POLICIES AND PROCEDURES[1]

The Honorable Karen Spencer Marston

United States District Court
Eastern District of Pennsylvania
United States Courthouse
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[1] Effective March 2022

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I. PRELIMINARY GENERAL MATTERS

A. Correspondence with the Court

Counsel and *pro se* parties should direct communications concerning administrative or procedural matters to Courtroom Deputies or Chambers. Direct communications with law clerks is prohibited. Letters may be submitted to the Court via e-mail, but such communications should be limited to routine matters for which no opposition is anticipated or required. Responsive letters should ***only*** be submitted at the Court's request. Counsel shall not send copies of correspondence among and between counsel to the Court.

The Court expects to be promptly advised in writing whenever any case has been resolved.

B. Telephone Conference

Judge Marston may hold telephone conferences to resolve scheduling matters, time extensions, or discovery disputes. The Court will notify counsel of the date and time for the telephone conference. In a civil case, counsel for the moving party will be responsible for initiating the telephone conference and contacting Judge Marston through her Deputy Clerk (via Chambers line 267-299-7370) after all parties are present on the call. In a criminal case, the United States Attorney's Office will be responsible for initiating the call and contacting Judge Marston through her Deputy Clerk (via Chambers line 267-299-7370) after all the parties are present on the call.

When a written communication concerning a case cannot timely address a problem, counsel may initiate necessary telephone communications with chambers. Issues appropriately addressed by telephone contact include:

1. Scheduling of conferences or proceedings, including pretrial and trial conferences;

2. Attendance of witnesses;

3. Exhibit handling or arrangements for video replay;

4. Arrangements for telephone conferences regarding discovery disputes;

5. Requests for ***absolutely necessary*** extensions of time to file any response, reply, brief, memorandum of law or the like.

Under no circumstances may any party or counsel communicate *ex parte* with any chambers personnel concerning substantive matters.

C. Oral Arguments and Evidentiary Hearings

Judge Marston does not reserve certain days or times for oral arguments or evidentiary hearings. Judge Marston generally schedules oral argument on dispositive motions and as otherwise necessary.

D. *Pro Hac Vice* Admissions

Judge Marston **does not** accept the standard form made available from the Clerk of Court. Motions for *pro hac vice* admission should be made as soon as possible and must be filed by an attorney: (1) admitted to practice and in good standing before this Court; (2) whose appearance had been entered in the case in which the motion is made; (3) describing the reasons the client requires this motion and (4) reciting the positions of all counsel regarding the motion. If any counsel opposes the motion, they must file their opposition papers within three (3) business days of the motion's filing.

The Motion must be accompanied by the affidavit of <u>each</u> attorney seeking *pro hac vice* admission swearing:

1. Year and jurisdiction of each bar admission;

2. Status of the attorney's admission(s) *i.e.*, active or inactive, in good standing, etc.;

3. Whether the attorney has ever been suspended from the practice of law in any jurisdiction or received any public reprimand by the highest disciplinary authority of any bar in which the attorney has been a member;
4. The affiant/declarant (a) has in fact read the most recent edition of the Pennsylvania Rules of Professional Conduct and the Local Rules of this Court and (b) agrees to be bound by both sets of Rules for the duration of the case for which *pro hac vice* admission is sought; and
5. That, if granted *pro hac vice* status, the affiant/declarant will in good faith continue to advise counsel who has moved for the *pro hac vice* admission of the current status of the case for which *pro hac vice* status has been granted and of all material developments therein.

The admission of counsel *pro hac vice* does not relieve associate local counsel, or the attorney moving the admission of responsibility for counsel admitted *pro hac vice*.

E. Use of Electronic Court Filing (ECF)

The Court expects all counsel (including *pro se* Plaintiffs or Defendants) to be registered on the ECF system for the District Court of the Eastern District of Pennsylvania. All official filings submitted to the Clerk of Court must be filed directly by the filing attorney onto ECF. The Court's orders, opinions and other docketed materials will be filed onto ECF and notice of the filing will be communicated to counsel either by ECF or ordinary first-class mail. Requests to be excused from ECF registration must be made in writing directly to Judge Marston.

When submitting exhibits via ECF, parties should submit each exhibit as a separate document on the ECF system, rather than as a single file. In addition, when parties submit exhibits via ECF, they must give each document a name identifying the document. Thus, it is not

sufficient to label a file "Exhibit A." Instead, the name should identify the document (*i.e.* "Exhibit A_Contract" or "Exhibit A_Declaration of John Smith").

F. *Pro Se* (Unrepresented) Litigants: Assistance From a Lawyer

Pro se litigants who are not being formally represented by lawyers, but have received substantive assistance (*i.e.* help, guidance, direction or the like with the development of strategy or tactics, drafted pleadings, motions or briefs, etc.) from an attorney for any material filed with the Court shall, in the filed material, identify the attorney, the attorney's contribution to the filing, and the scope of the attorney's limited representation. Failure to identify any such attorney will amount to a representation by the *pro se* litigant's submission for which no substantive assistance from an attorney was received.

II. CIVIL CASES

A. Pretrial Procedures

1. Affirmative defenses

Parties are reminded that Fed. R. Civ. P. 11 only permits parties to assert affirmative defenses for which they have a good faith basis. Parties may not assert affirmative defenses prophylactically.

2. Rule 16 Conferences

The Court will schedule a preliminary pretrial conference as described in Fed. R. Civ. P. 16 once each defendant has appeared in the case. The Court expects lead trial counsel to attend the counsel in person. If lead counsel is unable to attend **for a compelling reason**, the Court will reschedule the conference. However, any such request must be made as early as possible and must be based on a pre-existing commitment.

The Court relies on counsel's good faith compliance in all respects with Rule 26(f). The Rule 26(f) meeting shall take place as soon as possible, and should be viewed not as perfunctory, but rather as a meaningful and substantive discussion among professionals to formulate the discovery plan required by the Rule. Counsel taking part in any pretrial conference must be prepared to speak on every subject, including settlement, and have authority from their clients to do so. Counsel shall be prepared to discuss all claims and defenses in detail, as well as all topics listed in Local Rule of Civil Procedure 16.1(b) and Fed. R. Civ. P. 16(b)-(c) and 26(a), and shall have a thorough understanding of the facts of the case. The Court will issue a Rule 16 Scheduling Order following the conference.

Pending motions do not stay the parties' obligations to meet and confer pursuant to Fed. R. Civ. P. 26(f) or to attend a conference pursuant to Fed. R. Civ. P. 16. The parties should begin discovery as soon as permitted under the applicable rules, without waiting for the Rule 16 conference and regardless of whether a motion is pending. If a party wishes to stay discovery during the pendency of a motion, it should present its request in person at the Rule 16 conference. However, the Court will grant a stay of discovery only in extraordinary circumstances.

A joint status report pursuant to Fed. R. Civ. P. 26(f) is due at least seven (7) days prior to the Rule 16 conference and must be submitted to the Court via e-mail. The parties must use the Court's sample Rule 26(f) form that will be attached to the order scheduling the Rule 16 conference. This form is also available on Judge Marston's page on the Court's website.

Lead counsel shall participate in the Rule 26 conference, attend the Rule 16 conference and be deemed lead counsel for all future proceedings. A designation of "lead counsel" will mean the counsel will attend all court proceedings and will deliver an opening statement and

closing argument or summation at trial, absent a written request from the client to have someone else perform those tasks.

3. Continuances and Extensions

Parties are expected to adhere to all dates contained in the Scheduling Order unless there is a compelling reason to justify a change. Counsel should advise the Court immediately of any compelling reason justifying an extensive or continuance of any scheduled date. Such a request may be made by letter, describing in detail the basis for the request, noting the agreement or disagreement of all other counsel and setting forth the period of delay requested. A request for an extension or continuance of the date on which the case is listed for trial or the deadline for filing dispositive motions will rarely be granted and will only be considered in extraordinary circumstances. **Any request for an extension or continuance must be made at least seven (7) days before the applicable deadline or include a showing of good cause as to why the party making the request could not comply with that requirement.**

4. Injunctions

Judge Marston will promptly list any request for a temporary restraining order (TRO) or a preliminary injunction assigned to her. Except in cases where the nature of the emergency precludes it, Judge Marston requires the petitioner to notify the respondent of the nature of the request for a Temporary Restraining Order and to serve the petition and proposed Order upon the respondent. The Court will hold a pre-hearing conference to discuss discovery, narrow the issues in contention and allocate time for the hearing.

In appropriate cases, Judge Marston permits expedited and intensive discovery in injunctive matters.

At an argument or hearing on a petition for a TRO or preliminary injunction, Judge Marston prefers to have proposed findings of fact and conclusions of law before the hearing. Recognizing that the emergency nature of such a hearing may make this difficult, she may require proposed findings of fact and conclusions of law no later than twenty-four (24) hours after such a hearing.

5. Settlement

Settlement may be discussed at the initial Rule 16 status conference and at any subsequent conference. The Court's Scheduling Order will refer cases to a Magistrate Judge for a settlement conference.

6. Arbitration matters

The Court will generally not conduct a pretrial conference for cases that are assigned to the Court's arbitration track. Judge Marston expects the parties to complete all discovery prior to the date that the Clerk assigns for arbitration. Counsel may seek the assistance of the Court, if necessary, to complete discovery in advance of the scheduled arbitration date.

If a party seeks a trial *de novo* after an arbitration, the Court will expect to schedule the trial within sixty (60) days of the request.

7. Stipulations and proposed Orders

Contrary to Local Civil Rule 5.1.2(10), all stipulations and proposed orders must be e-mailed to Chambers rather than sent to the Clerk of Court.

8. Motions to Seal

The Court will only grant motions to seal upon good cause shown. When submitting a

proposed order for the Court's approval, the order must contain the following language: "The Court retains the right to allow disclosure of any subject covered by this stipulation or to modify this stipulation at any time in the interest of justice."

B. Motion Practice

Except as set forth here, motion practice will be conducted in accordance with Local Rule 7.1. The originals of all motions and briefs should be filed with the Clerk's Office.

Every factual assertion considered by the submitting party to be important to that party's position in a motion, opposing papers or brief must be supported by citation or other specific reference to the record where the fact may be found. Legal and record citations must be pinpoint cites.

1. Dispositive Motions

Before filing a motion pursuant to Fed. R. Civ. P. 12(b)(6), counsel shall first contact opposing counsel to discuss the substance of the contemplated motion and to provide an opportunity to cure any alleged pleading deficiencies. This conference shall take place at least seven (7) days prior to the filing of the motion. If the parties are unable to reach a resolution that eliminates the need for a 12(b)(6) motion, counsel for the moving party shall include, along with the 12(b)(6) motion, a certification that the parties met and conferred regarding the alleged pleading deficiencies. These efforts must include substantive verbal communications, whether by phone or in person. Exchanges of letters or e-mails are <u>not</u> sufficient. It is not sufficient to report that opposing counsel was not available or that the parties made "reasonable efforts." The Court will deny a 12(b)(6) motion that does not meet these requirements.

A motion for summary judgment, pursuant to Fed. R. Civ. P. 56, must follow the below procedures:

(a) The movant shall file a Statement of Undisputed Facts which sets forth, in numbered

paragraphs, each material fact which the movant contends is undisputed and provide a Word version of this document to respondent;

(b) Using the Word version of the movant's Statement of Undisputed Facts, the respondent shall respond to each numbered paragraph in line. The respondent shall also set forth, in separate numbered paragraphs, each additional fact which the respondent contends precludes summary judgment and share a word version with the movant and the movant shall respond thereto following the same procedure outlined herein;

(c) All material facts set forth in the Statement of Undisputed Facts served by the movant or in the Additional Statement of Undisputed Facts served by the respondent shall be deemed undisputed unless specifically controverted by the opposing party;

(d) Statements of undisputed facts in support of or in opposition to a motion for summary judgment shall include ***specific*** and not general references to the parts of the record which support each statement. Each stated fact shall ***cite*** the source relied upon, including the title, page and line of the document supporting each statement. Parties are encouraged to refer to prior paragraphs rather than repeat the allegations contained therein;

(e) Each exhibit should be filed as a ***separate*** attachment to the Statement of Undisputed Facts. A Table of Contents must be included with any set of exhibits submitted in support of or in opposition to a motion for summary judgment; and

(f) **All PDF documents filed must be *text searchable*.**

If the party's motion for summary judgment, or an opposition thereto, is based in whole or in part on an argument that expert testimony is not admissible, the party must raise such argument in a contemporaneous *Daubert* motion.

2. Memoranda of Law

Parties should include, in all memoranda of law, a table of contents and a table of authorities.

3. Oral Arguments of Motions

If the Court determines that oral argument will be helpful in deciding a matter, the Judge will schedule it, particularly when it involves a dispositive motion. A party desiring oral argument should request it by letter or in the body of the motion or responsive pleading. The Court is likely to hear oral argument on dispositive motions, or if either party requests oral argument.

4. Reply and Sur-reply Briefs

Reply and sur-reply briefs are strongly discouraged unless it is apparent on the face of the submission that such additional briefing is necessary to rebut an issue or point of law not anticipated in or otherwise discussed in the initial briefs. Reply and sur-reply briefs may be filed without leave of Court. They must be filed and served within seven (7) days of service of the brief to which the reply or sur-reply responds unless the Court sets a different schedule. Reply and sur-reply submissions should not contain a repeat recitation of the facts of the case. The Court will not necessarily delay its decision while awaiting a reply or sur-reply brief.

5. Page limits

Opening briefs in support of and in opposition to a motion shall not exceed twenty-five (25) pages. Replies and sur-replies must be limited to ten (10) and seven (7) pages, respectively. Any request to exceed an applicable page limit must be made at least four (4) days before the filing is due and may be made through a letter e-mailed to Chambers. Counsel making such a

request should confer with opposing counsel and set forth opposing counsel's position in the letter.

6. Amended Pleadings

All amended pleadings and motions to amend a pleading must include a redline showing the changes made to the original pleading.

7. Courtesy copies

The Court generally does not require courtesy copies, with the following two exceptions. First, for any filings made under seal, the filing party shall send a courtesy copy via e-mail to Chambers the same day as the filing. Second, for any motions with more than five (5) or more than fifty (50) pages of exhibits, the parties shall provide the Court with a courtesy copy of the exhibits within two (2) days of filing. Courtesy copies should be submitted as a hard copy and on a thumb drive.

C. Discovery

1. Length of Discovery Period

In standard track cases, the Court usually allows from 90 to 120 days from the date of the Rule 16 conference to complete discovery. If counsel anticipates that additional time for discovery will be required, they should raise the issue at the Rule 16 conference or any subsequent status conference.

2. Discovery Conferences and Dispute Resolution

Discovery must be proportional to the needs of the case and should focus specifically on obtaining information truly necessary to resolve the litigation. Counsel must carefully and realistically assess the actual need for the information sought.

Judge Marston urges parties to settle discovery disputes among themselves. However, if the parties remain unable to resolve a dispute despite making a good faith effort, counsel for the aggrieved party shall file with the Court a motion in conformity with Local Civil Rule 26.1(b), with a form of order and short brief, not to exceed five (5) pages (not including exhibits), describing the dispute. All discovery motions must attach the discovery requests at issue, as well as the written response. The Court will schedule a telephone conference with counsel to discuss the motion before the filing of any responsive brief.

In filing a discovery motion, the certificate of counsel must provide specific details of the parties' efforts to resolve the dispute informally. These efforts must include verbal communications, whether by phone or in person. Exchanges of letters or e-mails are not sufficient. It is not sufficient to report that opposing counsel was not available or that the parties made "reasonable efforts." The Court will deny a discovery motion that does not meet these requirements.

In most cases, the Court expects to rule promptly on discovery motions and often decides such motions during the telephone conference. All motions must contain the certification required under Local Civil Rule 26.1(f).

Counsel should contact the Court telephonically for any issues that arise during depositions. Counsel should not walk out of a deposition before making an effort to contact the Court and obtain guidance.

3. Privilege Logs

Parties preparing privilege logs must provide information sufficient for the opposing party to determine the basis for the assertion of privilege. For claims of privilege covering multiple e-mails, the party asserting privilege must describe the specific e-mails that are being

withheld, as opposed to only the e-mail at the top of the e-mail string, and the basis for withholding each e-mail. Where several e-mails are exchanged between individuals, and the same privilege claim applies to all of the e-mails, the party asserting privilege may describe the e-mails collectively, rather than one-by-one.

D. Protective Orders and Confidentiality Agreements

Any request for a protective order or approval of a confidentially agreement must be made by motion. The Court will not accept stipulated proposed orders in lieu of a motion. All such motions must satisfy the requirements of *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 924 F.3d 662, 672-73 (3d Cir. 2019) and *Pansy v. Borough of Stroudsberg*, 23 F.3d 772, 786 (3d Cir. 1994).

E. Final Pretrial Conferences

Typically, Judge Marston will hold a final pretrial conference approximately two weeks prior to the trial date. At least seven (7) days prior to the final pretrial conference date, the parties shall prepare pretrial memoranda and describe in detail the substance of the testimony of each witness. Identifying a witness as giving testimony on liability and/or damages is insufficient.

In addition, the memoranda should also include (with the exception of the materials discussed in section 4 below) the following:

1. All stipulations of counsel;
2. A statement of objection to: (a) the admissibility of any exhibit based on authenticity; (b) the admissibility of any evidence expected to be offered for any reason (except objections to relevancy); (c) the adequacy of the qualifications of an expert witness expected to testify and (d) the admissibility of any opinion testimony from lay

witnesses pursuant to Fed. R. Evid. 701. Such objection shall describe with particularity the ground and the authority for the objection.

3. Deposition testimony (including videotaped deposition testimony) that the party intends to offer during its case-in-chief. The statement should include citations to the page and line number and the opposing party's counter-designations.

4. Counsel must prepare ***one unified and agreed upon*** set of proposed jury instructions on substantive issues and ***one*** proposed verdict form or set of special interrogatories to the jury. If counsel cannot agree on a particular instruction, they must submit their competing versions along with a statement explaining why the Court should give their proposed instruction. Proposed jury instructions must be tailored and personalized for the case and should include accurate quotes from, and citations to, cases and pattern jury instructions where appropriate. If pattern instructions are to be given, those instructions should be taken from the Third Circuit Model Jury Instructions wherever possible. United States Supreme Court or Third Circuit Court of Appeals cases should be cited wherever applicable. In addition to filing the proposed jury instructions and verdict form on the Court's docket, the parties must e-mail the documents in Word format to Chambers_Judge_Marston@paed.uscourts.gov.

Prior to attending any pretrial conference, counsel should confer with each other about the topics expected to be discussed at the conference, including a substantive discussion of potential settlement. Counsel are also expected to have discussed with their respective clients prior to the conference the issues to be addressed at any conference with the Court and to come to the conference with all necessary authority.

F. Trial Procedure

1. Scheduling

A date for trial will be determined at the initial Rule 16 conference. Once the trial date is scheduled, counsel, parties and witnesses should be ready to start trial on the scheduled date. Questions relating to scheduling matters should be directed to Judge Marston's Civil Deputy Clerk.

2. Cases Involving Out-Of-Town Parties or Witnesses

Judge Marston schedules the trial of cases involving out-of-town counsel, parties, or witnesses in the same manner as all other cases. Counsel are responsible for scheduling their witnesses.

3. Conflicts of Counsel

Counsel should notify the Court immediately upon hearing of any unavoidable and compelling professional or personal conflicts affecting the trial schedule.

4. Jury Selection

Judge Marston will conduct *voir dire*, and will generally allow narrowly-focused follow-up questions from counsel. Judge Marston generally calls all prospective jurors to sidebar or into the jury room for individual *voir dire* after asking general questions that elicit non-verbal responses. Counsel may submit a set of *voir dire* questions in writing ten (10) days before the trial date.

5. Note-Taking by Jurors

Judge Marston permits jurors to take notes.

6. Trial Briefs

Each party should submit a trial brief on the legal issues involved in the case seven (7)

days prior to the trial date.

7. Motions *In Limine*

The time for filing motions *in limine* will be determined at the Rule 16 conference and will be confirmed in the Scheduling Order. Any brief or memorandum filed in support of or in opposition to a motion *in limine* must be limited to five (5) pages of double-spaced 12-point font. Absent leave of court, a party shall not file more than five (5) motions *in limine.*

8. Examination of Witnesses Out of Sequence

The Court will permit counsel to examine his or her own witnesses out of turn for the convenience of a witness.

9. Opening Statements and Summations

Judge Marston will not ordinarily impose strict time limits for opening statements and summations. However, counsel should strive to keep opening statements under 30 minutes and summations under 45 minutes.

10. Examination of Witnesses or Argument by More Than One Attorney

More than one attorney for a party may examine different witnesses or argue different points of law before the Court. Only one attorney for each side may examine the same witness or address the jury during the opening statement or summation.

11. Videotaped Testimony

Videotaped testimony should begin with the witness being sworn. Counsel should bring objections regarding videotaped testimony to the Court's attention at the time of the filing of pretrial memoranda. After the Court rules on any objections, counsel should edit the tapes according to the Court's order before offering the videotaped testimony at trial.

12. Reading of Material into the Record

Judge Marston will allow the reading of stipulations, pleadings or discovery into the record when appropriate.

13. Preparation of Exhibits

Exhibits must be pre-marked and exchanged in advanced of trial. In civil cases, the parties will prepare one joint exhibit book with all exhibits that counsel may use at trial. The joint exhibit book must contain an exhibit list briefly describing each exhibit. Counsel should provide the joint exhibit book as a hard copy and electronically on a thumb drive to the Court at the final pretrial conference.

14. Offering Exhibits into Evidence

Unless the parties have an agreement as to the admissibility of a proposed exhibit, a witness may not testify as to its content until it has been admitted into evidence.

15. Directed Verdict Motions

Motions for judgment as a matter of law in jury trials and motions for an involuntary dismissal in non-jury trials must be in writing. Oral argument in these motions will ordinarily be permitted.

16. Proposed Findings of Fact and Conclusions of Law

In non-jury cases, the parties shall submit proposed findings of fact and conclusions of law as specified in the Scheduling Order. The parties may submit revised or supplemental findings of fact and conclusions of law with specific reference to trial evidence at the conclusion of the case. A schedule for the submission of revised findings of fact and conclusions of law will be discussed at the conclusion of the trial.

17. Unavailability of Witnesses

If a witness is unavailable at the time of trial, as defined in Fed. R. Civ. P. 32(a)(4), the Court expects an oral or videotaped deposition to be used at trial for that witness, whether the witness is a party, a non-party or an expert. The unavailability of such witness will not be a ground to delay the commencement or progress of trial.

18. Courtroom Protocol

During oral arguments outside the presence of the jury, counsel can address the Court form counsel table or the podium, at counsel's discretion. When examining a witness, counsel should speak from the podium. Counsel should seek permission to approach a witness. Counsel shall direct all comments and questions to the Court or the witness, not to opposing counsel or the jury.

The Court does not permit speaking objections. If counsel needs to be heard on a matter immediately, request a sidebar. The Court generally prefers to avoid sidebars. Therefore, the Court encourages counsel to raise evidentiary issues at the final pretrial conference or outside the presence of the jury, whenever possible.

G. Jury Deliberations

1. Written Jury Instructions

The Court may give the jury a copy of the written instructions in appropriate cases.

2. Exhibits in the Jury Room

After the jury has been instructed and taken to the jury room to begin deliberations, the Court and counsel will discuss which exhibits should go out with the jury if the jury requests them.

3. Jury Requests to Read Back Testimony or Replay Tapes

At the jury's request, the Court may permit the Deputy Clerk to read portions of testimony back to the jury or to replay the audio or video-taped testimony.

4. Availability of Counsel During Jury Deliberation

Unless excused by the Court, counsel must remain in the general vicinity of the courthouse and be available on ten (10) minutes' notice during jury deliberations.

5. Polling the Jury

The Court will poll the jury if requested by counsel.

6. Talking with Jurors Following Verdict

Counsel are permitted to interview jurors after the verdict, but the Court will instruct the jury that they are not required to talk to the attorneys.