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# Summary judgment: Just the facts, please

By: Douglas H. Wilkins and Daniel I. Small March 12, 2020


If you were given the questions before taking an exam, wouldn't it make sense to study them carefully and follow them closely?

In our next several columns, we will talk about how the rules provide clear guidance in many aspects of preparing summary judgment papers. Follow them carefully and your life will be easier, and maybe even more successful. Nowhere is that more important than in the statement of material facts (Superior Court Rule 9A(b)(5)), which we consider the key to making and opposing a summary judgment motion.

Abuses, or abuses perceived by judges, have led to many recent amendments in Rule 9A(b), especially regarding the Rule 9A(b)(5) statement of undisputed material facts. Before filing your motion, it's important to re-read them, understand them, and follow them.

For many judges, the statement of material facts and response thereto hold the key to deciding a summary judgment motion. Some may start there. Others (including our judicial author) may rely heavily on those papers when writing the pivotal portion of a summary judgment decision: the facts section. Few judges ignore it. So make it count.

In keeping with our ongoing "follow the rules" theme, we stress the importance and tactical benefits of following Rule 9A(b)(5) in drafting your statement of undisputed material facts.

We preface that discussion, however, by starting with the most important advice. Our current Superior Court chief justice said it clearly and succinctly in the title of her article almost a decade ago: "Just the Facts." See, Hon. Judith Fabricant, "Voice of the Judiciary: Just the Facts," Boston Bar Journal (Summer 2011).

Even if you are too young to notice that the CJ was channeling police Sgt. Joe Friday from the classic "Dragnet" TV series, you should get the point. Whenever someone started rambling or arguing, that was Sgt. Friday's stock response to bring things back into focus. It should be yours as well.

Some basic rules follow from that advice. We start with two such rules, reserving others for our next column.

1. **State your facts as simply and directly as possible.** Don't make your opponent's job easier by overstating your factual case, or phrasing your statement rhetorically instead of in plain English. When drafting your statement of material facts, stick to basic, subsidiary facts that your opponent cannot easily deny.

Don't give your opponent the chance to contest your flowery adverbs or adjectives. For example, your opponent can easily deny this statement: "1. Because it was a cloudless day, visibility was unimpaired." It's a lot harder to deny: "1. On the day in question, there was no precipitation. 2. The accident occurred at noontime. 3. It was a partly cloudy day."

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Do make the judge's job easier. Write the facts in such a way that no one can fairly contest them. We acknowledge that this can be difficult, because the moving party goes first and therefore cannot know for sure what the opposing party will contest.

In drafting your statement of material facts, then, you need to think a couple of moves ahead. Don't just write up your facts from your client's point of view. Plan for and anticipate your opponent's possible responses.

It's not a game, but there is a lot to be learned from chess players, pool players and card players who need to think several moves in advance. Your goal should be to make it easy for the judge to accept those clearly stated facts that cannot fairly be contested. If you fail, it will be a lot harder for the judge to plow through a set of partially contested facts to determine what is in dispute.

2. **Support your facts with accurate citations to the record.** You can make it harder to oppose your statement of a given fact by scrupulous citation to an affidavit, exhibit or deposition page. Indeed, that's what Rule 9A(b)(5) requires: " … a statement of the material facts …, with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents … ."

So don't cut corners by inattention or, worse, trying to slip by with inaccurate or overly vague or general citations.

And, of course, the affidavits supporting your motion "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mass. R. Civ. P. 56(e).

Remember that, faced with a contest over whether a particular fact is contested, the judge is very likely to look up the record citation you gave the court. Someone is going to lose out when that happens. Your opponent's denial will certainly prevail, and your credibility will be diminished, if your record citations are imprecise, incorrect or do not actually support the fact you assert. That may be the quickest path to losing your motion. Make sure that it's your opponent who gets caught stretching the record.

Given the reasons we have outlined above, and some more advice in our next column, it is surprising that some attorneys appear to shortchange the rule's requirements by minimal or sloppy adherence to this rule.

Our advice goes beyond making it easy for the judge to accept your facts. It is also a matter of trust. If the judge can't trust you to state the facts simply and directly, and to support them with accurate citations to record material, you can't expect to win.

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