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Summary judgment motions: Don't forget to kick the tires

By: Douglas H. Wilkins and Daniel I. Small December 24, 2019

Lawyers are naturally good at putting forth their client's best case. That's for trial, though.

The well-known rules on summary judgment limit what comes naturally. When you move for summary judgment, you can't put forward your client's best case; you can only argue what is undisputed. Everyone knows that, right?

The problem isn't that lawyers need more instruction on what Rule 56 says. They don't. But still, many of the rules frequently seem honored in the breach. We think the problem is that following those rules seems to cut across the grain in a way that fundamentally challenges a litigator's instincts.

It almost seems disloyal to give the other side the benefit of the doubt on all contested issues and to withhold your client's best facts simply because they are contested. But that is exactly what you have to do when deciding whether you have a viable summary judgment motion.

> *Ask yourself the difficult questions before you file.*

Part of the solution is perspective. Start with the realization that the judge who will decide the summary judgment motion has none of the ambivalence that you may feel. Her only task is to decide what is truly undisputed and then determine whether those facts entitle one side to judgment without even having a trial.

If you think that summary judgment will serve judicial economy, the opposite is very often true. It is often easier to conduct a trial than to perform the exacting tasks necessary to decide whether summary judgment is appropriate. If summary judgment is denied, there is far less chance of appeal, reversal, delay and re-trial.

And just as lawyers naturally want to argue their case, judges often have their own natural inclination: to give every litigant his day in court. That might end up being the day a party opposes summary judgment, but that's not the usual meaning of that phrase.

So, as we have urged from the beginning of this series, you must, must, must consider your audience (the judges) and adapt your argument to them.

If this perspective seems too general, we suggest a few specific, practical questions for you to ask about your summary judgment motion, as you work on it:

What inferences can a jury draw in favor of the opposing party?

This truly requires you to consider a perspective opposite from the one you will take at trial, but you have to do it. If you cannot survive all permissible inferences in your opponent's favor, then you shouldn't file the motion.

You say the other side "has no evidence" on a particular point; what do you actually mean?

All too often, the moving party makes this claim when all it can really prove is that the opposing party has no direct evidence. But a plaintiff can prove its case by circumstantial evidence. If you focus only on direct evidence but ignore circumstantial evidence and the inferences therefrom, you are not doing your job.

Can you honestly say that all your facts are undisputed (i.e., in your statement under Superior Court Rule 9A(b)(5))?

Ideally, you would want to write your statement of undisputed facts by quoting and citing the other side's witnesses. If you are citing only your own witnesses' testimony and affidavits, you need a good-faith basis to believe that the opponent has no testimony or affidavits to contradict your evidence. The more you ramp up the rhetoric in your statement of facts, the more likely the other side can deny it with evidentiary support. Self-censorship and neutral phrasing are a must when drafting that statement.

Can you honestly include all necessary facts in something called an undisputed statement of facts? (Superior Court Rule 9A(b)(5))?

You can't dance around holes in your factual case. It does no good to show that 90 percent of the facts are undisputed and simply leave out the other necessary 10 percent. You can't make up the difference by putting those facts in your brief, even with citations. Either they are uncontested, in which case they belong in your statement of undisputed facts, or they aren't, in which case they are not available to you.

If there is an unsettled issue of law, are you better off at trial, when the court can consider contested facts that favor your client?

Not every case involves new questions of law, but in cases that raise novel or unsettled legal questions, often good facts make good law. There is a risk of an adverse legal ruling if the court must draw all factual inferences in your opponent's favor.

If you are arguing that "no reasonable jury could find" a particular fact, are you really asking the judge to do the jury's job?

That argument isn't impossible, but it is very hard to say what is reasonable as a matter of law.

Is your argument a stretch — to the point where you risk losing credibility with the court?

Perhaps, given rotating assignments, you will have a different judge at trial. But perhaps not, in which case your credibility with the trial judge will be in play.

Does your motion still have merit after you actually see the opposition and can assess what facts are uncontested?

As the process moves along, from drafting the motion, conducting the Rule 9C conference, receiving the opposition, and writing the reply memorandum, you need to reassess your prospects and the pros and cons of moving for summary judgment. More about this in a future column.

Ask yourself the difficult questions before you file. Don't wait for the other side to be able to ask them in their pleadings, or for the judge to ask them in open court.

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