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Opposing summary judgment: ways to avoid common errors

By: Douglas H. Wilkins and Daniel I. Small June 4, 2020

Our last column suggested that the best summary judgment response is often the simplest. In practice, though, needless complexity often seems to prevail. Perhaps out of an inability to contain an advocate's enthusiasm for his or her client's case, attorneys appear unable to resist the urge to pile on rhetoric at every opportunity, when the best approach calls for focus and discipline.

Summary judgment motions are not won or lost based on who uses the most, or most flamboyant, words. While you may think that you are convincing the court of your client's virtues, the judge is most likely looking for a clear answer. We suggest here some ways to avoid common errors.

First: Focus. In opposing summary judgment, many attorneys seem compelled to try to argue their whole case instead of simply ensuring a right to go to trial. Likewise, they often fight side skirmishes or pick fights that don't matter.

If you're a litigator, it's hard to hold your fire. But, obviously, it's a lot harder to win your whole case (or even multiple inconsequential battles) than to get to trial in the first place, so why would you take on that burden?

It's often best to acknowledge that the moving party may have enough to prevail at trial, but can't prevail now, because there are disputed facts.

Second: Fight the battle on your own terms. It may appear simplest and easiest just to rebut each of the moving party's arguments. That might be appropriate in some cases, particularly if there is an obvious dispute of fact, or other fatal defect apparent in the moving party's papers. But keep in mind that, when you do this, your opponent has dictated the battlefield.

Often it's best to show that there are issues for trial by leading off with your client's strongest case and your best legal arguments. After you frame the contest on your own terms, you have presumably shown the necessary "genuine issue as to any material fact" and can then refute anything that may remain of the moving party's points.

Third: Impose self-discipline by following the rules. Ground zero for unhelpful practices has been the response to the Rule 9A(b)(5) statement. That problem led to the Superior Court's latest amendments to the rule. Those amendments are very specific about what is unhelpful, undesirable and now improper in an opposition to summary judgment:

"[The opposition to the Rule 9A(b)(5) statement of facts] shall not:

1. Deny a fact unless the party has a good faith basis for contesting it.

2. Include a statement that a fact is not supported by the materials cited by the moving party, unless the responding party has a good faith basis for contesting it.
3. Include commentary on whether the fact asserted is relevant or material to any issue raised in the case, although a responding party may indicate, where appropriate, that the fact is admitted only for the purposes of the summary judgment motion.
4. Assert any additional facts. Additional facts may be included in the response only in the manner provided in section (b)(5)(iii)(B) below.
5. Make legal arguments or advocacy-oriented characterizations concerning the sufficiency, relevance or materiality of the moving party's factual proffers.

The first two "shall nots" require a good-faith basis to deny facts, even if the Rule 9A(b)(5) statement has a technical deficiency.

For instance, if you know that "the plaintiff is 59 years old," then there is no sense in denying that fact simply because the cited evidentiary material somehow falls short. The rule is telling you: Let's focus on real disputes, not mere technicalities.

The other "shall nots" respond to the former practice of including long discourses, arguments and factual presentations in the Rule 9A(b)(5) response. The point of Rule 9A(b)(5) is to sift the disputed facts from the undisputed ones. The now-prohibited tactics detracted from that goal. It was never helpful or tactically wise to employ them. Now it is a rules violation.

Fourth: If you still feel the need to respond to side skirmishes or to demonstrate the ultimate merits of your side, perhaps you should save those matters for your very last argument. At that point, the court will have seen your shortest and most compelling arguments for a trial. The risk of distracting or side-tracking the judge is minimized.

Moreover, pointing out the ultimate merits of your case is not a bad way to finish. Having seen why trial is necessary, no judge will be eager to throw out a potentially meritorious case.

Fifth: Don't get hung up on technicalities. True, we suggested in our last column that opposing parties should point out material deficiencies in the Rule 9A(b)(5) statement. That doesn't mean nit-picking.

While Rule 9A(b)(5) is fairly demanding for moving parties, the whole point is to apply Rule 56 rigorously and fairly. It is not designed to force a trial when no trial should occur.

> ***If we can indulge a pet peeve about details and formatting, think about your audience — the judge and clerk. Make your opposition (and indeed any pleading) as user-friendly as possible.***

So, while you may well want to point out technical non-compliance with Rule 9A(b)(5), it is best to do so in a way that does not detract from the substance of your opposition.

Again, putting the technical argument toward the end of your memorandum, or even in a footnote, may be wise. It is persuasive to point out that, while the moving party violated the rule in technical ways, you don't even need to rely on those violations because the court should deny the motion on the merits anyway.

Finally, if we can indulge a pet peeve about details and formatting, think about your audience — the judge and clerk. Make your opposition (and indeed any pleading) as user-friendly as possible.

For instance, please don't confusingly call your opposition a "memorandum in support of opposition." Are you supporting, or opposing? And, if your case has a lengthy caption, make sure that the title of your opposition appears on the first page so that no one has to turn pages to figure out what document he or she is looking at. The court and clerk will also appreciate other similar courtesies.

Focus, follow the rules, and consider your audience. Sounds easy, perhaps. Even if it's not, it's your best strategy.

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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