

2012

Kevin E. Kendall v. Discover Bank : Reply Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Brent G. Messel; Guglielmo & Associates; Attorney for Plaintiff/Appellee.

L. Miles LeBaron; LeBaron & Jensen PC; Attorneys for Defendant/ Appellant.

Recommended Citation

Reply Brief, *Kevin E. Kendall v. Discover Bank : Reply Brief of Appellant*, No. 20120498 (Utah Court of Appeals, 2012).
https://digitalcommons.law.byu.edu/byu_ca3/3059

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

**L. Miles LeBaron (#8982)
Tyler J. Jensen (#9913)
LEBARON & JENSEN, P.C.
476 W. Heritage Park Blvd., Ste 230
Layton, Utah 84041
Telephone: 801-773-9488
Facsimile: 801-773-9489**

UTAH COURT OF APPEALS

KEVIN E. KENDALL,

Defendant/Appellant,

vs.

DISCOVER BANK,

Plaintiff/Appellee.

REPLY BRIEF OF APPELLANT

Appellate Case No. 20120498

District Case No. 110707987

This is an appeal from a summary judgment order, entered May 9, 2012,
from the Second Judicial District Court, Farmington Department

Brent G. Messel
Guglielmo & Associates
PO Box 9420
Salt Lake City, UT 84109
Tel: (801) 466-4912
Fax: (801) 466-4913

Attorney for Discover Bank
Plaintiff/Appellee

L. Miles LeBaron
LeBaron & Jensen, P.C.
476 West Heritage Park Blvd., Ste 230
Layton, Utah 84041
Telephone: (801) 773-9488
Fax: (801) 773-9489

Attorney for Kevin E. Kendall
Defendant/Appellant

TABLE OF CONTENTS

| | |
|---|-----------|
| Table of Contents | 1 |
| Table of Authorities..... | 2 |
| Statement of Additional Facts..... | 2 |
| Argument | 3 |
| I. WHERE THE TRIAL COURT BELOW NEVER WITHDREW DEEMED ADMISSIONS OR MADE DETERMINATIONS GERMANE TO WITHDRAWAL OF DEEMED ADMISSIONS, THE ISSUE OF WHETHER OR NOT THE TRIAL COURT ABUSED ITS DISCRETION IN WITHDRAWING ADMISSIONS IS NOT BEFORE THIS COURT..... | 3 |
| II. DISCOVER BANK’S MOTION FOR SUMMARY JUDGMENT BELOW COULD NOT HAVE BEEN CONSTRUED AS AN IMPLIED MOTION TO WITHDRAW DEEMED ADMISSIONS WHERE IT MADE NO REQUEST OR EFFORT TO HAVE THE DEEMED ADMISSIONS WITHDRAWN | 4 |
| III. IT WOULD BE BAD POLICY TO ALLOW A TRIAL COURT TO UNILATERALLY WITHDRAW ADMISSIONS WITHOUT A PARTY REQUESTING IN THEIR OWN MOTION THAT THEY BE WITHDRAWN..... | 10 |
| IV. PARTIES WHO OBEY THE RULES SHOULD BE REWARDED AND PARTIES WHO DISOBEY THE RULES SHOULD BE PUNISHED. | 12 |
| Conclusion | 14 |

TABLE OF AUTHORITIES

Cases

| | |
|--|------------------|
| <u>Bruentti v. Mascaro</u> , 854 P.2d 555 (Utah Ct. App. 1993)..... | 4, 5, 6, 7, 8 |
| <u>Carney v. IRS (In re Carney)</u> , 258 F.3d 415 (5th Cir. Tex. 2001) | 8 |
| <u>DeBry v. Fidelity Nat'l Title Ins. Co.</u> , 828 P.2d 520 (Utah Ct. App. 1992) | 7 |
| <u>Gillett v. Price</u> , 2006 UT 24, 135 P.3d 861 (Utah 2006)..... | 7 |
| <u>Jensen v. Pioneer Dodge Ctr.</u> , 702 P.2d 98 (Utah 1985)..... | 6 |
| <u>Kotter v. Kotter</u> , 2009 UT App 60; 206 P.3d 633 (Utah Ct. App. 2009)..... | 10, 12, 14 |
| <u>Langeland v. Monarch Motors</u> , 952 P.2d 1058 (Utah 1998) | 3, 4, 12, 13, 14 |
| <u>Watkiss & Campbell v. Foa & Son</u> , 808 P.2d 1061 (Utah 1991)..... | 7 |
| <u>Whitaker v. Nikols</u> , 699 P.2d 685 (Utah 1985)..... | 6 |
| <u>W.W. & W.B. Gardner, Inc. v. Park W. Village</u> , 568 P.2d 734 (Utah 1977) | 10 |

Rules

| | |
|----------------------------|-----------------|
| Utah R. Civ. Pro. 36 | 3, 8, 9, 11, 12 |
| Utah R. Civ. Pro. 56 | 10 |

STATEMENT OF ADDITIONAL FACTS

1. Appellee Discover Bank's Cross-Motion for Summary Judgment did not contain any request to withdraw deemed admissions nor did it even mention the deemed admissions. (R. 90-93.)

2. The trial court's *Judgment and Order* did not withdraw deemed admissions nor did it even mention consideration of the deemed admissions or somehow treating Discover Bank's *Motion for Summary Judgment* as a motion to withdraw. (R. 138-139.)
3. The trial court's *Judgment and Order* was entered without a hearing or any ruling or other memoranda, such as grounds for the determination, findings of fact or conclusions of law. (R. 138-139.)

ARGUMENT

I. WHERE THE TRIAL COURT BELOW NEVER WITHDREW DEEMED ADMISSIONS OR MADE DETERMINATIONS GERMANE TO WITHDRAWAL OF DEEMED ADMISSIONS, THE ISSUE OF WHETHER OR NOT THE TRIAL COURT ABUSED ITS DISCRETION IN WITHDRAWING ADMISSIONS IS NOT BEFORE THIS COURT.

Appellee/Plaintiff Discover Bank (hereinafter "Discover Bank" or "Appellee") sidesteps the issue of the trial court's avoidance of procedural requirements. Appellee assumes that the trial court made a decision to withdraw the deemed admissions even though it was not within the trial court's discretion to do so nor did the trial court make any findings to that affect. In its *Appellee's Brief*, Discover Bank spends a great deal of space trying to show this Court that "withdrawal of the Appellee's admissions serves the presentation of the merits and does not result in prejudice to the Appellant." See *Appellee's Brief*, p. 4-7 (citing to Utah R. Civ. P. 36(c) and relating the *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1060-61 (Utah 1998), two-step process to review a

trial court's decision to deny or permit withdrawal or amendment of admissions).

However, this ignores the fact that this analysis is not appropriate given that the trial court never made a determination regarding the withdrawal of deemed admissions and there was never a motion to withdraw before the trial court that would have given it discretion to do so. *See* Part II, *infra*. Discover Bank never made any effort to ask the trial court to have the deemed admissions amended or withdrawn. Accordingly, this Court need not engage in the *Langeland* two-step analysis to review the trial court's withdrawal of deemed admissions since no such withdrawal was ever made by the trial court below.

II. DISCOVER BANK'S MOTION FOR SUMMARY JUDGMENT BELOW COULD NOT HAVE BEEN CONSTRUED AS AN IMPLIED MOTION TO WITHDRAW DEEMED ADMISSIONS WHERE IT MADE NO REQUEST OR EFFORT TO HAVE THE DEEMED ADMISSIONS WITHDRAWN.

No motion to amend or withdraw the deemed admissions was ever made by Discover Bank in the lower court, whether in proper form or implied. Appellee Discover Bank now attempts to argue, for the first time on appeal, the issues germane to a motion to withdraw deemed admissions. Before this appeal, Discover Bank never even mentioned the deemed admissions in any of its pleadings, let alone request that they be withdrawn. The trial court did not, in its *Judgment and Order* (R. 138-140), make its ruling on Discover Bank's motion for summary judgment on the basis of arguments concerning withdrawal of deemed admissions.

Opposing counsel cites to *Brunetti v. Mascaro*, 854 P.2d 555 (Utah Ct. App. 1993)

to argue that Discover Bank's motion for summary judgment should be treated as an implied motion to withdraw deemed admissions. While this Court in *Brunetti* did allow a motion for summary judgment, *wherein the issues addressing withdrawal of admissions were fully briefed*, to also be treated as an implied motion to withdraw deemed admissions, the facts in *Brunetti* are clearly distinguishable.

In *Brunetti*, there was a discrepancy over when discovery responses were actually sent. The Plaintiff attached discovery requests to the original summons and complaint served on the Defendant. The Defendant answered the complaint but did not send a response to the request for admissions until November 22, 1989 when they were due on November 16, 1989. Plaintiff filed a motion for summary judgment in May of 1990 based on deemed admissions asserting that he had never received a response to his request for admissions. Defendant responded to the summary judgment motion and attached his response to the request for admissions along with its mailing certificate reflecting the November mailing date and an affidavit from counsel asserting that to his knowledge the response had been mailed accordingly. Plaintiff filed a reply to Defendant's response "in which he further clarified his position that the said admissions should be admitted and not allowed to be withdrawn." *Id.* at 556. After a hearing on the motion, the trial court denied Plaintiff's motion. After a bench trial in January of 1991, Plaintiff appealed claiming the trial court erred in not granting his motion for summary judgment, from at least eight months prior, where Defendant's response to Plaintiff's

request for admissions were not received until after he filed for summary judgment.

On appeal, this Court found in *Brunetti* that, under the circumstances, the trial court's denial of Plaintiff's motion constituted authorization for withdrawal of the deemed admissions. In making this determination, this Court noted however that (1) "[Defendant's] response to the request for admissions, although never received, had in fact been previously mailed in good faith to the court," (2) Defendant "convinced the Court that his failure to timely respond was due to a reasonable oversight" where the discovery requests had come stapled to the complaint, (3) the trial court "determined that the merits of the action would be undermined unless the admission were withdrawn," and (4) Plaintiff never argued "that he would be prejudiced by the withdrawal of the said admissions." *Id.* at 558-59. In *Brunetti*, this Court also distinguished *Jensen* (*Jensen v. Pioneer Dodge Ctr.*, 702 P.2d 98 (Utah 1985)) and *Whitaker* (*Whitaker v. Nikols*, 699 P.2d 685 (Utah 1985)) from the circumstances in *Brunetti* by stating that in these cases, the supreme court "reversed and remanded the trial court's decision to ignore admissions because there was nothing in the record to indicate that the party opposing the admissions had made any attempt to withdraw or amend the said admissions." *Brunetti* at 559. "Here [in *Brunetti*], all of the documents before the trial court on Brunetti's motion for summary judgment *solely and specifically* addressed the issue of whether the requested admissions should be admitted or withdrawn, and the trial court denied Brunetti's motion *precisely*

on the basis of the arguments in those documents.”¹ *Id* (emphasis added). While both *Brunetti* and the case at bar involve deemed admissions and a motion for summary judgment, that is as far as the similarities go. Beyond these, the circumstances are vastly different.

First, in the case at bar, there is no discrepancy as to when discovery responses were mailed by Discover Bank; responses were sent more than seventy (70) days beyond

¹ The authority the court in *Brunetti* relied upon to justify looking “to the substance of [a] document, and not merely to its caption” was *DeBry v. Fidelity Nat'l Title Ins. Co.*, 828 P.2d 520, 522 (Utah Ct. App. 1992) and *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1064 (Utah 1991). These cases dealt with post-judgment motions where the caption did not match the substance of what the motion was requesting. The courts characterized objections in motions filed within ten days after an entry of judgment as a post-judgment motion pursuant to Rule 52(b) or 59(e). Ironically, *Brunetti*, has been overruled as to this principle by *Gillett v. Price*, 135 P.3d 861 (Utah 2006) wherein the Utah Supreme Court stated:

[R]egardless of the motion's substance, postjudgment motions to reconsider and other similarly titled motions will not toll the time for appeal because they are not recognized by our rules. We realize that this holding repudiates a long line of cases from both the court of appeals and this court treating motions to reconsider as rule-sanctioned motions based on the substance of the motion. We are now persuaded that it is time this practice comes to an end. In our system, the rules provide the source of available relief. They are designed to provide a pattern of regularity of procedure which the parties and the courts can follow and rely upon. Accordingly, the form of a motion does matter because it directs the court and litigants to the specific, and available, relief sought . . . Hereafter, when a party seeks relief from a judgment, it must turn to the rules to determine whether relief exists, and if so, direct the court to the specific relief available. Parties can no longer leave this task to the court by filing so-called motions to reconsider and relying upon district courts to construe the motions within the rules.

Id. at 863 (internal quotations and citations omitted). While Mr. Kendall realizes that this holding deals with post-judgment motions for relief and is only binding in that context, he asserts that the dicta shows the growing desire that courts have for litigants to properly caption and apply for specific relief as provided by the rules.

the deadline and only after Mr. Kendall filed his motion for summary judgment. The time for moving the court to withdraw admissions should not be after a motion for summary judgment.² In its recitation of the facts, Appellee Discover Bank conveniently omits the efforts Appellant Kevin Kendall took to remind and then ultimately compel some type of a response to his discovery requests from Discover Bank. It was only after the time and expense of a letter (R. 59), a motion to compel (R. 31-33), and a subsequent motion for summary judgment (R. 60-61), that Discover Bank, the original Plaintiff who was to be prosecuting the case³, finally responded to discovery requests and gave a cursory opposition to Mr. Kendall's summary judgment motion (R. 86-87), notably, one that did not address the merits of the motion or even mention the deemed admissions or request their withdrawal.

Second, in this case, there was no "reasonable oversight" as to the due date for the

² The treatment of Federal Rule 36(b) is both logical and persuasive and lends insight to the case at bar. "Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, *they cannot be overcome at the summary judgment stage* by contradictory affidavit testimony or other evidence in the summary judgment record . . . Instead, the proper course for a litigant that wishes to avoid the consequences of failing to timely respond to Rule 36 requests for admission is to move the court to amend or withdraw the default admissions in accordance with the standard outlined in Rule 36(b)." *Carney v. IRS (In re Carney)*, 258 F.3d 415 (5th Cir. Tex. 2001) (emphasis added).

³ In *Brunetti v. Mascaro*, it was the Defendant who opposed the deemed admissions and asked the court for relief from them. In the present case, it is the Plaintiff, Discover Bank, who was supposed to be prosecuting the case, that was clearly dilatory in responding to discovery requests and moving the case forward and who now wants relief from deemed admissions even though he never requested such relief in the trial court.

response to requested admissions; the discovery requests were served separately from the complaint (R. 15-16) and not stapled to the back of the complaint as in *Brunetti*.

Third, the trial court below made no determinations as to how the merits of the action or prejudice to the nonmoving party might be affected if the admissions were not withdrawn. If a motion to withdraw deemed admissions had been before the trial court, whether actually or implied, the trial court, in order to not be found to have abused its discretion, would have needed to make determinations that the affect of a withdrawal of admissions would serve the merits of the action and not cause the requesting party to suffer prejudice. *See* Utah R. Civ. P. 36(c).

Fourth, although Mr. Kendall has not made arguments with regard to how he would be prejudiced if the admissions were to be withdrawn, this is because he has not been required to do so thus far where no such motion was ever before the lower court or fully briefed. Discover Bank has made hay with the assertion that Mr. Kendall has not put forward any proof that the deemed admission at issue is in fact true. Appellee misapprehends the purpose behind Rule 36(c). It is meant to release the party who gained the deemed admission of the burden of needing to present evidence on the matter deemed admitted. The burden is not on the Appellant to prove the truth of the deemed admission but is now on the Appellee *to request* the admission be withdrawn and to prove “that the deemed admission is in fact untrue.” That Appellant has not put forward additional evidence beyond the deemed admission to show its truth is not at issue here.

Fifth, and similarly, the documents and motion for summary judgment before the lower court did not “solely and specifically address[] the issue of whether the []admissions should be admitted or withdrawn,” and the trial court did not grant Discover Bank’s motion “precisely on the basis of the arguments in those documents.” *Brunetti* at 559. The trial court’s *Judgment and Order* does not mention deemed admissions or any consideration of issues germane to their withdrawal. (R. 138-39.) It merely awards judgment “as requested in Plaintiff’s Motion for Summary Judgment.” (R. 138.) A reading of *Plaintiff’s Memorandum in Support of Motion for Summary Judgment* likewise does not mention deemed admissions or any consideration of issues germane to their withdrawal. (R. 90-93.) The substance of Discover Bank’s motion did not have to do with deemed admissions or request they be withdrawn. Instead, it focused solely on the requirements for summary judgment under Rule 56 and completely ignored the deemed admissions. The motion, at most, merely presented additional evidence, something which *Kotter v. Kotter*, 206 P.3d 633, 639-640 (Utah Ct. App. 2009), indicates is insufficient for purposes of requesting a withdrawal of admissions.⁴

⁴ Where a party makes “no effort to have the admissions amended or withdrawn... [but] merely present[s] additional evidence on [the] issue,” the court will not engage in further analysis but will find the admissions “conclusively established and legally binding.” *Kotter*, 206 P.3d at 640; *see also W.W. & W.B. Gardner, Inc. v. Park W. Village*, 568 P.2d 734, 736-737 (Utah 1977) (holding that where defendant made no motion to withdraw or amend admissions but merely submitted an affidavit supporting its belated denial of admissions, the matters deemed admitted were conclusively established).

III. IT WOULD BE BAD POLICY TO ALLOW A TRIAL COURT TO UNILATERALLY WITHDRAW ADMISSIONS WITHOUT A PARTY REQUESTING IN THEIR OWN MOTION THAT THEY BE WITHDRAWN.

It is not requisite with justice that a Plaintiff initiate an action for their own benefit, not respond to a Defendant's discovery requests, reminder letter, and motion to compel, and then, after Defendant has incurred expenses for all these plus the filing of his motion for summary judgment, that Plaintiff suddenly be rewarded for all their delays by the trial court being allowed to ignore Rule 36(c) procedure and grant a cross-motion for summary judgment in favor of Plaintiff yet contrary to deemed admissions. This is especially true where, here, Discover Bank's motion for summary judgment did not ask for any treatment of deemed admissions, in form or substance, and the trial court did not make any findings or rulings stating that it had considered issues germane to withdrawing deemed admissions or that it was even withdrawing the deemed admissions. If the substance of a trial court's order granting a motion does not make any findings or rulings withdrawing the deemed admissions, and the substance of the motion itself does not request withdrawal or even discuss the deemed admissions, it would be bad policy to, after the fact, declare the substance of the motion to be one requesting withdrawal of the deemed admissions. *See* FN1, *supra*. Otherwise, the predictability and fairness that the rules of civil procedure are aimed to secure is lost. The net result would be to introduce uncertainty into most motions before a court. The opposing party would be uncertain as

to whether or not a judge would transform a motion into a specific request despite the substance of the motion being void of any discussion regarding such a request. A judge could eclipse a motion before the court based on his own inclinations and feelings as to what should happen in the case. It would follow then that a judge would not have to make any findings or conclusions in an attendant order declaring what he is in substance doing—transforming the motion before the court into something else entirely. If a judge could impute requests to a party even without the party requesting it or facts before him pertaining to the factors or issues germane to that request, the effect would be to make Rule 36(c) of no real import or affect.

IV. PARTIES WHO OBEY THE RULES SHOULD BE REWARDED AND PARTIES WHO DISOBEY THE RULES SHOULD BE PUNISHED.

It should go without saying that all parties should follow the rules, that those who do should be rewarded and those who do not should not benefit from their disobedience at another party's expense. Unfortunately, in the instant matter, Mr. Kendall, who obeyed the rules and used the legal means available to him to move the case forward to resolution, at his expense, was steam rolled by the trial court's *Judgment and Order*. On the other hand, Discover Bank broke the rules and is now being unfairly rewarded.

Mr. Kendall asks this Court to reverse the trial court's grant of summary judgment to Discover Bank and grant summary judgment in his favor. Mr. Kendall

is concerned that a reverse and remand will simply be a roadmap to show Discover Bank how to maneuver its way out of its rule-breaking. Discover Bank has already received preferential treatment by the trial court and that treatment will likely continue unless the trial court's subsequent denial⁵ of Mr. Kendall's motion is reversed.

This is not the first time that courts have cut off litigation regarding the deemed admissions upon the filing of a motion for summary judgment based on the deemed admissions. In both *Jensen* and *Langeland*, the Utah Supreme Court dealt harshly with parties who only sought to withdraw and amend its deemed admissions *after* a motion for summary judgment was filed. *See Appellate Brief*, pp. 13-14 for further details. In the instant matter, the situation is even more egregious where Discover Bank has not even sought to withdraw the deemed admissions. It was only after Mr. Kendall filed his *Motion for Summary Judgment Based on Deemed Admissions* (R. 60-61) that Discover Bank began to move forward with its case. Accordingly, Mr. Kendall should not be punished for obeying the rules while a national bank is rewarded for breaking them.

Litigation must come to an end sometime, and the rules of procedure are intended to provide an orderly schedule for moving cases along their track to conclusion—not to squander legal, judicial, and financial resources by

⁵ The lower court did not deny Defendant's Motion for Summary Judgment (June 21, 2012; see Court Docket) until *after* Defendant had filed this appeal (June 7, 2012; see R. 144-145). From a procedural standpoint, this makes the case more difficult where the lower court's denial of that motion is not part of the record submitted to this Court.

generating lawsuits within lawsuits to determine whether the rules must actually be followed. Consequently, the court will not come to the rescue of a party who flagrantly ignores these rules at the expense of a party who attempts to conform with them.

Langeland, 952 P.2d at 1064.

“The penalty for delay or abuse is intentionally harsh, and parties who fail to comply with procedural requirements of rule 36 should not lightly escape the consequences of the rule.” *Kotter v. Kotter*, 2009 UT App 60, P19 (Utah Ct. App. 2009) (quoting *Langeland*).

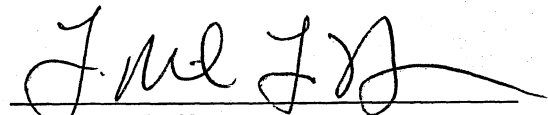
Ignoring the rules is never good policy and neither Discover Bank nor the trial court should be allowed to do so in this matter.

CONCLUSION

The trial court’s grant of summary judgment to Appellee was in unilateral disregard of deemed admissions and is therefore unfounded. Accordingly, the trial court’s grant of summary judgment in favor of the Appellee should be summarily reversed, and summary judgment granted in favor of the Appellant.

DATED and SIGNED this 8 day of January 2013.

LEBARON & JENSEN, P.C.

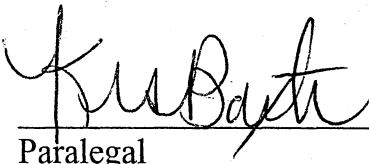

L. Miles LeBaron

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellant to be served via first class U.S. mail, postage pre-paid, to the following:

Brent G. Messel
GUGLIELMO & ASSOCIATES
PO Box 9420
Salt Lake City, UT 84109

on this 8 day of January 2013.

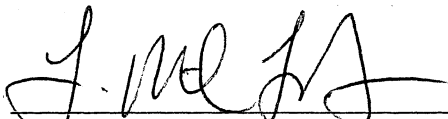


Paralegal

Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:
 - ✓ This brief contains 3,905 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B), or
 - ☐ This brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because:
 - ✓ This brief has been prepared in a proportionally space typeface using Microsoft Word 2003 in Times New Roman, 13 size font, or
 - ☐ This brief has been prepared in a monospaced typeface using _____ [name and version of word processing program] with _____ [name of characters per inch and name of type style].


L. Miles LeBaron

Dated: 01/08/13