

The Ten Commandments of Summary Judgment Practice

By J. Bradford McCullough

Of all the weapons at the litigator's disposal, the motion for summary judgment is one of the most potent. It can end a case in its entirety, strip away portions of the case, or alter the course and contours of the litigation. It is also one of the most frequently used tools. In the words of a former chair of the ABA Section of Litigation, "there is no doubt that summary judgment has become a centerpiece of federal litigation over the past 25 years," and "summary judgment motions have become part of virtually all substantial federal civil litigation." Gregory P. Joseph, *Federal Litigation—Where Did It Go Off Track?* LITIGATION J., Vol. 34, No. 4 Summer 2008, p. 5. Given the power and the prevalence of the motion for summary judgment, how should counsel go about litigating such motions? What should you keep in mind as you consider the motion and as you prepare a motion or a response? There are certain principles that apply to summary judgment practice no matter the subject matter of the case, and that should be followed—or at least considered—in the course of seeking or opposing the entry of summary judgment. Here then are ten ideas, or if you will, Ten Commandments of summary judgment practice.

Before Preparing and Filing the Motion for Summary Judgment

1. Have summary judgment in mind from the outset of the case and throughout the case.

It is often said that from the moment that an attorney begins to prepare a complaint or an answer, he or she should also begin to prepare a closing argument to deliver at trial. The possibility of summary judgment should command similar attention—a lawyer should have summary judgment in mind from the outset of litigation. While state-court experiences can vary greatly from jurisdiction to jurisdiction, it is generally understood that federal courts are very receptive to well-founded motions for summary judgment, and many cases are resolved through the entry of summary judgment. Even if a motion for summary judgment does not resolve a case in its entirety, the court may enter partial summary judgment, determine that certain material facts are not genuinely in dispute, or otherwise narrow the scope of the litigation. Fed. R. Civ. P. 56 (a), (d). Such rulings often precipitate settlement, and streamline those cases that continue on for additional litigation and trial.

It is also important to keep in mind that some types of cases are particularly well suited for summary disposition. For example, claims that hinge on an interpretation of a written

contract are prime summary judgment candidates. "If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are in genuine issue." *Goodman v. Resolution Trust Corp.*, 7 F.3d 1123, 1126 (4th Cir. 1993). Even if the contract is found to be ambiguous, summary judgment might still be available. "Even where a court, however, determines as a matter of law that the contract is ambiguous, it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if the evidence is, as a matter of law, dispositive of the interpretative issue, grant summary judgment on that basis." *Id.* As such cases are especially conducive to summary disposition, counsel should always have summary judgment in mind when litigating these cases.

In addition, counsel should know the issues that are likely to be the focus of the motion for summary judgment, and become familiar and comfortable with the applicable case law and statutory provisions that will govern those issues. Discovery should then be framed with those legal standards in mind. Counsel should draft written discovery with those controlling legal standards in mind, and interrogatories may include specific statutory language or specific language from pivotal cases. Similarly, deposition questioning should be tailored toward building the record needed to support the motion for summary judgment—or to oppose the motion that counsel anticipates may be coming from his or her opponent. See Michele L. Maryott, *The Trial on Paper: Key Considerations for Determining Whether to File a Summary Judgment Motion*, LITIGATION J., Vol. 35 No. 3 Spring 2009, p. 36.

2. Keep in mind the proper timing of a motion for summary judgment.

As is true for many things in life, timing can be crucial in deciding when to file a motion for summary judgment. Traditionally, most motions for summary judgment have been filed after the completion of discovery, and that remains the most common time for filing such motions. Yet, there are some cases where an earlier motion might be appropriate. Indeed, federal courts have held that Fed. R. Civ. P. 56 "does not require trial courts to allow parties to conduct discovery before entering summary judgment." *Humphreys v. Roche Biomedical Labs., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993). For example, where a claim on its face is time-barred, and the plaintiff fails to specify how additional discovery might unveil information that could somehow overcome that bar, a court may proceed to entertain the defendant's motion for summary judgment. *Humphreys v. Roche Biomedical Labs., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993). Similarly, where the deposition testimony of the

J. Bradford McCullough is a principal in the law firm of Lerch, Early & Brewer, Chtd. in Bethesda, Maryland, and is a chair of the Dispositive Motions Subcommittee of the Pretrial Practice & Discovery Committee.

plaintiff destroys an element of his or her claim, the court does not have to wait until the close of discovery before considering and granting the defendant's motion for summary judgment. *Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 922–924 (8th Cir. 2010).

Thus, in an appropriate case, you should carefully consider an early motion for summary judgment. As one commentator has noted, “in a complex case, for example, a judge might encourage the parties to file motions as early as possible regarding any claims that might potentially be disposed of by summary judgment, without prejudice to filing motions later in regard to other claims where additional discovery is needed.” 3 Robert L. Haig, *Business and Commercial Litigation in Federal Courts* § 27:3, p. 305 (2005). Also, if a defendant prevails on a motion for summary judgment based on one narrow issue, and then seeks to recover its fees incurred in defending the claim—including discovery costs and expert-witness fees that were incurred in litigating all of the various issues presented by the plaintiff's complaint—a court might ask why the narrow motion for summary judgment had not been asserted earlier before all of those other costs were incurred. A response from counsel to the effect that they had pursued discovery on all issues because they wanted to move for summary judgment on all available grounds, and “you only get to do one motion for summary judgment,” might not be well received by the court. Faced with that situation, the Eleventh Circuit observed that neither Fed. R. Civ. P. 56 nor the applicable local district rule limited a party to one motion for summary judgment, and remarked that “there is no reason to assume that a district judge will stubbornly refuse to rule on a motion for summary judgment at an early stage of the litigation if the moving party clearly apprises the court that a prompt decision will likely avoid significant unnecessary discovery.” *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1188 (11th Cir. 2005).

3. Have a theme and a focus.

Just as you should have a theme for trial, you should also have a theme for a motion for summary judgment or a response to such a motion. It is obviously important to make sure that the memorandum supporting the motion (or the opposition to the motion) contains a strong legal argument, with references to the record as well as to the governing legal authorities. But it is also important that the factual record and the controlling legal principles be presented in the context of a compelling story or narrative. In other words, it is not enough simply to give the judge the legal basis for ruling in your favor. You should also give the judge a basis for *wanting* to rule in your favor. Similarly, the motion should have a focus. Find the issue or issues that really support your position, clearly identify and address those issues, and stick to those issues. “Shotgun” style approaches that fire off a multitude of issues and arguments are seldom if ever advisable, but they are particularly ill-advised in motions for summary judgment. One trial court recently complained about the “organization-by-shotgun methodology” of a party's brief supporting its motion for summary judgment, and remarked that the shotgun methodology made “it difficult to identify with precision the arguments on which” that party relied. *Commodities Exp. Co. v. City of Detroit*, No. 09-CV-11060-

DT, 2010 WL 2633042, *6 (E.D. Mich. June 29, 2010). Not surprisingly, that party's motion was denied.

4. Know the rules.

This one should be obvious. But sometimes, it is easy to overlook the obvious. Different jurisdictions have different rules, some of which might differ greatly from what you might be used to seeing elsewhere. For example, in the Superior Court of the District of Columbia, before filing any motion, other than a motion seeking Rule 11 sanctions, “the moving party shall first ascertain whether the other affected parties will consent to the relief sought.” D.C. Super. Civ. R. 12-1. Thus, when litigating in that court, you must seek consent to the entry of summary judgment before you actually file your motion for summary judgment.

Also, some jurisdictions expressly require a statement of material facts as to which the moving party contends there is no genuine dispute. See, e.g., D.C. Super. R. 12-1 (k). Other jurisdictions have no such requirement. See, e.g., Md. Rule 2-510. Prior to December 1, 2010, the Federal Rules of Civil Procedure contained no such requirement, but the local rules for some district courts did—while others did not. Compare U.S. District Court for the District of Columbia Local Rule 7(h) with U.S. District Court for the District of Maryland Local Rule 105.

Remember that absent congressional action to the contrary, as of December 1, 2010, new subsection (c)(1) of Fed. R. Civ. P. 56 will contain such a requirement. The bottom line—you must read and know the rules.

5. Know the judge.

Apart from the applicable rules, a particular judge might have his or her own “rules,” maybe in the form of a formal standing order or maybe in the form of informal “preferences.” Know them. Also, before filing a motion for summary judgment—or any other dispositive or nondispositive motion for that matter—you should try to find out what the judge has previously said on the same subject. Before filing a motion for summary judgment in a fraud case pending before U.S. District Court Judge Jones, a little research should uncover what Judge Jones has had to say about summary judgment procedures in general and fraud claims in particular. Do that research.

As You Prepare and Present the Motion (or Response)

6. Keep it simple.

When preparing a motion for summary judgment, avoid the temptation to look too innovative or creative. You should try your best *not* to leave the judge with the impression that your position is intriguing and “cutting edge.” You are *not* trying to convince the judge that you are the brightest, most visionary lawyer practicing before the court. (While it is nice if the judge reaches that conclusion, that is not your primary objective). You *are* trying to convince the judge that there is no genuine dispute as to any material fact and that your client is entitled to judgment as a matter of law. There is nothing novel or earth-shattering about your client's case—it is an ordinary case where the law is well established and the factual record is clear. In other words, your case is one that does not deserve

a trial. In preparing your papers, try to paint the picture that your case is clear and straightforward. Judges grant motions for summary judgment in cases that they see as being clear and straightforward. *See, e.g., First United Mortg. Co., Inc. v. Chaucer Holdings PLC*, Civil No. 2:08-2754, 2010 WL 3283525, *1 (D.N.J. Aug. 17, 2010) (“This matter is a straight forward coverage dispute rooted in the language of the policy agreement, and for the reasons which will be elaborated below, the Court will GRANT Defendant’s Motion for Summary Judgment. . . .”) If the judge concludes that your case is so clear that anyone could win it, then you will win. A judge does not need to “go out on a ledge” to grant such a motion.

Of course, if you are opposing a motion for summary judgment, you should try to paint a different picture. Your case is very complicated, with many factual twists and turns. *See, e.g., Star Spa Servs. Inc. v. Robert G. Turano Ins. Agency, Inc.*, 595 F.Supp.2d 519, 529 (M.D. Pa. 2009) (“The court concludes that this complicated factual situation would be best resolved by a jury and will deny summary judgment on this point.”) There is something about your case that is different. There might be case law that holds that facts “a, b, and c” dictate a particular result. Well, maybe your case has facts “a, b, and c,” but your case might also have facts “d, e, and f”—or at least a genuine dispute about those latter three facts. And maybe the controlling case law has not directly addressed the significance of those facts. *See, e.g., A&L Precision Prods. v. Alloy Bellows & Precision Welding, Inc.*, Civil No. 07-0345, 2009 WL 2959608, *7 (W.D. Pa. Sept. 14, 2009) (“[T]his Court will deny A&L’s request for summary judgment on this portion of Alloy Bellows’ fraudulent claim, declining to determine in advance of necessity the complex and novel question of whether the Pennsylvania Supreme Court would, under the circumstances alleged, bar A&L’s fraudulent inducement claim premised on A&L’s alleged ‘passing off’ of a defective product under the gist of the action doctrine.”) In short, this case is *not* clear and straightforward.

Counsel representing the target of an early motion for summary judgment, and who concludes that additional information must be obtained through discovery before responding to the motion, should turn to Fed. R. Civ. P. 56 (f), or any state-court equivalent. That rule permits a district court to deny a motion for summary judgment, or to grant a continuance for the party opposing the motion to obtain affidavits, to take depositions, or to undertake other discovery. To obtain that relief from the court, however, the party opposing the motion for summary judgment must show “by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition.” Fed. R. Civ. P. 56 (f). Failure to comply with that affidavit requirement will result in a denial of the request to defer disposition of the motion for summary judgment. *Adorno v. Crowley Towing & Transp. Co.*, 443 F.3d 122, 127–128 (1st Cir. 2006).

7. Consider partial summary judgment.

The Federal Rules of Civil Procedure permit a motion “for summary judgment on all or *part* of the claim.” Fed. R. Civ. P. 56 (a) (emphasis added). A judge who might be reluctant to grant a motion for full summary judgment, which would have

the effect of tossing out a plaintiff’s claim (or less commonly, a defendant’s defense) in its entirety, might be more receptive to a motion for partial summary judgment. Your motion for partial summary judgment, which attacks one or two of the five counts in your opponent’s complaint, could present a slightly different picture to the trial judge than would a motion seeking summary judgment on all five counts. The former looks like an effort to streamline the case and save judicial resources as well as the resources of the litigants. It has the feel of being of assistance of the court. The latter motion, on the other hand, could create the perception of over-reaching and overzealous advocacy.

Which is not to say that you should not file a motion for full summary judgment on all five counts of a five-count complaint if there is truly a strong case for arguing that there is no genuine dispute as to any material fact with respect to any count and that your client is entitled to judgment as a matter of law on each count. If, however, you have a strong case for obtaining summary judgment on two or three of the counts, and a weak case at best on the other two or three counts, you are probably better off filing a narrowly focused motion for partial summary judgment than you are filing a motion for full summary judgment. The danger with the motion for full summary judgment in that situation is that the weaker arguments could dilute and diminish the strength of your more compelling arguments. If the judge concludes that there is a genuine dispute as to a material fact with respect to two or three of the counts, he or she could conclude that there are factual issues foreclosing summary judgment as to *any* aspect of the case. Remember the warning—“pigs get fed, hogs get slaughtered.”

8. Remember the beauty of brevity.

Less is generally more. Judges are busy and appreciate it when we get to the point. Do not say in 25 pages that which can be said in 15—or 10.

9. Tone it down: Persuasive is not the same as argumentative.

Do not overdo the rhetoric and do not overplay your hand. Avoid personal attacks, invective, and ad hominem arguments. Similarly, the overuse of adjectives and adverbs can easily detract from your papers. *See, e.g., Jim McElhaney, Style Matters* ABA J., June 2008. An indiscriminate characterization of each one of your positions as being “clear,” and each one of your opponent’s positions as being “baseless,” “specious,” or “absurd” can quickly get tiresome, and can cause you to lose credibility. Make your argument clearly and persuasively with heavy reliance on nouns and verbs. If the judge finds that your position is “clear,” the judge will come to that conclusion without you having to tell him or her. Likewise, if the judge finds your opponent’s position as “baseless,” “specious,” or “absurd,” the judge does not need you pointing it out. The judge will come to that conclusion without any prodding.

10. Responding? Consider a cross-motion for summary judgment.

Sometimes the appropriate response to a motion for summary judgment includes filing a cross-motion for summary judgment.

This often occurs in cases dealing with the interpretation of a written contract. By submitting cross-motions for summary judgment, the parties are telling the court that they do not think that there are any genuine disputes as to any material fact and that the case should be decided as a matter of law. The court, however, does not have to agree with that assessment, but is free to conclude that there is a disputed question of fact and therefore deny both of the cross-motions. *Podberesky v. Kirwan*, 38 F3d 147, 156 (4th Cir. 1994), amended on denial of reh'g, 46 F3d 5 (4th Cir. 1994).

Conclusion

Motions for summary judgment are powerful weapons that are frequently used in contemporary civil litigation. Careful attention to the applicable rule provisions, together with knowledge of the substantive legal principles governing your dispute, provides the necessary foundation for analyzing the availability of summary judgment in your case. If you build on that foundation by following the foregoing “Ten Commandments,” you should do well in representing your clients’ interests.