

BY MARK R. SEIDEN

Filing a summary judgment motion is always a critical moment in a lawsuit. If the plaintiff's summary judgment motion is granted, it can seek to enforce its judgment immediately against the defendant. Conversely, denial of the plaintiff's summary judgment motion may mean the plaintiff exposed key strategies and theories regarding the case to the defendant, while perhaps gaining little in return. Depending on the substance of the court's ruling on the motion, denial of a summary judgment motion can materially impact the settlement value of a case. To state the obvious, the stakes are quite high.

Typically, the papers supporting a summary judgment motion are voluminous, and accordingly, preparation of the motion often requires a team effort. The motion itself consists of (i) a notice of motion; (ii) one or more affidavits setting forth each witnesses' sworn statement of the relevant events; (iii) exhibits to the affidavits, including pleadings, deposition transcript excerpts, and documentary evidence; (iv) often a statement of undisputed material facts; and (v) a memorandum of law. Given the breadth of documents, it is not surprising that junior attorneys often play significant roles in the process of preparing such a motion. This column provides several suggestions in getting started when asked to work on such a motion.

Upon joining the summary judgment team, visiting the law library is among the first things to do. It is of paramount importance to review all applicable rules prior to commencing work on the motion. These rules can dramatically alter both the substance and format of the written summary judgment submission. Indeed, the rules (which vary from court to court, and even from judge to judge within a given court) may preclude a party from moving for summary judgment without leave of court. Indeed, many judges now require that a party request and attend a premotion court conference before filing a motion for summary judgment.

Courts use these conferences for a variety of purposes, including to narrow the issues to be addressed in the motion, or at times, to strongly dissuade a party from moving for summary judgment. There are few things as embarrassing as drafting several client affidavits and a 30-page memorandum of law only to then attend a premotion conference at which the court strongly discourages the filing of the motion. Try explaining that to the client.

The applicable rules go well beyond whether

Career Development

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a premotion conference is required. Other rules impact the papers submitted in support of a summary judgment motion. For instance, many courts now require that a statement of proposed undisputed material facts accompany the motion. By rule, the failure to include such a statement can result in the automatic denial of the motion. (Again, try explaining that result.)

Other rules address seemingly more mundane—but nonetheless essential—issues, such as page limits, the format of documentary exhibits, the timing for service of the moving, opposition and reply papers, and the submission to the court of courtesy copies of the motion. A careful review of the rules can insure that the motion will not violate the court's mandates and potentially prejudice the client's position on the summary judgment motion.

Additional legal research needs to be performed to understand what evidence is material to the court's ultimate determination of the motion. A junior lawyer must understand, for instance, the elements of the causes of action being prosecuted, the admissibility of the evidence relied upon and the nature of the defenses asserted.

Once armed with the legal standard, begin to review the entire factual record that has been developed to make sure you can establish a prima facie case. This means reviewing all the relevant deposition testimony, the documents produced by parties and non-parties in the litigation, pleadings, interrogatory responses and responses to requests for admission. Make a determination as to whether these materials support the grant of summary judgment, and beyond that, are worthy of inclusion in the motion papers. To the extent that documents or testimony are uncovered that suggests a dispute exists over

material facts, consider whether it is possible to present evidence to contextualize and overcome the apparent dispute.

Early in the process, consider (usually in consultation with more senior attorneys) which witnesses will be needed to execute affidavits supporting the motion. This determination should be made as early as possible to insure that each witness will be available to assist in the process of reviewing and finalizing the affidavits.

Indeed, depending on the complexity of the matter, it may be necessary for the witness to review multiple drafts of the affidavit, provide assistance explaining complex documents, and ultimately he must be available to execute the finalized affidavit before a notary public.

As a general rule, assume that each witness maintains a busy schedule and will be difficult to reach. Communicate with the witnesses early on in the process to work out a mutually convenient schedule for review and assistance with the affidavits. Doing so will avoid the embarrassing pitfall of having drafted an affidavit for an unavailable witness.

Finally, the junior attorney will likely play some role in drafting the memorandum of law. To the extent you are asked to find helpful precedent, try to find cases with factual situations analogous to the circumstances presented in the present case. Also, be sure the case result, and not just the holding, supports the grant of summary judgment.

For example, to demonstrate that generally an offer to enter into a contract cannot be rescinded once it has been accepted, do not cite a case that states that principle but denies the grant of summary judgment. Instead, find a decision that states the legal principle and grants summary judgment to the plaintiff. And, of course, always Shepardize any case cited in a memorandum of law to insure that it remains good law.

It is a daunting task to put together a summary judgment motion. By following these guidelines, the junior attorney is likely to add significant value to the process. The cornerstones to success lie in proper advance planning and careful and thoughtful research. Do both and your chances for success will be enhanced.