MASSACHUSETTS Lawyers Weekly

Summary judgment: less really is more

By: Douglas H. Wilkins and Daniel I. Small April 16, 2020

In our last column, we set forth two central rules governing Rule 9A statements of material facts, and pointed out some strategic advantages of closely following the key requirements of Rule 9A(b)(5): carefully setting forth and documenting the facts in your statement of material facts.

In this column, we add some additional principles and emphasize your tactical interests in following the rules.

- **Stick to "material" facts**

A recent amendment to Rule 9A states: "Only such facts as are material to deciding the motion shall be included in the Statement of Facts." Rule 9A(b)(5)(i).

A fact is material if it makes a difference under Rule 56 and the substantive law. It may be true that, when the accident occurred, your angelic client was driving to serve lunch at a soup kitchen, but it is not material and may be contested.

Worse, immaterial facts may be a red flag signifying weakness or may give your opponent a bigger target to shoot at.

We have appeared before a now-retired judge who denied summary judgment motions automatically as long as even one statement of material fact was properly denied. His rationale was that the moving party said it was material, and so if it was denied by the other side, summary judgment was not available.

We would not go that far. We acknowledge that a fact may be material but not indispensable. But don't run the risk in the first place by putting a potentially contested or immaterial fact in the statement of material facts.

We do agree with that judge that you are representing that the proposed fact is "material." You should think twice before doing that and then having to un-ring the bell.

- **Background "atmospherics" don't help**

Focus the court on your most direct path to victory. At the same time, reduce your opponent's ability to create a dispute of fact. You accomplish this, in large part, by eliminating most, if not all, of the "atmospheric facts" that you might want to include simply to put your client in a good light. Not only are those facts likely targets for denial, but they impair the focus on your theory of the case.

Not surprisingly, Rule 9A(b)(5)(i) supports this advice:

"The Statement of Facts … shall not include … [b]ackground facts not material to decision of the motion. Such facts may be included in a party's memorandum of law even though they are not in the statement."

The judge can tell when you are relying on atmospherics and recognizes that lawyers often use sympathy to make up for legal shortcomings. Moreover, you are unlikely to get judges to act on their personal view of who should win because they know that a jury might disagree with their own views. Judges have experience in deferring to juries

rather than taking matters into their own hands. It doesn't take long on the bench before a judge sees first hand that juries often view things differently.

Remember that moving for summary judgment is nothing less than asking the judge to take matters into his or her own hands. If your rationale is that your client is a "good" person or company, you are probably undermining the credibility of any justifiable legal argument you may have.

Excessive reliance on atmospherics, thus, seriously distracts from your path to victory.

- **Avoid shortcuts**

We know that the rules governing Rule 9A(b)(5) statements are exacting. It is hard to prove that a fact is undisputed, or that the other side has no reasonable prospect of proving a fact at trial. Perhaps because of the difficulty, we have seen counsel resort to shortcuts that, upon analysis, don't work.

For instance, sometimes a Rule 9A(b)(5) statement merely states that a witness testified to such and such. If admitted, the statement only establishes the content of the witness's statement. It does not establish the truth of what the witness said. Only rarely is it material that a witness testified in a particular way.

If you are trying to prove the truth of the underlying fact, you need to state the fact directly, as opposed to reciting the testimony. If you can't do that, then you need to rethink whether the fact is material and whether summary judgment is appropriate.

> *Another common mistake is to assert that "there is no evidence" when all you really mean is that there is no direct evidence on a given point. Circumstantial evidence counts too.*

Other Rule 9A(b)(5) statements recite that the plaintiff agreed at deposition that he or she did not know any facts establishing the defendant's liability. That may be a legitimate proposed fact, but it is not determinative. Obviously, opposing counsel may have evidence from a variety of sources, other than the parties themselves, to prove their case or refute yours.

There is no rule that plaintiffs must be able to prove their entire case through their own testimony. So don't overstate the significance of an opposing party's inability to testify to the key facts, unless you also eliminate other sources.

A related point: You can't discount an opposing party's testimony or affidavit on the ground that it is "self-serving." That is just a credibility argument, which is inappropriate at the summary judgment stage.

Another common mistake is to assert that "there is no evidence" when all you really mean is that there is no direct evidence on a given point. Circumstantial evidence counts too. It is difficult to rule out circumstantial evidence. In no small part, that is because the court must draw all inferences in favor of the party opposing summary judgment.

If your Rule 9A(b)(5) statement alleges that "there is no evidence" on a point, you are opening yourself up to an easy denial based on circumstantial evidence. If you ignore the problem and rely solely on your memorandum, your Rule 9A(b)(5) statement will fail to lay the factual foundation for your motion.

There are other examples, but you get the point.

- **Brevity**

Finally, Rule 9A(b)(5)(i) prohibits statements that are "unnecessarily long," limits all such statements to 20 pages (as served), and prohibits quotations of documents or statutes (that serve no purpose, if the documents are admittedly authentic, but may nevertheless be attached in an appendix to the summary judgment memorandum). This reflects the court's collective experience that moving parties must focus on "just the facts."

And, if you still aren't convinced, consider the following statements from the Appeals Court in affirming now-Superior Court Chief Justice Judith Fabricant's decision to rely on a well-drafted statement of material facts:

"[Rule 9A(b)(5)] is a pragmatic and reasonable response to the propensity of lawyers to file literally mounds of affidavits, depositions, interrogatories, and depositions in support of, or in opposition to, summary judgment. Both formulation of such rules and administering them in a fashion so that they have bite find support in the cases. [citations omitted] The judge acted within her discretion in taking as admitted those facts asserted by the moving party … that were not disputed by the party opposing the motion for summary judgment …, in accordance with the rule." See *Dziamba v. Warner & Stackpole LLP*, 56 Mass. App. Ct. 397, 399-401 (2002).

Make it so.

Previous installments of "Merits of the Cause" can be found here. 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.

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