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4 Tips To Winning Summary Judgment

By **Brian Mahoney**

Law360, Washington (May 16, 2014, 3:45 PM ET) -- Attorneys know that winning summary judgment is rare — but that it's an uphill battle worth waging. Doing your homework, approaching the case aggressively and keeping your argument simple are the keys to victory, lawyers said.

The key question raised in summary judgment — what are the genuine issues of material fact in this case? — should be of primary importance to an attorney when developing a record through depositions and paper discovery, experts say.

Here are tips partners say are essential to know in preparing a winning summary judgment motion.

Start Early

Expert lawyering requires preparation, discipline and aggression, and that's especially true at the summary judgment stage, which should be on attorneys' minds from the very first day of a case if they expect to win it, top partners told Law360.

"There are some cases where you might say, 'Listen, we've got no chance.' But in some cases, you make your own probabilities as a lawyer," said Daniel Slifkin of Cravath Swaine & Moore LLP.

Making your own probabilities means mastering the record from the outset, Slifkin said, planning your depositions, discovery and expert witnesses with an eye toward meeting the strict standard of summary judgment and having the discipline to focus solely on the issues that matter most to winning your case.

"As we all know, the summary judgment standard is that there is no genuine issue as to any material fact, so 'material' falls into planning and 'genuine issue' falls into discipline," he told Law360. "In order to successfully plan for and get to a summary judgment stage and ultimately get the result you want, a win, you have to plan for it from the beginning of the case."

Harry Olivar of Quinn Emanuel Urquhart & Sullivan LLP agrees, and notes that grasping the material issues early in the case is necessary to winning summary judgment.

"We're a very trial-oriented firm and our approach to summary judgment is similar ... to succeed in a case on summary judgment, you have to start early in the case and focus solely on what matters," Olivar said.

Play Offense

Slifkin has seen attorneys take a reactive approach to cases, allowing their adversaries to build the record and develop legal theories before preparing a relevant defense.

"That kind of reactive approach is a recipe for disaster," he said.

And it's especially crippling for winning summary judgment because so much of convincing a judge to forego a trial requires developing overwhelming evidence favorable to your side.

“You have to say to yourself from the beginning of the case:Okay, what are the elements of the causes of action here? And what can I do to say these critical elements are not and cannot be made out? ... You need to understand what's material to the claims or defenses in the case. You need to know that from day one, because only then can you make sure that the facts you need are in the record,” Slifkin said.

An offensive approach to summary judgment requires diligent discovery planning, according to Jesse A. Cripps of Gibson Dunn.

"It helps to have the facts in your favor, but a lot of that depends on what your discovery plan is and how you go about developing that discovery," Cripps said.

That diligence and offensive approach includes taking important depositions as early as you can, Olivar said, in the hopes of catching your adversary off guard.

“Take key depositions early," he said. "Because when you take a deposition early if you catch a witness or a counsel in a position where they're not really focused on what the critical points are going to be and you may get some very key admissions in an early deposition that's going to help you on a summary judgment motion."

Indeed, gaining key admissions early can help your side even when those admissions are not enough to win the summary judgment motion, Olivar said.

Don't Forget the Jury Instructions

Anticipating the questions that the jury will confront in your case is an excellent strategy to build a winning summary judgment argument, experts told Law360. Jury instructions focus on the most essential unresolved matters in a litigation and developing evidence and building arguments to resolve those questions before they reach a jury is essential to penning a persuasive summary judgment brief.

"I don't think this happens a lot, but it should happen all the time," said Jeffrey G. Huron, a member of the business litigation group at national law firm Dykema Gossett PLLC. "Before you actually start preparing the motion, you should look at the jury instructions and you should make sure that you know what the elements are to each of the claims and defenses and that there are no material facts in dispute as to each of those elements. Because if you can't knock out all of the elements, then you're not going to prevail."

Jury instructions highlight the main issues of the case and building a record to bolster your side's take on those issues should be your primary purpose, Slifkin said.

"Jury instructions are the last thing that happens in a case, but they should be the first thing you're thinking of," Slifkin said. "You should really be thinking at the outset, 'OK, what are the jury instructions going to be that's telling the ultimate trier of fact what you decide and how you decide?' You have to internalize that from the beginning and say, 'I know that's the target I'm aiming at in building the record.'"

Keep the Argument Simple

Effective briefing and oral argument requires great discipline, experts said. While you're trying to win on all claims in summary judgment, you can increase your chances of success by narrowly tailoring the issues to focus on the most essential elements of your case.

"Keep the motion focused and simple," Olivar said. "Sometimes people feel like they need to move for summary judgment on everything or use summary judgment as a way to tell their story, and I think the opposite approach is a better recipe for success. Keep the motion very focused on a simple element of the claims that is weak as a defendant or, on the plaintiffs' side, on the key element where you think you can really win."

Both Huron and Cripps said that a narrowly tailored separate statement of facts or summary of undisputed facts can make your brief far more persuasive to a skeptical judge.

"I've actually sat down with judges and talked to them about what their approach to summary judgment is," Cripps said. "And what judges consistently told me was that the very first thing they look at is the separate statement of undisputed facts. If they can identify a single fact in the separate statement that's going to cause them heartache, their job is done."

"The goal has to be to proffer only those facts that are absolutely essential to your motion and not be lulled into the thinking that you're going to overpower the judge with a number of facts that are undisputed. It's quality not quantity," he added.

"Keep it simple" should be your mantra for oral argument as well, Slifkin said.

"I think the briefing is absolutely critical to frame the issue for the court. But that having been said, you must in the oral argument resist the temptation to address everything the other side says and to answer every point," he told Law360.

Bonus Tip: Keep Your Opponent Guessing

If you think your chances of winning summary judgment, or even partial summary judgment, are slim, it may be wise to forego the motion altogether. Doing so will keep your adversary guessing on your final trial strategy, Huron told Law360.

"You have to feel that you have more than a 50 percent chance of prevailing on the motion," Huron said. "Because the last thing you want to do is prepare the motion and marshal all the evidence to simply give it to the other side right close to trial, so that you're giving the other side a road map."

And if you think a trial is inevitable, you should think twice before aiming to gut your adversary's weak claims via a partial motion for summary judgment. Those claims might serve you well before a jury, Slifkin said.

"I want to have bad claims in there so I can get up and point out to the jury that these claims are meritless, and say, 'Not just these specific claims, actually they are all without merit,' and you paint it with a broad brush," Slifkin said. "Why make the case easier for opposing counsel?"