



Don't throw me in the briar patch!

Opposing summary judgment helps ready a case for trial



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BY MILES B. COOPER

It arrived in one of those big space-age tear-proof fabric envelopes. Thick enough to require two-hole prongs at the top instead of staples. And a title that made the lawyer sigh deeply and think, "Well, there goes a month of my life." Yay. The motion for summary judgment.

Expect us

One of the best ways to oppose summary judgment is to know it is coming before it arrives. Employment case or construction site injury? Novel legal theory? Probably going to face the summary judgment crucible. Take this into account when developing the case plan. Getting out in front of the issue helps.

Jury instructions

Not to sound like a broken record after last month's column, but grab the jury instructions. They are typically the best proof outline. Determine where the triable issues of material fact are likely to reside. The triable issues and the facts are what carry the day.

Identify and fill holes

Reviewing the motion, the jury instructions, and the file helps identify what evidence needs to be gathered. The summary judgment opposition window in California looks big but time passes quickly. If one still needs written discovery before any depositions, the window passes quickly indeed. Immediately send out discovery to fill any evidentiary holes. Stay on the scheduling if there are any problems. Do this in a written format – friendly emails are fine. If one needs a 437c(h) continuance, attached written efforts are harder to dispute than a declaration about the number of phone calls.

Start with the separate statement: facts and story win the day

Time to actually start writing. Where to start? Create the separate statement. Then go through the file and put every conceivably useful factoid in the statement. Start with the depositions. Go through each one, beginning to end, transferring factoids into the separate statement. Deposition summaries can speed the process. They make it easy to cut and paste into the separate statement. Pin cite it later. Baby step the factoids – they shouldn't contain more than one or two issues per factoid nor should they be longer than three sentences.

Don't forget documents and photographs. Long ago I read about a lawyer who thinks, "What if I only had this one piece of evidence to win my case? How do I squeeze every useful nugget out of this piece of evidence?" Be creative with the material.

The small print and boilerplate in documents sometimes contain gems.

As the chronology develops, use signposts. This small fact-gathering approach yields hundreds of facts. Bold headers every 10-20 facts help guide the narrative. This is a story, after all, about an awful event. Judges are not thinking machines. Their decisions can be influenced by emotion even if they wear black robes. The signposts will then become the subheader sections in the points and authorities.

After all the factoids are in, re-read it and strip the extraneous material. Once the separate statement is done (and by done, I mean really done – set aside, re-read, edited, and done), give it to someone to double-check every fact and citation. The goal is perfection in pin citation and no stretching. Lose credibility with the court's research attorney and lose the motion. If your reviewer thinks any of the factoids are stretching the testimony, dial the factoid back.

Points on points and authorities

Once the separate statement is done, so is the statement of facts for the points and authorities. Cut and paste the facts. Every 3 to 5 sentences, insert a citation (Smith's Disputed and undisputed Facts "SDF" 15-19.) Pare down the facts if the content is too robust. Just because it is in the separate statement does not mean it has to be in the points and authorities. The signposts become the subheaders. The subheaders, in the table of contents, should tell a complete story.

Consider using a table for the legal analysis section. If a cite has the key elements for your case, a table listing the element in one column and your facts supporting that element in another makes the court's job easy. Easy is good. It can also shorten the discussion. Remember that the page limit is a maximum – it is not essential to fill every page.

The final push

Editing and document assembly always take longer than expected. A separate statement's heavy formatting makes it crash-prone. Leave at least two buffer days before the filing deadline for assembly and the unexpected.

There's a good chance the separately-bound evidence will be thick. Don't forget the two-inch rule. Clerks won't accept items thicker than two inches. Bind it in more than one volume if necessary.

Outro

Back to our summary-judgment-opposing lawyer. Some months after it arrived, the judge ruled on and denied the motion. On to trial. The lawyer, with the defense's summary judgment assistance, teed the case up for trial. And when the defense



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recognized this, the defense's settlement outreach started in earnest.

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