Id.* Lastly, the procedure required her to order the twice-daily tests specified in the policy, but she chose not to. *Id.* Under the holding center’s medical department procedures, she was required to order blood sugar tests for Chaplin the next day in the morning and again in the afternoon, but she chose not to. *Id.* And, while Curvin claims she gave Chaplin insulin that Friday afternoon as she was ordered to do, there is no medical administration record to support her claim.

When asked at her deposition whether she remembered ever reading the policy prior to her deposition, Curvin stated that she did not. Ex. D at 23:12. She went on to say that even if she had had the procedure in front of her when she saw Chaplin on April 15, she “would not have done anything different than the way I did it because I met his needs as they had arisen, and he was going to court.” *Id.* at 26:5-10. Remarkably, she made no provisions for him the next day, in the likely event he was returned to jail after he appeared in court. *Id.* at 27:12.

Although Chaplin had a blood sugar level in the highly dangerous range and complained of thirst—a sign of uncontrolled diabetes—Curvin gave him just one

¹⁸ See [Exercise 4-7](#) at the end of the document.

¹⁹ See [Exercise 4-8](#) at the end of the document.

cup of water. *Id.* at 20:11. The next morning, she walked past Chaplin’s cell as he was lapsing into diabetic ketoacidosis. *Id.* at 72:13-73:18. Several hours later, she walked past his cell again. *Id.* at 72:4-12. Just forty-five minutes later, he was found there, unconscious and suffering from a nearly fatal episode of diabetic ketoacidosis. *Id.* at 74:2. Curvin’s practices fell “far below the standard of correctional care.” Ex. J ¶¶ 10-12. Curvin’s conduct was patently unreasonable and demonstrates deliberate indifference to Chaplin’s needs.

The defendant correctly states that Chaplin must also demonstrate that he had a “serious medical need.”²⁰ However, the implication that Chaplin’s diabetes was merely “an assertion of pain sensation alone, unaccompanied by any large medical complication” is absurd. There can be no doubt that diabetes is a serious medical need. Ex. G ¶ 8. The Second Circuit has ruled that even a dental cavity is a serious medical need because it will “degenerate with increasingly serious implications if neglected over sufficient time.” *Harrison v. Barkley*, 219 F.3d 132, 137 (2d Cir. 2000). See also *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 258 (D. Conn. 2008) (“There can be no real dispute that Chrohn’s disease, which causes severe pain when left untreated, constitutes a serious medical condition.”).

Significantly, the serious medical need suffered by the *Weyant* plaintiff was diabetes. 101 F.3d at 848. The Second Circuit did not even discuss the question of whether diabetes was a serious condition. Indeed, on appeal, the *Weyant* defendants did not attempt to argue that it is not, because there can be no dispute that when diabetes is left untreated it degenerates into a fatal condition. The plaintiff’s own experience at the county jail establishes this beyond any doubt.

²⁰ Here the writer rebuts the opposing party’s argument. Notice that the rebuttal follows the writer’s primary argument. For more on writing rebuttals, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 5 (CALI eLangdell Press 2023).

CONCLUSION

For all the reasons stated above, this Court should deny the defendant's motion for summary judgment in its entirety. Chaplin has submitted sufficient proof to raise questions of fact about Curvin's liability, and his claim should proceed to trial.

Respectfully submitted,

Attorney Signature

Attorney Name

Address

Email address

Phone number

Date

Exercise 4-7

Question: What is the significance of the phrase “looking at the evidence in the light most favorable to Chaplin”? (See paragraph 3 under the argument section.)

- A. Because Curvin is the moving party, the evidence presented to the court will be construed in favor of Chaplin, giving him the benefit of all reasonable inferences.
- B. While the court must view the evidence in the light most favorable to Curvin, the writer urges the court to view the facts in the light most favorable to her client because it is persuasive.
- C. In a prior motion, the parties argued over whether the court should view the facts in the light most favorable to Chaplin or Curvin, and Chaplin won.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-30>

Exercise 4-8

Question: What is the significance of the phrase “raises questions of fact”? (See paragraph 3 under the argument section.)

- A. It is the standard imposed on a party moving for summary judgment.
- B. It is the burden imposed on a party opposing summary judgment when the moving party has met its burden to show that there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law.
- C. It shows that Chaplin is entitled to judgment as a matter of law.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-31>

Second Sample

As explained above, any party can move for summary judgment on particular claims or defenses. The next sample is a plaintiff's motion for summary judgment on the issue of liability. In this case, the plaintiff, Gino Baynes, broke his arm and fractured multiple ribs as a result of a motor vehicle accident that occurred when another driver entered the plaintiff's lane of traffic. The plaintiff moves for summary judgment on the issue of liability because he argues that the sole cause of the accident is that the driver crossed into the plaintiff's lane of traffic, in violation of the New York Vehicle and Traffic Law, and that the driver did not face a qualifying emergency, which would absolve the defendant of liability.

The defendant is the United States of America because the driver, Marine Sgt. Gil Hoffmann, was a United States Marine driving in the course of his employment. Under these circumstances, a plaintiff must sue under the Federal Torts Claim Act and must name as the defendant the United States of America. 28 U.S.C. §§ 2671-2680. As in diversity actions, the court will apply federal procedural law and state substantive law to this Federal Torts Claims Act action.

Answer the following questions to identify the procedural rules that will apply to the plaintiff's motion.

Exercise 4-9

Question 1: Who has the initial burden in the plaintiff's motion for summary judgment, and what must that party prove?

Question 2: In what light will the court view the evidence before it?

Question 3: If the moving party is successful, the burden shifts. In this case, what must that party prove?

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-32>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-33>

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-34>

As a review, once you know the procedural rules, you combine them with the substantive issue to form the issue before the court. Here's an effective formula:

(insert the way the court will view the evidence) (insert party with burden of proof) (insert what that party must prove) (insert substantive issue)

Exercise 4-10

Question: The substantive issue in *Baynes v. United States* is whether the defendant was negligent. Apply the formula to the procedural rules and substantive issue in this case related to the plaintiff's motion for summary judgment.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-35>

Sample Document 6

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

GINO BAYNES,

Plaintiff,

25-cv-939

v.

THE UNITED STATES of AMERICA,

Defendant.

PLANTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff Gino Baynes, through his undersigned attorneys, respectfully moves for summary judgment on the issue of defendant's liability. In support of this motion, Baynes submits the attached statement of undisputed facts, with exhibits, and accompanying memorandum of law. Because there is no genuine dispute as to any material fact and Baynes is entitled to judgment as a matter of law, Baynes respectfully requests that the Court grant this motion.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sample Document 7

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

GINO BAYNES,

Plaintiff,

25-cv-939

v.

THE UNITED STATES of AMERICA,

Defendant.

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS²¹

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56(a)(1), plaintiff Gino Baynes hereby submits this statement of undisputed facts. This Federal Torts Claim Act action is based on a motor vehicle collision that occurred on December 26, 2023 on Route 16 in Erie County, New York. As a result of the collision, Baynes broke his left arm and fractured multiple ribs. As fully explained in the accompanying memorandum of law, Baynes is entitled to judgment on the issue of liability based on the following undisputed material facts.

²¹ In compliance with Federal Rule of Civil Procedure 56 and the local rules for this district, the parties have submitted statements of undisputed facts along with the supporting evidence and memoranda of law. Remember to always check local rules for particular requirements, which vary by court.

THE UNDISPUTED FACTS²²

1. On²³ December 26, 2023, at approximately 4:35 pm, Baynes was driving his vehicle northbound along Route 16, about a mile from Wales, New York. Baynes Dep. 11:4, 8-9.
2. It was dusk, but the road was well lit. Baynes Dep. 11:4, 10.
3. It was snowing lightly. Baynes Dep. 11:6, 10.
4. The winds were gusting up to 40 miles per hour. Baynes Dep. 11:6, 10.
5. The speed limit in that area is forty-five miles per hour, but Baynes was driving at approximately thirty miles per hour because of the winter road conditions. Baynes Dep. 16:3.
6. Other motorists were driving at approximately the same speed as Baynes. Baynes Dep. 16:12-14.
7. Baynes' headlights were on. Baynes Dep. 17:8.
8. At the same time, Gil Hoffmann, a U.S. Marine driving in the course of his employment for defendant United States of America, was driving southbound on Route 16 in a minivan. Hoffmann Dep. 13:18-19.
9. His headlights were not on, and he was traveling about forty-five miles per hour. Hoffmann Dep. 19:17, 22:1-2.
10. As the plaintiff neared the Waffle House on Route 16, he noticed the defendant's van veer sharply towards his lane of traffic. Baynes Dep. 22:16-20.
11. To avoid the situation, the plaintiff applied the brake and moved onto the shoulder as "far as was possible." Baynes Dep. 18:19-22, 52:8-11.
12. Nevertheless, the defendant's van careened across the double yellow line centerline toward the plaintiff and slammed into the plaintiff's vehicle. Baynes Dep. 20:3-5.
13. Hoffman testified that he veered into the plaintiff's lane of traffic to avoid hitting a deer that ran into the road. Hoffmann Dep. 19:17, 26:1-2.
14. The area on both sides of Route 20 in the vicinity of Wales is wooded and a popular place for hunters in deer season. Baynes Dep. 28:16-20.

²² Take a few minutes to compare the plaintiff's statement of undisputed facts with the defendant's below. Each tells the story behind the claim from their point of view.

²³ Each paragraph is limited to facts. Facts are about the physical world and can be verified through objective evidence. In contrast are opinions, conclusions, and emotions, which tell the reader what to think. For more on using facts, rather than conclusions or opinions, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 10 (CALI eLangdell Press 2023)

15. Hoffman knows that section of Route 20 “well.” Hoffmann Dep. 21:17, 26:1-2.

Respectfully submitted,

Attorney Signature

Attorney Name

Address

Email address

Phone number

Date

Sample Document 8

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

GINO BAYNES,

Plaintiff,

25-cv-939

v.

THE UNITED STATES of AMERICA,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

In this motor vehicle accident case, the record establishes that the defendant was negligent as a matter of law because driver Gil Hoffman crossed over into plaintiff Gino Baynes' lane of traffic in violation of New York Vehicle and Traffic Law § 1126(a), which prohibits drivers from crossing over a double yellow line into opposing traffic. Hoffman did not face a qualifying emergency before doing crossing over the line, so the sudden emergency doctrine does not absolve the defendant of liability. Because the undisputed material facts establish that defendant is liable for negligence, the Court should grant summary judgment to Baynes on the issue of the defendant's liability.

STATEMENT OF FACTS

The facts material to this motion for summary judgment are fully set forth in the attached Statement of Undisputed Facts.

SUMMARY JUDGMENT STANDARD

Summary judgment will be granted if the moving party establishes that there is no genuine dispute of material fact and that they are, therefore, entitled to judgment as a matter of law.²⁴ Fed. R. Civ. P. 56(a). “Once the movant meets its burden, the non-movant may defeat summary judgment only by producing evidence of specific facts that raise a genuine issue for trial.” *Music Royalty Consultants, Inc. v. Reservoir Media Mgmt., Inc.*, 598 F. Supp. 3d 158, 172 (S.D.N.Y. 2022) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). To survive summary judgment, the non-moving party must present concrete evidence and rely on more than conclusory or speculative claims. *Id.* (citing *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980)).

ARGUMENT

AS A MATTER OF LAW, THE DEFENDANT IS LIABLE FOR BAYNES’ INJURIES BECAUSE HOFFMAN CROSSED INTO BAYNES’ LANE OF TRAFFIC AND DID NOT FACE A QUALIFYING EMERGENCY.

Defendant United States of America is liable as a matter of law because Hoffman crossed over into Baynes’ lane of traffic in violation of New York Vehicle and Traffic Law § 1126(a), which prohibits drivers from crossing over a double yellow line into opposing traffic. Moreover, the defendant cannot be absolved of liability under the emergency doctrine despite the deer running into the road because Hoffman was familiar with the area he was driving in and driving too fast under the circumstances.

Violation of a statute governing traffic safety is negligence per se. *Marks v. Rieckoff*, 101 N.Y.S.3d 63, 65 (App. Div. 2019). Thus, “[c]rossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law § 1126(a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver’s own making.” *Burgess v. Little Wolf Cabinet Shop, Inc.*, 210 N.Y.S.3d 206, 208 (App. Div. 2024). It is uncontested that Hoffman crossed a double yellow line into Baynes’ lane of traffic. Thus, Hoffman’s violation of section 1126(a) establishes negligence as a matter of law.

²⁴ As the attorney supporting summary judgment, the writer focuses on what satisfies the standard. Their purpose is to be persuasive by keeping the reader’s focus leaning the same way they will apply the standard. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

The only way a driver who crosses over to another driver's lane of traffic can escape liability is when the crossover is justified by a "qualifying emergency," which is one that is both "sudden and unforeseen" and "not of the actor's own making." *Caristo v. Sanzone*, 750 N.E.2d 36, 38 (N.Y. 2001). Moreover, according to the New York Appellate Division, "some emergencies must be anticipated, and the actor must be prepared to meet them when he engages in an activity in which they are likely to arise." *Shaw v. Mfg. Hanover Trust Co.*, 464 N.Y.S.2d 172, 174 (App. Div. 1983) (quoting Prosser, *Law of Torts* 170 (4th ed.)). Thus, the doctrine is inapplicable where "the defendant driver should reasonably have anticipated and been prepared to deal with the situation with which he was confronted." *Muye v. Liben*, 723 N.Y.S.2d 510, 511 (App. Div. 2001) (citation modified).

For example, the New York Court of Appeals reversed a trial court that gave an emergency instruction to a driver who claimed the sun blinded him while he was driving in an area he was familiar with.²⁵ *Lifson v. City of Syracuse*, 958 N.E.2d 72, 75 (N.Y. 2011). The driver was about to turn to the west at a time of day that the sun would be setting. *Id.* The court reasoned that "it is well known, and therefore cannot be considered a sudden and unexpected circumstance, that the sun can interfere with one's vision as it nears the horizon at sunset, particularly when one is heading west." *Id.* See also *Shaw*, 464 N.Y.S.2d at 174 (finding the possibility of a bank robbery is not unforeseeable).

Though a deer ran out in front of Hoffman's car, the sudden emergency doctrine does not apply to these facts because the presence of the deer was not unforeseeable. That a deer might run onto the road on Route 16 near Wales, New York is foreseeable for anyone familiar with the area. The undisputed evidence is that Hoffman was familiar with the area where he claims he was faced with a qualifying emergency. Hoffman admitted in his deposition that he "know[s]" the area "well." Hoffmann Dep. 21:17; 26:1-2. The area on both sides of the road in that area is wooded and a popular place for hunters in deer season. Baynes Dep. 28:16-20. Hoffman should have been prepared for the possibility that a deer might run into traffic when he was driving on this stretch of road.

Like the *Lifson* defendant who claimed he faced an emergency when he was blinded by the sun while turning to the west at a time and place he knew the sun would be setting, Hoffman claims he faced an emergency when a deer ran into his lane of traffic when he was driving through a wooded area he knows well

²⁵ This sentence is an example of a hook, which is the first sentence of a rule illustration. A hook focuses on the key terms that the precedent illustrates. For more on writing effective hooks, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch.2 (CALI eLangdell Press 2023).

that is known to be a popular place for deer hunters. The *Lifson* court found that where it is well known that a circumstance may take place, it cannot be considered sudden or unexpected, and so too should this Court.²⁶

Even if the appearance of a deer in a wooded area were unforeseeable, the defendant is not entitled to the emergency defense because “a driver confronted with an emergency situation may still be found to be at fault for the resulting accident where the prior tortious conduct of the driver contributed to bringing about the emergency.” *Kizis v. Nehring*, 811 N.Y.S.2d 509, 511 (App. Div. 2006). The undisputed evidence before this Court establishes that Hoffman’s tortious conduct prior to the emergency contributed to bring about the emergency because he was driving unreasonably in light of the hazardous road conditions. It was snowing. Baynes Dep. 11:6, 10. Winds were gusting at up to forty miles per hour. *Id.* 11:6, 10. The speed limit in the area of the collision is forty-five miles per hour, and the plaintiff was driving at approximately thirty miles per hour, because of the winter road conditions. *Id.* 16:3. Other motorists were driving at the same speed as the plaintiff. *Id.* 16:12-14. And the plaintiff’s headlights were on. *Id.* 17:8. Nevertheless, Hoffman was traveling at a rate of forty-five miles per hour. Hoffmann Dep. 19:17. And while it was December 26 at about 4:30 p.m., his headlights were not on. Hoffmann Dep. 22:1-2. Therefore, Hoffman was driving unreasonably when he encountered the deer, which was a foreseeable situation.

CONCLUSION

For the reasons stated above, the defendant is liable for negligence as a matter of law. Thus, this Court should grant the plaintiff’s motion for summary judgment on the issue of defendant’s liability.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

²⁶ This paragraph is an analogy between the facts from the case before the court and the facts from a precedent case. For more on writing analogies, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 2 (CALI eLangdell Press 2023).

Sample Document 9

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

GINO BAYNES,

Plaintiff,

25-cv-939

v.

THE UNITED STATES OF AMERICA,

Defendant.

DEFENDANT'S STATEMENT OF UNDISPUTED FACTS²⁷

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56(a)(2), the defendant respectfully submits this statement of undisputed facts. The defendant opposes summary judgment because there are questions of fact about whether the sudden emergency doctrine applies in this case. Thus, the defendant respectfully requests that this Court deny the plaintiff's motion for summary judgment.

RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

1. Agree that the plaintiff so testified.
 2. Agree that the plaintiff so testified.
 3. Agree.
 4. Agree that the plaintiff so testified.
 5. Agree that the plaintiff so testified.
 6. Agree that the plaintiff so testified.
-

²⁷ Here is the defendant's statement of undisputed facts. Take a few minutes to compare it to the undisputed facts as told by the plaintiff's attorney. Each tells the story behind the claim from their own point of view.

7. Agree that the plaintiff so testified.
8. Agree.
9. Agree that the plaintiff so testified.
10. Agree that the plaintiff so testified.
11. Agree that the plaintiff so testified.
12. Agree that the plaintiff so testified.
13. Agree.
14. Agree that the plaintiff so testified.
15. Agree.

DEFENDANT'S STATEMENT OF UNDISPUTED FACTS²⁸

1. On the day of the accident in the late afternoon, the plaintiff was driving northbound on Route 16 near Wales, New York. Baynes Dep. 16:1-3, 16:16.
2. At the same time, Marine Sgt. Gil Hoffmann was traveling south, returning to his base after distributing gifts to children for the United States Marines Toys for Tots program. Hoffmann Dep. 8:6-9.
3. It was not yet dusk, and the road was well lit. Hoffmann Dep. 10:6-9.
4. Hoffman was driving within the speed limit. Hoffmann Dep. 11:3-4.
5. A deer ran "suddenly" into Hoffman's lane of traffic. Hoffmann Dep. 13:-4.
6. Hoffman testified that the deer appeared so suddenly that he had no time to think about his actions. He turned sharply to the left to avoid hitting the animal. Hoffmann Dep. 13:7-10.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

²⁸ Here the defendant tells their version of the story using the undisputed case file facts. Carefully check all applicable rules to see if the moving party is permitted or required to reply to these facts that the non-moving party considers undisputed.

Sample Document 10

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

GINO BAYNES,

Plaintiff,

25-cv-939

v.

THE UNITED STATES of AMERICA,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Because the evidence before this Court raises questions of fact about whether driver Gil Hoffman was faced with an emergency before crossing into the plaintiff's lane of traffic, this Court should deny the plaintiff's motion for summary judgment on liability and allow the case to proceed to trial.

STATEMENT OF FACTS

The facts material to this motion for summary judgment are fully set forth in the attached Statement of Undisputed Facts.

SUMMARY JUDGMENT STANDARD

Summary judgment will be denied unless the moving party meets the initial burden of demonstrating the absence of a genuine issue of material fact.²⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When making this determination, a court must view all facts in the light most favorable to the non-moving party, *Tolan v. Cotton*, 572 U.S. 650, 657 (2014), and “resolve all ambiguities and draw all permissible factual inferences” in favor of the non-moving party, *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012).

ARGUMENT

QUESTIONS OF FACT ABOUT WHETHER HOFFMAN ACTED REASONABLY WHEN A DEER SUDDENLY RAN INTO HIS LANE OF TRAFFIC PRECLUDE THE ENTRY OF SUMMARY JUDGMENT.³⁰

The plaintiff’s motion for summary judgment on liability should be denied because there are issues of fact about whether Hoffman was faced with an emergency situation that absolves the defendant of liability for the crossover into the plaintiff’s lane of traffic.

When “an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency.”³¹ *Lifson v. City of Syracuse*, 958 N.E.2d 72, 74 (N.Y. 2011) (citation omitted). “The doctrine recognizes that a person confronted with such an emergency situation “cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the

²⁹ As the party that argues against summary judgment, the writer focuses on what does not satisfy the standard. For more on writing rules persuasively, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch.4 (CALI eLangdell 2023).

³⁰ A persuasive heading should include a legal conclusion or the action you’re asking the court to take, plus the reason supporting this conclusion or requested action. For more on headings, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 7 (CALI eLangdell Press 2023).

³¹ The rule explanation in this paragraph is written persuasively. It keeps the focus on what satisfies the rule because the defendant argues that the facts of the case satisfy the rule.

wrong decision.” *Id.* (citation omitted). The existence of an emergency and the reasonableness of a party’s response to it will ordinarily present questions of fact. *Blajszczak v. McGhee-Reynolds*, 141 N.Y.S.3d 210, 212 (App. Div. 2021); *Schwallie v. Farnan*, 132 N.Y.S.3d 470, 471 (App. Div. 2020). Indeed, the Appellate Division has concluded that issues of fact precluded summary judgment in a case involving a deer that darted into the road. *Hill v. Cash*, 985 N.Y.S.2d 345, 350 (App. Div. 2014).

Any party that presents “some” evidence of a qualifying emergency is entitled to have a jury instructed on the defense. *Rivera v. N.Y. Transit Auth.*, 569 N.E.2d 432, 434 (N.Y. 1991) (finding reversible error when a trial court denied a defendant’s request for an emergency doctrine jury instruction where a subway train ran over a person on the tracks after failing to stop on time). “If, under some reasonable view of the evidence, an actor was confronted by a sudden and unforeseen occurrence not of the actor’s own making, then the reasonableness of the conduct in the face of the emergency is for the jury, which should be appropriately instructed.” *Id.*

For example, the Court of Appeals affirmed the trial court’s jury instruction on the emergency doctrine in a case in which the driver was traveling below the speed limit but struck a child who ran into the street. *Ferrer v. Harris*, 434 N.E.2d 231, 234-35 (N.Y. 1982), *amended*, 436 N.E.2d 1342 (N.Y. 1982). The court held:

[I]t would be rational for the jury to have adopted a view of the evidence from which it concluded that traveling at 15 to 20 miles per hour was an adequate response to the prevailing circumstances and that the opportunity to learn of and react to the presence of [the child in the street] was too brief and too unexpected to allow time to think of blowing the horn or to make a calculated and intelligent choice as to the best way to avoid or minimize the impending collision, be it by braking, acceleration or otherwise.

Id. at 235.

A driver’s awareness of a road hazard does not preclude the emergency doctrine defense.³² *Kuci v. Manhattan Bronx Surface Transit Operating Author.*, 631 N.Y.S.2d 163, 163 (App. Div. 1995), *aff’d*, 669 N.E.2d 1100 (N.Y. 1996). In

³² This is a hook, which is the first sentence of a rule illustration. It should tell the reader why you chose to include the rule illustration and how it supports your argument. For more on writing hooks, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch.2 (CALI eLangdell 2023).

Kuci, the court reasoned that “the bus operator’s awareness that at the particular intersection, motorists often made sudden right turns from the left lane, creating a hazard with buses leaving the bus stop there, did not lessen the potential emergency quality of these circumstances.” *Id.* Therefore, the Appellate Division held that the trial court committed reversible error when it failed to instruct the jury on the emergency doctrine. *Id.* at 163-64.

Viewing the facts in the light most favorable to the defendant and drawing all permissible inferences in its favor, the evidence before this Court raises questions of fact about whether Hoffman’s reactions were reasonable under the circumstances when he was faced with an emergency.³³ Immediately before a deer suddenly ran into Hoffman’s lane of traffic, he was driving in a reasonable and prudent manner at approximately 45 miles per hour, Hoffmann Dep. 19:17, which is within the speed limit, Baynes Dep. 16:3. It was snowing only lightly. Baynes Dep. 11:6, 10. And while the plaintiff testified the wind gusted up to 40 miles per hour, there is no evidence of blowing or drifting snow.³⁴

Like the *Ferrer* defendant who was driving within the speed limit when a child suddenly ran into the street, Hoffman was driving within the speed limit when a deer suddenly ran into his lane of traffic. Like the *Ferrer* plaintiff who argued that the defendant should have been driving more slowly because of the presence of children in the area, here the plaintiff argues that Hoffman should have been driving more slowly because of the weather conditions. Like the *Ferrer* court that held that a jury could reasonably conclude that the driver adequately responded to the circumstances presented, so too could a jury reach that conclusion here.

While Hoffman was familiar with the area in which he was driving, it did not lessen the possibility that a deer would run suddenly into the road.³⁵ The defendant freely admitted he knew the area where the deer ran into the road “well.” Hoffmann Dep. 21:17. 26:1-2. The area is wooded and a popular place for hunters in deer season. Baynes Dep. 28:16-20. But the *Kuci* defendant was also familiar with a particular intersection when an emergency arose, yet the Appellate Division reasoned that the defendant’s familiarity with the intersection did not diminish the emergency he faced. So too should this Court reason that simply being familiar with a stretch of road does not lessen the potential emergency situation of a deer suddenly running into a lane of traffic. Like the

³³ See [Exercise 4-11](#) at the end of the document.

³⁴ Point out the absence of evidence when it supports your argument.

³⁵ This is an assertive rebuttal to a negative fact. Rebuttal to negative facts should be assertive rather than defensive. For more on writing rebuttals, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 5 (CALI eLangdell Press 2023).

Appellate Division that let a jury decide whether the *Kuci* defendant was entitled to the emergency doctrine defense, so too should this Court let a jury decide if Hoffman was faced with an emergency at the time of the incident.³⁶

CONCLUSION

For the reasons stated above, this Court should deny the plaintiff's motion for summary judgment.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Exercise 4-11

Question: What three procedural rules did the writer incorporate into the following sentence: "Viewing the facts in the light most favorable to the defendant and drawing all permissible inferences in its favor, the evidence before this court raises questions of fact about whether Hoffman's reactions were reasonable under the circumstances when he was faced with an emergency?"

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=166#h5p-36>

³⁶ This paragraph is an analogy between the facts from the case before the court and the facts from a precedent case. For more on writing analogies, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 2 (CALI eLangdell Press 2023).

Coming Up Next

If the case ultimately proceeds to trial, there may be pre-trial motions filed. One kind, motions in limine, are the subject of the final chapter.

Chapter 5: Motions in Limine

By Nan L. Haynes and Katrin C. Rowan

Learning Outcomes

1. Understand:
 - a. why and when to file a motion in limine;
 - b. the relevant procedural rules when making or opposing a motion in limine; and
 - c. the documents required when making or opposing a motion in limine.
2. Be able to:
 - a. apply the relevant procedural rules when making or opposing a motion in limine; and
 - b. draft the documents required when making or opposing a motion in limine.

Introduction

If dispositive motions have not been filed or granted and the case proceeds to trial, the parties may file pre-trial motions as authorized by the court's local rules, scheduling order, or standing orders.

One common pre-trial motion is a motion in limine, in which the parties argue before trial about the admissibility of certain evidence or arguments. The purpose of a motion in limine (meaning "at the threshold") is "to aid the trial process by enabling the court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (citation modified).

Why File a Motion in Limine

Some evidence, including certain expert, testimonial, and documentary evidence, is not admissible depending on the facts of the case. For example, evidence may be inadmissible hearsay, protected by the attorney-client

privilege, or not relevant. Or, evidence that is relevant may nonetheless be so highly prejudicial compared to its probative value to a case that it should be excluded. See *O’Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1306 n.1 (5th Cir. 1977) (describing motions in limine “for the purpose of prohibiting opposing counsel from mentioning the existence of, alluding to, or offering evidence on matters so highly prejudicial to the moving party that a timely motion to strike or an instruction by the court to the jury to disregard the offending matter cannot overcome its prejudicial influence on the jurors’ minds”) (citation omitted). An attorney may also argue that the opposing side should not be permitted to pursue a particular theory or argument at trial.

Exercise 5-1

Question: Which Federal Rule of Evidence permits otherwise relevant evidence to be excluded on the basis of unfair prejudice?

- A. Rule 401
- B. Rule 403
- C. Rule 801
- D. Rule 802

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=168#h5p-37>

When counsel believes an opponent will offer or mention evidence that should be excluded at trial, they can move in limine for a pre-trial ruling on the issue. The motion must specifically identify what evidence or argument should be excluded and provide concrete reasons for its exclusion (for example, why the evidence is inadmissible under one or more of the relevant rules of evidence, which would be the Federal Rules of Evidence in federal court).

Sometimes, attorneys file motions in limine seeking a pre-trial ruling that particular evidence or argument *is* admissible, to avoid a dispute during trial and prepare for trial accordingly. Carefully consider your trial strategy before filing such a motion.

Resolving evidentiary issues before trial allows the parties and court to more carefully argue and consider the specific issue, as opposed to addressing it

during trial itself. If the motion is successful, the jury will never hear the inadmissible or prejudicial evidence. The parties can then prepare for trial in accordance with the court's pre-trial evidentiary ruling.

However, be careful not to overwhelm the court with pre-trial requests for rulings on motions in limine, also keeping in mind the potential benefit of surprise during trial with respect to particular evidence or strategy. Before filing a motion in limine, consider the importance of the particular evidence to your case or to the opponent's and the benefits versus risks of bringing this issue to the court's (and opposing counsel's) attention before trial.

When to File a Motion in Limine

No Federal Rule of Civil Procedure prescribes when to file a motion in limine. (See the appendix for links to each state's rules.) Instead, carefully follow the local rules, standing orders, and scheduling order.

Exercise 5-2

Question: Skim through the Federal Rules of Civil Procedure to answer this question: what rule, if any, governs motions in limine?

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=168#h5p-38>

Procedural Rules

Motions in limine are focused largely on the relevant rule of evidence that supplies the basis for the request. For a general overview of the Federal Rules of Evidence, see the CALI lessons on these topics.

The practice of filing motions in limine “developed pursuant to the district court’s inherent authority to manage the course of trials.” *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). Therefore, as always, it is important to follow local rules and judicial preferences in terms of the timing, content, and form of these pre-trial motions. As with discovery-related motions, some courts require that counsel make a good faith effort to agree on an evidentiary issue before filing a motion in limine asking for the court’s pre-trial ruling on a particular matter.

In assessing a motion in limine, courts “make a preliminary determination on the admissibility of the evidence under Rule 104 of the Federal Rules of Evidence.” *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 467 (S.D.N.Y. 2005). “The moving party bears the burden of establishing that evidence is inadmissible for any purpose and so properly excluded on a motion in limine.” *Starmel v. Tompkin*, 634 F. Supp. 3d 41, 44 (N.D.N.Y. 2022). The court will grant the motion “only when that evidence is clearly inadmissible or admissible on all potential grounds.” *United States v. Thrush*, 768 F. Supp. 3d 879, 884 (E.D. Mich. 2024) (internal quotation marks and citation omitted). A district court may reserve judgment on a motion in limine until trial if more factual development is first necessary. *See, e.g., Nat’l Union Fire Ins. Co. of Pittsburgh v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996) (deciding to “reserve judgment on the motion until trial when admission of particular pieces of evidence is in an appropriate factual context”). Additionally, a district court may change its pre-trial ruling “when the case unfolds, particularly if the actual testimony differs from” what was presented in the motion. *Luce*, 469 U.S. at 41.

Exercise 5-3

Question: Skim through the evidentiary rules for your state jurisdiction. Brainstorm 5-10 different arguments you might make for excluding evidence in that jurisdiction via a motion in limine.

An interactive H5P element (including the answer) has been excluded from this version of the text. You can view it online here:

<https://rowanhayneshandbookmotions.lawbooks.cali.org/?p=168#h5p-39>

Supporting Documents

Again, consult the applicable local rules to determine which documents must be included along with a motion in limine. Generally, include a supporting brief/memorandum of law that outlines the reasons supporting the request. See Rule 7(b), which requires that motions be in writing and “state with particularity the grounds for seeking the order,” as well as the relief sought. You may also need to include a declaration or affidavit with the relevant evidence (the subject of the motion in limine) attached. The opposing party will file a brief in opposition to the motion. Depending on local rules, the moving party may file a reply. Always check local rules to confirm page/word limits and other formatting requirements, courtesy copies, and other details. In addition to the example documents below, you can ask your supervisor or colleague for a sample filing in the same jurisdiction, to give you an idea what this brief should look like conforming to local standards. For a review of how to organize and write a persuasive memorandum of law, see Nan Haynes, *Legal Writing Handbook for Clinical Students* (CALI eLangdell Press 2023).

Checklist

- √ Identify the relevant rules of evidence (the Federal Rules of Evidence in federal court).
- √ You can make a well-founded argument that particular evidence or argument should be excluded (or admitted) under these rules.
- √ You have made a strategic decision to seek the court’s ruling before, rather than during, trial.
- √ Check the local rules, judicial standing orders, and Rule 16 scheduling order to identify requirements or preferences for bringing the dispute to the court’s attention, including any filing deadlines. For example, does the court require that the parties meet and confer or seek a court conference before any motion in limine is filed?
- √ Identify the required supporting documents, such as the motion, brief, and affidavits/declarations/affirmations attaching pertinent evidence.

Sample Documents

The following samples pertain to an employment discrimination lawsuit filed in federal district court. In this case, the admissions director of a university had been fired, purportedly for her poor job performance. However, the former employee believed her termination was based on her gender and sexual orientation, so she filed an employment discrimination suit against her former employer.

In the first motion, the defendant university seeks to exclude evidence of a prior lawsuit against the university, filed by a different former employee alleging discrimination on the basis of her gender and sexual orientation. The plaintiff opposes this motion, arguing that the jury should hear evidence related to this prior lawsuit against the same defendant. The plaintiff has also filed a cross-motion, in which she seeks to exclude evidence of her prior lawsuits against different defendants. The university opposes this motion, arguing that the jury should hear evidence tending to establish the plaintiff's motive to file discrimination lawsuits. In compliance with the applicable local rules, the plaintiff has combined her response to the defendant's motion with the material in support of her cross-motion.

Sample Document 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PETULA HARVEY,

Plaintiff,

25-cv-2962

v.

NOTICE OF MOTION
IN LIMINE

UNIVERSITY OF NEW AMSTERDAM,

Defendant.

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PRIOR LAWSUIT

Pursuant to Federal Rule of Evidence 403,¹ defendant University of New Amsterdam respectfully moves in limine to exclude evidence of a prior lawsuit against the university filed by a different plaintiff. The parties discussed but were not able to resolve this issue during a court conference with the assigned magistrate judge on [date].² In support of this motion, the defendant relies on

¹ In the motion, the writer expressly mentions the relevant evidentiary rules that support the motion in limine.

² The writer includes this information because it is required by the local rules for this jurisdiction.

the attached memorandum of law, filed pursuant to Local Rule of Civil Procedure 7.1(b).³

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

³ In addition to a supporting memorandum of law that outlines the legal arguments behind the request, the moving party may also need to file an affidavit or affirmation setting forth the factual basis for the request. As always, carefully check local rules.

Sample Document 2

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PETULA HARVEY,

Plaintiff,

25-cv-2962

v.

UNIVERSITY OF NEW AMSTERDAM,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE

Defendant University of New Amsterdam ("the university") respectfully requests that the Court enter an order excluding all reference or mention by plaintiff Petula Harvey, witnesses called on her behalf, and/or exhibits offered into evidence pertaining to an unrelated prior lawsuit against the university. Because this material would unfairly prejudice the university, it should be excluded from trial pursuant to Federal Rule of Evidence 403.

THE COURT SHOULD EXERCISE ITS DISCRETION TO
EXCLUDE EVIDENCE OF THE PRIOR LAWSUIT BECAUSE ITS
ADMISSION WOULD UNFAIRLY PREJUDICE THE DEFENDANT
AND MISLEAD THE JURY.

As the Court is aware,⁴ the university maintains in this case that it properly terminated Ms. Harvey, a former admissions director, for poor performance. The discovery materials are replete with evidence supporting the university's

⁴ Because the motion is filed at a later stage in the litigation, just before trial, the court is already familiar with the facts of the case. Accordingly, only a brief summary (from the defendant university's perspective) is offered here. In general, motions in limine should be concise and specific requests.

position, including witness testimony, performance evaluations, and other documentary evidence. However, Ms. Harvey alleges that her employment was terminated instead due to discriminatory reasons, the subject of the upcoming trial.

During the discovery process, in response to the plaintiff's requests, the university produced discovery material related to a 2011 lawsuit that had been filed by a former university basketball coach against the university, alleging wrongful termination on the basis of her gender and sexual orientation. *Dillon v. Univ. of New Amsterdam*, N.D.N.Y. No. 11-2041. The complaint filed in that lawsuit is attached to this motion as Exhibit A.⁵ The plaintiff in that case alleged that she had been subjected to a series of discriminatory remarks by her supervisor, the university's athletic director, and that she was ultimately terminated for reporting this conduct. The *Dillon* lawsuit generated significant negative publicity for the university, including a feature-length article in the *New Amsterdam Press*. A copy of that article is attached to this motion as Exhibit B.

Any mention or evidence pertaining to this lawsuit,⁶ which was ultimately settled on confidential terms, should be excluded at trial given the risk of unfair prejudice to the university and confusion for the jury. Federal Rule of Evidence 403⁷ provides that the "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. District courts within the Second Circuit "generally exclude evidence of related lawsuits, due to concerns of confusing the jury and unfairly prejudicing defendants." *Thompson v. Spota*, No. 14-CV-02473, 2022 WL 17253464, at *9 (E.D.N.Y. Nov. 28, 2022) (collecting cases). While the Second Circuit has permitted an exception "if part of a pervasive or continuing pattern of conduct," *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 151 (2d Cir. 1997), there is no indication that the former *basketball coach*, terminated in 2011, is in any way related to this former *admissions director plaintiff*, terminated in 2022.⁸

⁵ Always check local rules to see if exhibits should be attached by affidavit, affirmation, or otherwise.

⁶ The writer makes clear which specific evidence they seek to exclude.

⁷ The writer grounds the legal argument within the applicable rules of evidence, since those rules provide the basis for this request. You can read about grounding rules in Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 1 (CALI eLangdell Press 2023).

⁸ The writer uses parallel structure and selective emphasis to highlight the distinction.

Indeed, because these matters are so disconnected in terms of substance (different university departments) and time (over a decade in between terminations), there is a substantial risk of confusing the jury by taking its attention away from the lawsuit at hand. See *Stair v. Lehigh Valley Carpenters Loc. Union No. 600 of United Bhd. of Carpenters & Joiners of Am.*, 813 F. Supp. 1116, 1120 (E.D. Pa. 1993) (granting defendant's motion in limine and excluding evidence of past alleged discrimination, though relevant, due to the "remoteness in time" between incidents).

Moreover, the *Dillon* case was settled out of court, so there has never been a judicial determination as to liability in that case. The university has already been subjected to negative press regarding those allegations. Including evidence related to that lawsuit would greatly prejudice the university as it defends the present matter, compounding the past prejudice suffered as a result of the newspaper reporting of the *Dillon* lawsuit.

This Court has "broad discretion over the admission of evidence." *Perry*, 115 F.3d at 150. The university respectfully requests that this Court exercise this discretion and exclude all reference or evidence related to the prior lawsuit under Rule 403.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Sample Document 3

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PETULA HARVEY,

Plaintiff,
v.

25-cv-2962
NOTICE OF CROSS-MOTION
IN LIMINE

UNIVERSITY OF NEW AMSTERDAM,

Defendant.

PLAINTIFF'S CROSS-MOTION IN LIMINE⁹ TO EXCLUDE EVIDENCE OF PRIOR LAWSUITS

Pursuant to Federal Rules of Evidence 403 and 404(b), plaintiff Petula Harvey respectfully cross-moves in limine to exclude evidence of prior lawsuits filed by the plaintiff in unrelated actions against unrelated defendants. The parties met with the assigned magistrate judge on [date] but could not resolve this issue.¹⁰

⁹ In this jurisdiction, the local rules provide that a party may file a cross-motion at the same time it files its opposition to the original motion. Per N.D.N.Y. Local Rule 7.1(c), the brief in opposition to the original motion is combined with the brief in support of the cross-motion.

¹⁰ The writer includes this information because it is required by the local rules for this jurisdiction.

In support of this motion, the plaintiff relies on the attached memorandum of law, filed pursuant to Local Rule of Civil Procedure 7.1(b).¹¹

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

¹¹ In addition to a supporting memorandum of law that outlines the legal arguments behind the request, the moving party may also need to file an affidavit or affirmation setting forth the factual basis for the request. As always, carefully check local rules.

Sample Document 4

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PETULA HARVEY,

Plaintiff,

25-cv-2962

v.

UNIVERSITY OF NEW AMSTERDAM,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION IN LIMINE AND IN SUPPORT OF
PLAINTIFF'S CROSS-MOTION IN LIMINE

Plaintiff Petula Harvey respectfully requests that this Court deny the defendant's motion in limine seeking to exclude relevant evidence from trial and grant her motion in limine seeking to exclude prohibited Rule 404(b) evidence from trial.

- I. This Court should allow evidence related to a similar employment discrimination lawsuit filed against the same employer, the defendant university, because it is probative and not unduly prejudicial or confusing.

Harvey's lawsuit alleges employment discrimination on the basis of gender and sexual orientation. The past lawsuit that the university seeks to exclude, *Dillon v. Univ. of New Amsterdam*, alleged employment discrimination on the basis of gender and sexual orientation.¹² As courts within the Second Circuit have repeatedly¹³ made clear, such evidence is highly relevant in an employment discrimination case. See *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 151 (2d Cir. 1997) (concluding that the district court erred by excluding evidence of past

¹² The writer uses parallel structure here to emphasize the similarity between the two lawsuits.

¹³ The writer emphasizes the clarity and consistency of the applicable rule.

discrimination, though such error was ultimately harmless); *Puglisi v. Town of Hempstead Sanitary Dist. No. 2*, No. 11-445, 2014 WL 12843521, at *3 (E.D.N.Y. Jan. 27, 2014) (“A plaintiff in a discrimination action may offer evidence from other related discrimination lawsuits, such as a plaintiff’s or witness’s testimony in the other lawsuit, to show the existence of a hostile work environment or pattern of discriminatory conduct by the defendant.”).

Although some time has passed in between the two claims, courts within the Second Circuit have not developed any bright-line rule requiring a particular temporal connection. The fact that the discrimination occurred in two different departments is irrelevant, since the employer—the university—is the same. And while the university would surely prefer the jury not to hear evidence related to additional discrimination, the university does not explain why any harm would be considered *unfair* prejudice under Rule 403.¹⁴ The fact that the university has already been subject to previous poor publicity from the prior lawsuit does not have any bearing on this analysis. Therefore, this relevant evidence should be admitted at trial.

- II. This Court should exclude evidence of the plaintiff’s prior lawsuits against unrelated defendants because it is impermissible evidence under Rule 404(b) and unfairly prejudicial under Rule 403.

The defendant indicated it intends to introduce evidence of five lawsuits the plaintiff previously filed. None is related to the present action. Three were filed over twenty years ago against the University of Arlington, alleging it failed to protect the plaintiff from sexual harassment while she was a Ph. D. candidate. *Harvey v. Univ. of Arlington*, N.D. Cal. No. 04-4848, N.D. Cal. No. 04-4891, and N.D. Cal. No. 04-4901. While the actions have different civil numbers, they arise from a single claim. The initial complaints were dismissed for insufficient service of process, due to ineffective counsel. The plaintiff then hired new counsel, and that claim ended with a jury verdict in favor of the defendant. The other two lawsuits, both filed in 2007, related to discrimination in the workplace. *Harvey v. Safety Corp.*, S.D.N.Y. No. 07-828 and *Harvey v. Univ. at Mariner*, E.D.N.Y. No. 07-1002. The action against Safety Corp. ended with a grant of summary judgment to the defendant, and the action against the University at Mariner ended in a jury verdict in favor of the defendant. All of the relevant dockets are attached hereto as Exhibit A.

¹⁴ The writer grounds this argument in the relevant evidentiary rule. To read about grounding rules, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 1 (CALI eLangdell Press 2023).

This Court should exclude evidence that the plaintiff previously litigated discrimination claims because the defendant's sole and impermissible purpose in introducing this evidence is to attack the plaintiff as litigious. "It is well settled that it is improper for a court to admit evidence of prior lawsuits for the purpose of demonstrating that a plaintiff is a 'chronic litigant.'" *Hickey v. Myers*, No. 09-01307, 2013 WL 2418252, at *4 (N.D.N.Y. June 3, 2013) (quoting *Outley v. City of New York*, 837 F.2d 587, 591-93 (2d Cir. 1998)). According to the Second Circuit, since there is a "substantial danger of jury bias against the chronic litigant," trial courts have a "duty to prevent exploitation of this prejudice." *Outley*, 837 F.2d at 592 (citation omitted). Thus, as the Ninth Circuit has cautioned, "[t]he attempted use of past litigation to prevent a litigant from pursuing a valid claim in federal court warrants . . . most careful scrutiny." *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008).¹⁵

In assessing whether prior lawsuit evidence is admissible, courts must consider both Rules 404(b) and 403:

Rule 404(b) requires a two-part analysis; first, consideration of whether the evidence fits within the exceptions listed in the rule and, second, balancing the probative value of the evidence against the likelihood of undue prejudice, equivalent to the analysis under Rule 403.

Outley, 837 F.2d at 592. Indeed, "[l]itigiousness is the sort of character trait with which Rule 404(b) is concerned." *Id.*

In *Outley*, the Second Circuit held that it was reversible error for the district court to admit evidence of the plaintiff's past lawsuits, since it was impermissible character evidence under Rule 404(b). *Id.* at 592-93, 595. The court rejected the defendant's arguments that the evidence had been offered to impeach or prove bias. *Id.* at 593-95. As for unfair prejudice under Rule 403, the court noted that the "charge of litigiousness is a serious one, likely to result in undue prejudice against the party charged, unless the previous claims made by the party are shown to have been fraudulent." *Id.* at 592. *See also Raysor v. Port Auth.*, 768 F.2d 34, 40 (2d Cir. 1985) (concluding that "[a plaintiff's] litigiousness may have some slight probative value, but that value is outweighed by the substantial danger of jury bias against the chronic litigant.") Because there was no evidence of fraud in *Outley*, and because the harm to the plaintiff, "in a case where his

¹⁵ Note that the writer focuses here on what is not admissible, since their client opposes admission of evidence. This is an example of writing rules persuasively by keeping the reader's focus leaning the same way the rule application will lean. For more on writing rules persuasively, see Nan Haynes, *Legal Writing for Clinical Students*, Ch. 4 (CALI eLangdell Press 2023).

credibility was of particular importance, was substantial,” the court reversed and remanded the case. *Id.* at 593-95.

For the same reasons highlighted in *Outley*, the evidence as to the plaintiff’s prior lawsuits should be excluded in this case. First, as the Second Circuit held in *Outley*, the mere fact that a plaintiff filed a lawsuit cannot be used to impeach a plaintiff’s credibility or prove their bias. Here, nothing in the record about the prior litigation suggests that the plaintiff is not credible or that she is biased against universities. One of her prior claims was against a corporate employer, not a university employer. And there is no indication that her prior lawsuits are relevant to the other Rule 404(b) permissible uses of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or lack of accident.”

Second, as in *Outley*, there is no evidence that her prior lawsuits were fraudulent. That two of them ended with a jury verdict in favor of the defendant, and one in a grant of summary judgment to the defendant, does not suggest otherwise. In fact, it is consistent with the odds of winning a lawsuit against an employer. See, e.g., Kevin Clermont et al., *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol’y Rev. 103, 127 (2009) (finding that employees won discrimination lawsuits against their employers only 15% of the time between 1979 and 2006).¹⁶ Accordingly, this Court should rule that evidence as to the plaintiff’s prior employment discrimination litigation history is inadmissible at trial.

For these reasons, the Court should deny the defendant’s motion in limine and grant the plaintiff’s motion in limine.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

¹⁶ This is an assertive rebuttal of negative facts. For more guidance on crafting rebuttals, see Nan Haynes, *Legal Writing Handbook for Clinical Students*, Ch. 5 (CALI eLangdell Press 2023).

Sample Document 5

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PETULA HARVEY,

Plaintiff,

25-cv-2962

v.

UNIVERSITY OF NEW AMSTERDAM,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION IN LIMINE

This Court should deny the plaintiff's cross-motion in limine because the evidence of her *five* past lawsuits against prior employers is relevant to her motive, which is admissible under Rule 404(b)(2). Moreover, its probative value is not outweighed by a danger of unfair prejudice under Rule 403.

Evidence of a party's past litigation history is admissible if offered for a permissible purpose under Rule 404(b), as opposed to merely trying to show litigiousness. *Outley v. City of New York*, 837 F.2d 587, 593 (2d Cir. 1988). Then, the district court is afforded "broad discretion" in conducting a Rule 403 analysis. *Id.* at 592.

Other courts have allowed parties to present evidence of prior lawsuits when offered for a proper purpose under Rule 404(b). For example, in *Van Deelen v. Johnson*, the district court found that the plaintiff's prior lawsuits were "similar enough to the present case in their allegations, claims and/or substance, that they could in fact reveal that plaintiff had a motive, plan or scheme to bring similar kinds of claims against those who crossed him. Because of their similarity to the present case, plaintiff's prior civil lawsuits show more than a generic pattern of litigiousness meant to show bad character." No. 05-4039, 2008 WL 4683022, at *3 (D. Kan. Oct. 22, 2008). Similarly, in *Hickey v. Myers*,

the district court allowed evidence of the plaintiff's prior lawsuit against his employer to show that the plaintiff pursued the lawsuit "in an effort to intimidate those who disagreed with him" and that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. No. 09-01307, 2013 WL 2418252, at *4–5 (N.D.N.Y. June 3, 2013). In both cases, the courts considered the possibility of a limiting instruction as to the jury's consideration of this evidence. *Van Deelen*, 2008 WL 4683022, at *4; *Hickey*, 2013 WL 2418252, at *5.

Here, this Court should deny the plaintiff's motion in limine and allow evidence of her prior lawsuits under Rules 404(b) and 403. Taken together, the plaintiff's prior lawsuits raise questions as to her motive. Including the present matter, the plaintiff has filed no fewer than *six* lawsuits alleging discrimination against four separate defendants. This evidence of motive is highly probative, which outweighs any potential prejudice. Additionally, the Court could issue a limiting instruction as necessary.

Therefore, the plaintiff's motion in limine should be denied.

Respectfully submitted,

Attorney Signature
Attorney Name
Address
Email address
Phone number
Date

Appendix: State Procedural Rules

Note: Since procedural rules are regularly updated, always carefully check to ensure that you're relying on the most current version of the relevant rules.

Alabama	https://judicial.alabama.gov/library/CivilProcedure
Alaska	https://courts.alaska.gov/rules/docs/civ.pdf
Arizona	https://govt.westlaw.com/azrules/Browse/Home/Arizona/ArizonaCourtRules/ArizonaStatutesCourtRules?guid=N93E3A75086BD11E6B9D68CD8AD30786D&transitionType=CategoryPageItem&contextData=(sc.Default)&bhcp=1
Arkansas	https://opinions.arcourts.gov/ark/cr/en/item/16712/index.do#!fragment/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSqBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA
California	https://www.courts.ca.gov/cms/rules/index.cfm?title=three
Colorado	https://leg.colorado.gov/sites/default/files/images/olls/crs2023-court-rules.pdf
Connecticut	https://www.jud.ct.gov/Publications/PracticeBook/PB.pdf
Delaware	https://courts.delaware.gov/forms/download.aspx?id=173418

Florida	https://www.floridabar.org/rules/ctproc/
Georgia	Georgia Code Title 9 (available on Lexis or Westlaw)
Hawaii	https://www.courts.state.hi.us/wp-content/uploads/2024/09/hrcp_ada.pdf
Idaho	https://isc.idaho.gov/ircp-new
Illinois	https://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=073500050HArt%2E+II&ActID=2017&ChapterID=56&SeqStart=1100000&SeqEnd=22300000
Indiana	https://www.in.gov/courts/rules/trial_proc/#_Toc152229088
Iowa	https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/1.pdf
Kansas	https://ksrevisor.gov/statutes/ksa_ch60.html
Kentucky	https://govt.westlaw.com/kyrules/Browse/Home/Kentucky/KentuckyCourtRules/KentuckyStatutesCourtRules?guid=N2C3C8B00A79211DAAB1DC31F8EB14563&transitionType=CategoryPageItem&contextData=%28sc.Default%29
Louisiana	https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=68&level=Parent

Maine	https://www.courts.maine.gov/rules/rules-civil.html
Maryland	https://govt.westlaw.com/mdc/Browse/Home/Maryland/MarylandCodeCourtRules?guid=NDFFF2D009CCE11DB9BCF9DAC28345A2A&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)&bhcp=1
Massachusetts	https://www.mass.gov/law-library/massachusetts-rules-of-civil-procedure
Michigan	https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/michigan-court-rules/court-rules-book-ch-2-responsive-html5.zip/index.html#t=Court_Rules_Book_Ch_2%2FCourt_Rules_Chapter_2%2FCourt_Rules_Chapter_2.htm
Minnesota	https://www.revisor.mn.gov/court_rules/rule/cp-toh/
Mississippi	https://courts.ms.gov/research/rules/msrulesofcourt/rules_of_civil_procedure.pdf
Missouri	https://www.courts.mo.gov/page.jsp?id=674
Montana	https://leg.mt.gov/bills/mca/title_0250/chapter_0200/parts_index.html
Nebraska	https://supremecourt.nebraska.gov/supreme-court-rules/chapter-6-trial-courts/article-11-nebraska-court-rules-pleading-civil-cases

Nevada	https://www.leg.state.nv.us/courtrules/nrcp.html
New Hampshire	https://www.courts.nh.gov/rules-superior-court-state-new-hampshire
New Jersey	https://www.njcourts.gov/attorneys/rules-of-court
New Mexico	https://nmonesource.com/nmos/nmra/en/item/5687/index.do#!fragment/BQCwhgziBcwMYgK4DsDWszlQewE4BUBTADwBdoByCgSgBplTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA
New York	https://www.nysenate.gov/legislation/laws/CVP
North Carolina	https://www.ncleg.net/enactedlegislation/statutes/html/bychapter/chapter_1a.html
North Dakota	https://www.ndcourts.gov/legal-resources/rules/ndrcivp
Ohio	https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/civil/CivilProcedure.pdf
Oklahoma	https://oksenate.gov/sites/default/files/2019-12/os12.pdf
Oregon	https://www.oregonlegislature.gov/bills_laws/Pages/orcp.aspx

Pennsylvania	https://www.pacodeandbulletin.gov/Display/pacode?titleNumber=231&file=/secure/pacode/data/231/231toc.html
Rhode Island	https://www.courts.ri.gov/Courts/superiorcourt/Documents/SuperiorCourtRulesOfCivilProcedure.pdf
South Carolina	https://www.sccourts.org/courtReg/indexCivil.cfm
South Dakota	https://sdlegislature.gov/Statutes/15-6
Tennessee	https://www.tncourts.gov/courts/supreme-court/rules/rules-civil-procedure
Texas	https://www.txcourts.gov/rules-forms/rules-standards/
Utah	https://legacy.utcourts.gov/rules/urcp.php
Vermont	https://legislature.vermont.gov/statutes/title/12
Virginia	https://www.vacourts.gov/courts/scv/rulesofcourt.pdf
Washington	https://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=cr
West Virginia	https://www.courtswv.gov/legal-community/court-rules

Wisconsin	https://docs.legis.wisconsin.gov/statutes/statutes/802
Wyoming	https://www.wyocourts.gov/court-rules/wyoming-rules-of-civil-procedure/