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Opposing summary judgment by defending the high ground

By: Douglas H. Wilkins and Daniel I. Small May 21, 2020

Almost 150 years ago, a disappointed baseball reporter made the first recorded use of a now well-known phrase, when he complained of his team: "Were they fairly defeated after having played a creditable game there would be no censure for them; but when they snatch defeat from the jaws of victory there can be little sympathy for their deserved misfortune."

So it is in litigation. When you oppose a summary judgment motion, the presumptions favor you. So don't blow it! A simple, focused and well-documented opposition can make it very easy for the court to deny summary judgment. The rules tell you how to accomplish this.

Fact issues. First, ask yourself if there is any "genuine issue as to any material fact." See Mass. R. Civ. P. 56. If so, your response to the Rule 9A(b)(5) statement of that fact should simply say "denied" and provide a page or paragraph references to evidentiary documents in the record. See Superior Court Rule 9A(B)(5)(iii)(A).

Highlight the dispute — probably as your first argument — in your opposition memorandum. If you want to quote the evidentiary material upon which you rely, you should do so only in the memorandum. If this approach shows that your dispute is genuine, then the court must deny summary judgment. Make it easy for the judge to see this argument right away.

Although this approach is simple and highly persuasive, many attorneys apparently feel the need to embellish. More about that in our next column. For now, don't do it; go right to the heart of the matter.

Inferences. Second, the rules give you a very powerful tool: inferences. Ask: "What inferences can the fact-finder draw in my favor?" As you know, the court must "assume the facts set out in the nonmoving party's summary judgment materials are true, and … make all logically permissible inferences in its favor." *The Alphas Company, Inc. v. Kilduff*, 72 Mass. App. Ct. 104, 108 (2008), citing *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991).

Moving parties often respect the first part of this rule (by assuming the opponent's facts), but ignore the second part, because the facts may permit some uncomfortable inferences. Don't let them get away with this. Often, the opposing party's best approach is to state clearly what inferences the jury could draw, and then set forth succinctly each fact that contributes to that inference — citing, as always, to the page or paragraph references for each such fact. Using bullet points or indented, numbered paragraphs may be a good way to do this.

Deficiencies. Third, point out material deficiencies in the 9A(b)(5) statement. As we noted in previous columns, moving parties often try to dodge disputes of facts by omitting an inconvenient fact entirely from the Rule 9A(b)(5) statement.

Only slightly more subtle is the moving party's mere recitation of testimony without asserting that the underlying fact is true. For instance, a statement that "John Smith testified that the sky was blue" (or that "the report states that the sky was blue") is deficient if the moving party needs to show, beyond dispute, that "the sky was blue."

If you are opposing the motion, call out moving parties in no uncertain terms whenever they employ these dodges. Point out that the omission in the 9A(b)(5) statement not only is procedurally deficient, but is a tacit admission that the moving party cannot possibly show the key fact to be undisputed. It's a twofer: You score points on the merits and seriously undermine your opponent's credibility at the same time.

Credibility. Fourth, note that opposing parties can sometimes deny a proposed fact in a 9A(b)(5) statement on credibility grounds. Most often, this occurs when a moving party with the burden of proof relies on testimony that a jury is free to disbelieve. A jury need not believe a witness whose testimony is cited. "[W]here the party with the burden of proof at trial provides unrebutted testimony, summary judgment for that party may still be precluded because credibility is for the fact finder and the fact finder is free to disbelieve the testimony." *Zaleskas v. Brigham and Women's Hospital*, 97 Mass. App. Ct. 55, 61 (2020).

Rule 9A(b)(5)(iii)(A) acknowledges this possibility by requiring a citation "to the specific evidence, *if any*, in the Joint Appendix that demonstrates the dispute." [Emphasis added]. The phrase "if any" recognizes that a dispute of fact does not always require conflicting testimony. This does not, of course, allow a defendant to prevail solely on the ground that the jury might not believe the plaintiff's witnesses. *Id.*

Admissibility. Fifth, if the moving party has included material that is not admissible in evidence (as required by Mass. R. Civ. P. 56(c)), the opposing party should file a motion to strike. *Zaleskas*, 97 Mass. App. Ct. at 62. Otherwise, the court has discretion to rely on the material. *Id.*

Strategic use of memorandum. Sixth, use your opposing memorandum wisely. Your best facts are often your best argument. Some attorneys may chafe at the recent amendments, which prohibit an opposing party from filing a separate "statement of additional facts." The same amendments, however, also say: "Additional facts may be included in the response only in the manner provided in section (b)(5)(iii)(B) [i.e. in the opposition memorandum, each to be supported with page or paragraph references to supporting … documents.] … ." Take that advice.

A highly persuasive opposition may begin with a multi-page factual argument, effectively saying: "While the moving party's papers present its point of view, a jury could find the following facts, and draw the following inferences, in our favor." You should then present your facts fairly, with citations to the evidence and without exaggeration or rhetorical embellishment. While you may have additional arguments, a judge may well conclude from your first, fact-based argument that there is no way the court can grant summary judgment.

Generals, coaches, business managers and others often have the good fortune to defend the high ground, have good field position, have leverage or the like. They have learned to focus and use those advantages. When opposing summary judgment, the facts are often the most important high ground. Use the presumptions and advantages that the rules give you to take and hold that ground.

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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