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Protect your investment: think, confer about Rule 9C

By: Douglas H. Wilkins and Daniel I. Small January 23, 2020

Lawyers often have so much invested after they serve a summary judgment motion that they are unwilling or unable to take a second look. They have committed themselves mentally to filing the motion, no matter what the opposition may say.

We understand this. But you protect your investments in other parts of your life. You should do that in the summary judgment context, too.

Don't be afraid of the reality that facts you thought were undisputed frequently turn out to be contested. Once you get the other side's input, you need to take a fresh look at which facts are truly undisputed. You should not simply ignore an opposition that includes evidence and argument purporting to dispute your facts. Nor should you deny to yourself, or the court, that the fact(s) are contested. You can be sure that the court will not simply ignore that alleged dispute.

You do not help your case when the judge sees you rely on certain facts that you claimed were undisputed, and now the judge can see that you were wrong. At that point, you have wasted much of your investment in the motion.

Worse, you are approaching the point of negative returns, because you are losing credibility with the court, which may affect how the court receives your future motions, in this case and even in other cases.

You have several opportunities along the way to avoid wasting time, effort, money and credibility on a summary judgment motion that you thought was stronger than later appears.

Ideally, before you even serve your motion, you have engaged in the critical analysis of your own arguments that we suggested in our last column. That is, you put yourself in the shoes of your opponent or the court and identify disputes of fact that are likely to arise. That lets you shape your initial motion papers in a way that will not make it easy for the opposition to identify a fatal dispute of fact.

Superior Court Rule 9C makes this process easier. It requires the moving party to confer with the opponent to discuss "whether the moving party should refrain from making any motion qualifying for decision without a hearing under Superior Court Rule 9A(b)(vi) and make a good faith effort to narrow areas of disagreement that may be resolved through amendment of the pleading, a stipulated dismissal of specified claims or parties, or otherwise."

We are well aware that many lawyers chafe at the notion of conferring with their opponent before filing a dispositive motion. Some may feel that being the first one to break the ice is a sign of weakness (which is not true, if the rule says you have to confer). Others may feel that the conference is a waste of time.

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We suggest that the Rule 9C conference is an opportunity for both sides. The moving party should use it to anticipate opposing arguments and to avoid walking right into them. The opposing party should use it to head off

disputes that will take time, effort and money in ways that will benefit neither side.

Moreover, simply because they are talking about the case, the parties may consider ways to limit or even settle the disputes between them. Lawyers who are motivated to pay only lip service to Rule 9C will probably pay no immediate penalty, but they are missing an opportunity, which may well cost them when the judge hears and decides the motion.

Beyond these general considerations, Rule 9C has some very specific content. By cross-reference to Rule 9A(b)(vi), Rule 9C(b) requires the parties to confer about whether the proposed motion falls within any of three categories:

(1) Multiple summary judgment motions by a single party, or subsequent summary judgment motions by parties sharing similar interests and making the same arguments as those the court has already resolved.

(2) Motions for partial summary judgment that will save little or no trial time, will not simplify the trial, and will not promote resolution of the case.

(3) Motions for summary judgment when a genuine dispute of material fact is obvious on the face of the papers.

Category (1) motions will probably be obvious on their face and may sometimes be filed for improper reasons that, we concede, no conference can forestall.

On the other hand, discussion of category (2) motions requires counsel to consider the larger picture, including how the case is to be litigated through trial.

Category (3) motions will likely benefit from the conference between counsel, because they likely reflect insufficient attention to the flaws in the moving party's papers. You can file such motions, but why would you? The rule itself tells you all you need to know about how the court is likely to receive that kind of motion. Indeed, the court need not hold a hearing before denying them (it will not grant such a motion without a hearing, in compliance with Mass. R. Civ. P. 56).

Which raises the question: When should the conference occur? Rule 9C does not say. Generally speaking, the earlier the better. Pleadings can be streamlined, contested facts can be explored, and having time allows you to react appropriately. Perhaps the "contested" facts are not really a bar to a motion. Perhaps you should consider using your reply to show why an apparent dispute is not "genuine" or that the contested facts are not "material," and why. There are lots of options.

If none of this works, you should also consider re-serving a more focused motion package. That new motion will not assert facts to be undisputed when, in fact, they are. Better to start anew than to throw good money after bad. The knowledge you gained by conferring may be painful in the short term but helpful in the longer term.

By the time you are done, your motion papers will be simple, direct and persuasive. That will pay dividends. Conferring and constant evaluation can help you get there.

Judge Douglas H. Wilkins sits on the Superior Court. Prior to taking the bench, he was a trial attorney in private practice and at the Attorney General's Office. Daniel I. Small is a litigation partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of "Preparing Witnesses" (ABA, 4th Edition, 2014), and teaches CLE programs around the country. He can be contacted at dan.small@hklaw.com.