TOP TEN TIPS WHEN MOVING FOR OR OPPOSING SUMMARY JUDGMENT

Robert B. Gordon
Justice of the Superior Court

What follows, in no particular order of importance, are ten things worth keeping in mind when either seeking or contesting summary judgment in Superior Court.

1. **Don't move for summary judgment too early in the life of the case.** This is a common mistake made by inexperienced practitioners. Moving for summary judgment before applicable Tracking Order deadlines have passed and discovery has been completed all but assures non-success for the motion. Premature summary judgment-seeking will invite a Rule 56(f) motion to which the reviewing judge is apt to be receptive. At the same time, doing so risks providing your adversary with a roadmap to issues of disputable fact that will defeat summary judgment when the motion is considered on its merits. Moving for summary judgment at the earliest point you see a pathway to it can be a great temptation. Resisting that temptation until you are certain you have your adversary well locked in on the essential points of material fact is a discipline that will pay great dividends.

2. **Less is sometimes more when scoping out the reach of summary judgment motions.** Consider the wisdom of moving for summary judgment as to *some* rather than all of the claims pleaded. Courts have become more welcoming to motions for partial summary judgment, recognizing that they can helpfully clear a case of unmeritorious claims that could pose a distraction at trial. Likewise, reducing the number of viable claims (and eliminating particular sources of liability) can position a suit for a settlement that might otherwise prove elusive with more claims and greater damages exposure in the picture. Conversely, stretching to move for summary judgment on claims that are virtually certain to survive it risks a loss of your credibility before the reviewing judge. This, in turn, invites a broad denial of summary judgment on claims as to which such a motion possesses merit, merely because such claims got tainted by the motion's over-reach.

3. **Beware the perils of excessive factual exposition.** A motion for summary judgment does not have to be the definitive narrative that recites the history of the parties' relationship from first moment to last. Litigants are often tempted in Rule 56 motions to provide a comprehensive recitation of each and every fact that is even arguably relevant to the plaintiff's claims and the defendant's defenses. This is a mistake, reflecting a misapprehension of the legal standard that is operative in a motion for summary judgment. When a party includes an assertion of fact in a Rule 9A(b)(5) Statement, it is telling the Court two things: (a) That the fact is "undisputed"; and (b) That the fact is "material" – that is, it makes a difference to the outcome of the case. In other words, a summary judgment movant's Rule 9A(b)(5) Statement is telling the Court that all of the facts set forth in it *matter* to the resolution of the plaintiff's claims. This

carries the necessary implication that disputes as to any of those facts will defeat summary judgment. One BLS judge has been known to react to Rule 9A(b)(5) Statements that include 300 numbered paragraphs of factual recitation by posing the following question to the moving party's counsel: "So if I find even one factual dispute in these 300 paragraphs, I will have to deny your motion, correct?" This question typically plunges the lawyer into a paroxysm of panic.

The Rule 9A(b)(5) Statement is intended only to include those propositions of fact the determination of which is essential to the resolution of the plaintiff's claims. Not *all* facts that are merely *relevant* to such claims. Now we all know that many litigants file Rule 9A(b)(5) Statements that do not adhere to this prescription. The Statements instead endeavor to chronicle the definitive history of the contract, or the employment relationship, or the asserted episode of medical malpractice and its sequelae. In doing this, however, such Statements undermine the cause of summary judgment in two ways. First, they balloon the size of what can already be a ponderous summary judgment record, calling on the reviewing judge to read much more when conducting his or her examination of the motion. This, of course, is never what you want to do when filing any motion – *viz.*, requiring more work on the part of a busy judge to come out your way. Second, and more importantly, proliferating the number of facts that you tell the Court are material (that is, they make a difference to the viability of the plaintiff's claim or the effectiveness of the defendant's defense) provides your adversary with that many more targets to shoot at. The more facts that you tell the Court must be determined to be undisputed in order to allow summary judgment to enter, the more opportunities you afford the opposing party to identify factual disputes that will defeat the motion.[1]

Motions for summary judgment are not doctoral theses, and moving parties should not feel compelled to render a comprehensive narrative about the case in them. If your summary judgment motion rests upon three particular points of law, you should recite only those facts that are truly necessary to establish such points. Judges see a lot of these motions, and are familiar with the most common factual paradigms presented. They don't need to be spoon-fed every background and contextual fact in a case in order to understand how what are asserted to be the material facts fit together. If you do feel the need to provide background and context, those kinds of facts <u>can</u> be included in your memorandum of law. There is nothing in Rule 56 or Rule 9A that dictates that each and every fact referenced in a brief must be included and record-cited in the 9A(b)(5) Statement. The Rule 9A(b)(5) Statement was designed to provide the Court with an easy way to identify issues of *material* fact in a case, and then to determine whether or not those issues are genuinely disputed. The Rule 9A(b)(5) Statement was never intended to be the pleading that includes each and every *relevant* fact in a case, thereby obviating the need to reference such facts in the accompanying memorandum of law. Avoid cluttering your Rule 9A(b)(5) Statement with non-essential facts. Your summary judgment motion will be tighter, less susceptible to dispute-manufacturing by your adversary, and more likely to be granted.

4. **Undisputed facts are a two-sided coin.** Do *not* present a fact as undisputed unless it has, indeed, been *demonstrated* to be undisputed. This means that a fact is not undisputed merely

---

[1]One can expect this ill-advised practice to become less commonplace with the page limit placed on Rule 9A(b)(5) Statements effective with the Superior Court's November, 2018 amendments to the rule.

because the defendant asserts it to be so. The fact that a defendant can cite an interrogatory answer, or a portion of his own affidavit or deposition testimony, for a factual proposition does not by itself establish that the fact is *undisputed*. A fact is only undisputed when you can show that *both* sides agree that it is. So unless you can cite a portion of your adversary's testimony (in a deposition, interrogatory answer or Rule 36 admission) in support of an asserted fact, you should assume that the fact will be disputed in a forthcoming opposition to the motion. Take a hard look at the record citations contained in your Rule 9A(b)(5) Statement. If, as to any assertion of material fact, those citations are exclusively to your own client's testimony, then you have very likely failed to face up to the reality that the fact is in actuality disputed. There is nothing more frustrating for a reviewing judge than to see a supposedly undisputed fact in a Rule 9A(b)(5) Statement that is supported only by a movant's citation to his own testimony – only to have that fact placed into genuine dispute by the filing of a contradictory affidavit.

5. **Citing to the case record rather than the Rule 9A(b)(5) Statement is no crime.** There is no rule that requires parties' memoranda of law to cite exclusively to the Rule 9A(b)(5) Statement. If a critical fact – be it undisputed (sayeth the movant) or disputed (sayeth the opponent) – is to be found on specific pages of a particular deposition transcript, it actually *helps* the reviewing judge if your brief cites directly to the record rather than to the Rule 9A(b)(5) Statement. As to any truly material point of fact, the judge is going to need to end up checking the actual case record, anyway. Citing to the record itself will spare him or her the added burden of having to get there via the Rule 9A(b)(5) Statement.

6. **Be sensible when you represent more than one party.** If you represent multiple parties in a case, do *not* presume that you have leave to file multiple motions for summary judgment with multiple memoranda of law and Rule 9A(b)(5) Statements. Representing more than one litigant is not a license to circumvent the page limits applicable to summary judgment briefs. Filing multiple briefs on behalf of parties who are represented by the same lawyer and whose interests are in alignment is a bad idea, and it will surely lose you points with the reviewing judge. If you represent multiple parties and if these parties have distinct defenses, ask the Court to enlarge the page limit rather than file multiple memoranda of law. Even where parties on the same side of the "v" are represented by different counsel, every effort should be made to minimize the number of filed pleadings in a summary judgment packet. At a minimum, a single Rule 9A(b)(5) Statement that corresponds to all filed Rule 56 motions should be the strong presumption.

7. **The Rule 9A(b)(5) Statement is not an advocacy document.** Litigants opposing summary judgment should be mindful that the Rule 9A(b)(5) Statement is not the place to argue their case. If a fact is asserted to be undisputed, a proper response should be limited to one of two things: (a) "Agreed. This fact is undisputed"; or (b) "Disputed," with a citation to the case record showing the particular matter that is in dispute. For example, if the moving party asserts that the traffic light was green, the response of an opposing party should be either an admission that the light was green, or an assertion that the fact is disputed accompanied by a citation to the testimony of a witness who saw that the light was red. This is *not* the occasion or venue for arguing that the defendant's view of the light was obscured, or that he wasn't wearing his glasses, or that there was blinding glare from the sun, or that he was talking to his girlfriend on the phone at the time. This is likewise not the place for pointing out that the road conditions were

slippery, that the defendant was driving too fast, that the defendant failed to recall any observation of the traffic light in his initial statement to the police, and that, in all events, it doesn't matter whether the light was green or red. All of this might make for effective cross-examination at trial. But it will not create a genuinely disputed issue of material fact sufficient to avoid summary judgment, and it will drive your reviewing judge around the bend. For an excellent discussion of this and related matters, *see* J. Fabricant*, "Just the Facts,"* Boston Bar Journal (February 16, 2011), available at www.bostonbar.org.

8. **Be attentive to the precise grounds for your opposition.** Always be mindful of the important distinction between the following propositions: (a) A statement of fact is not supported by the record evidence cited; (b) An asserted proposition of fact that is claimed to be undisputed is in fact disputed; (c) The evidence cited in support of an asserted fact is inadmissible as a matter of law; and (d) A particular statement of fact relied upon in support of summary judgment is legally irrelevant or immaterial to the claim or defense in issue. Each of these grounds for opposing summary judgment calls for something quite different to be presented to the reviewing judge.

A statement that is claimed to be unsupported by the record requires no more than that this point of opposition be asserted in the Rule 9A(b)(5) Statement. No further argument is required, as the judge is capable of consulting the cited portion of the record and making a judgment as to whether the evidence does or does not suffice to demonstrate the asserted fact. A statement of fact that is claimed to be affirmatively disputed requires a citation (in the 9A(b)(5) Statement) to some portion of the case record in which the asserted fact is expressly contradicted. A contention that an asserted fact is not supported by admissible evidence should be addressed in a separate motion to strike (not in the Rule 9A(b)(5) Statement) and then argued as a point of law in the memorandum of opposition. (Failure to file a motion to strike will afford the Court, in its discretion, leave to consider what might otherwise be inadmissible evidence.) Finally, the contention that a particular fact is not relevant or material to any claim or defense should be addressed exclusively in the memorandum of law, and not in the Rule 9A(b)(5) Statement.

9. **Don't play games with the page limits.** Judges are all too familiar with the mischief of which modern word processing is capable. Shrinking font sizes, narrowing margins, and the like are not going to escape notice, and will merely irritate your reviewing judge. There are specific court rules that govern the formatting, margins and font size of motion papers, and these rules are designed to spare judges the burden of over-long filings. Attempting to flout these rules with word processing gimmicks will only jeopardize your position on the merits of the motion. If you truly need more briefing space – and the strong presumption should be that you don't – be a grown-up and ask for it up front. I know of judges who will deny Rule 56 motions – *with prejudice* – when they encounter shenanigans of this sort.

10. **Consider a post-opposition withdrawal or modification of your motion.** All practitioners have had the experience of serving a motion for summary judgment and then receiving an unexpectedly effective opposition. The opposing party may through previously undisclosed evidence place a factual matter into genuine dispute. Or present a theory of liability that differs from the one defense counsel had understood was being litigated. Or identify a

change in the law on a point that bears on the viability of an affirmative defense. When these things happen, the all too typical response of the summary judgment-seeker is to file the packet and hope for the best. “Maybe the judge won’t notice the gaping hole that’s been blown through my Rule 56 motion.” Consider the following alternatives. You might defer the filing of the summary judgment motion in order to take further discovery into the new evidence your adversary has cited. What appears at first blush to give rise to a disputed issue of material fact may not withstand the scrutiny afforded by deposition. In the alternative, consider a re-do of the summary judgment filing, appropriately tailored to the legal theories and supporting evidence upon which your adversary is relying. Ignoring the disconnection altogether is a near certain recipe for failure; and, if the points made by your adversary are important enough to overcome your motion, trying to salvage summary judgment in a reply brief may not be the best course. Finally, if it has become clear that your motion for summary judgment simply will not succeed as to some or all of the claims to which it was addressed, give serious thought to withdrawing (not filing) it. Or at least proceeding only as to some but not all of the claims. Taking the position that you have invested a lot of resources in the motion, “So why not roll the dice and see how things turn out?,” is not the way you want to practice law. Incurring legal fees in the drafting of unmeritorious reply papers and the preparation and conduct of futile court hearings throws more of your client’s good money after bad. At the same time, it diminishes your own credibility before the Court, and threatens good arguments with the taint of bad ones. A tactical retreat that leaves you able to fight another day is often the best way forward.