MASSACHUSETTS Lawyers Weekly

Summing up summary judgment

By: Douglas H. Wilkins and Daniel I. Small July 1, 2020

Two things sound easy but aren't. First, follow the rules. Second, be honest with yourself.

In our last series of columns, we have more or less explicitly discussed these principles as we have addressed the summary judgment package. Before we move on to oral argument, we explore these two strategic and practical issues.

First, the rules. It's not that the rules themselves are particularly difficult for lawyers to follow. We don't think they are, although we acknowledge that the summary judgment rules are extensive. Yet, as far as we can see, many lawyers chafe at many of the rules on summary judgment, including both Mass. R. Civ. P. 56 and Superior Court Rule 9A(b).

Perhaps it's a visceral reaction, born of frustration from all those experiences trying to read instructions where there is "some assembly required."

More seriously, it probably comes from attorneys' confidence that they know best what the court needs to hear, and from their natural inclination to put their client's case in the best possible light no matter the context.

We understand. We might reply: "You don't have to love the rules, but you do have to follow them!"

However, our response goes deeper. As we have observed in earlier columns and other contexts, the courts' rules reflect the input of your audience, the judges. They know firsthand what is and is not effective in summary judgment practice. The rules codify that knowledge so that you can address the court persuasively. Rarely is that insight more strategically important than in summary judgment proceedings.

Our own experience teaches that courts did not respond well to the practices now prohibited by Rule 9A. That's why the rules have changed in recent years. So why would you want to do things that the rules and experience show are unpersuasive?

Following the rules does not just mean minimal, technical compliance, or pushing the limits of the rules' language. You may feel clever in doing so, but frustrating the judge yields no advantage.

Nor do we exalt technicalities over substance. We are not talking about just following the letter of the rules. Following the rules, in our view, also means following the spirit of the rules by presenting a focused, concise, well-organized and fully documented motion package, fully supported by the law and admissible facts, because that is what your judge will find useful and persuasive. It means establishing your own credibility by showing that your argument is so strong that you do not have to break or stretch the rules to make it.

Because of this focus on substance, you also should not spend a lot of time, or invest a lot of hope and client expectation, in arguing that the court should rely on technicalities to grant or deny your opponent's otherwise meritorious motion. As our series title says, attorneys must always focus on the "merits of the cause."

Second, be honest with yourself. We're all familiar with the tendency of lawyers to believe in their client's case, even though the same lawyers might see things differently if they weren't involved. It's usually an admirable characteristic of our adversary system, but it can get in the way of advocacy.

As a general proposition, at nearly every stage of litigation, it is a serious error to ignore your opponent's best argument or best case. It is far more effective to recognize and deal with the full force of your opponent's factual and legal arguments.

Perhaps you can even find a way to take your opponent's best facts and find a theory of the case that actually makes those facts work for you. These general rules of good litigation strategy apply fully to your motion for summary judgment.

You can and should apply these rules by being honest with yourself as you write your statement of facts and the accompanying memo. After you have written down a proposed fact, ask: Is it really uncontested? Is the fact stated fairly? Have I ignored or consciously omitted important and material facts favorable to the other side? Have I adequately recognized the full force of my adversary's factual and legal case, and, if so, have I dealt with them persuasively?

In other words, once you think you have put your best foot forward, play devil's advocate. Or ask someone else to read your papers and play that role.

This kind of self-examination will pay dividends. In many cases, it will produce a far better summary judgment motion (or opposition), which will be much harder, if not impossible, for the other side to attack.

In some cases, it will lead you to save your time and the client's money by deciding not to file a doomed motion. At a minimum, it will help you perform your crucial duty to advise your client realistically about the prospects for success.

Unrealistic client hopes, resulting from a failure of sober advice by litigation counsel, is not a prescription for retaining clients long term in an increasingly cost-conscious world. So follow the rules and be honest with yourself.

Now on to the fun part: oral argument!

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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