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[LETTER to a young trial lawyer]

WINNING ON THE PAPERS

by DAVID BISSINGER and MARTIN SIEGEL

Lawyers eager for jury trial experience grow weary of writing motions. But like it or not, motions for summary judgment, motions under *Daubert, et al. v. Merrell Dow Pharmaceuticals Inc.* and other motions play a vital role in every trial lawyer's life.

Documents are one reason. When pre-eminent lawyers such as Frank Jones of Houston, the former co-head of litigation and now of counsel at Fulbright & Jaworski, were "in trial two times a week," as he reflects in his recent book, "Lessons From the Courtroom," cases were blissfully free of e-mail exchanges, Excel spreadsheets and digitally recorded telephone calls. Today, the increased availability of digital documents gives rise to more motions for summary judgment and other dispositive relief. As a result, winning on the papers dominates practice at the trial level.

Still, successful motion strategy differs less from trial strategy than many lawyers appreciate. Take summary judgments. As with trial, winning summary judgment hinges more on the facts than the law. In both settings, speed can pay; summary judgments are often most effective when filed early, even before extensive discovery. Finally, in cases with depositions and extensive discovery, the summary judgment motion often resembles the one-day or two-day trials of old.

Here's what lawyers need to know to win.

• *The facts, not the law, win summary judgments.* Just like trials, summary judgment motions must tell a compelling story. Every motion should open with a cogent factual statement that follows basic storytelling techniques. Make the characters easily identifiable. Avoid acronyms and complexity. "Smith Technology Co." should be "Smith Technology," not "SMC." Describe the client's business or background in the simplest and most attractive terms possible.

The factual statement should have the three parts present in any good story: a beginning, middle and end. Each part should flow toward the inevitable conclusion mandating the relief the client seeks. Strike every word, phrase or idea unless it serves this purpose.

When building the factual statement, one or more compelling themes should emerge, just as in any trial. For example, in arguing to strike a claim for lost profits under a contract exclusion, the defendant may wish to argue (if possible) that the plaintiff had no demonstrable history of profits to begin with. That question may involve some factual dispute that, alone, would not require summary judgment. But including the client's version of the facts will help put the case in context and make the judge that much more likely to grant the motion.

By the time the facts are covered, the outcome should be obvious. The court should not need to look to the law for anything more than confirmation of the decision already reached to grant the motion. As in most trials, lawyers win most motions on undeniable facts that conform to an undisputed legal principle.

• *File as soon as possible.* With the increased availability of digital evidence such as e-mail, parties now have a greater chance of obtaining summary judgment than they may have in the earlier era described by lawyers used to more trials. For instance, commercial cases often hinge on e-mail the parties already possess. Those e-mails or other similar records may sufficiently define the case, though other documents exist and have not yet been produced.

Yet despite already holding more than enough ammunition, lawyers often conduct all sorts of unnecessary discovery before moving for summary judgment. This gives the other side time to devise new theories, unearth new facts and potentially waste the client's money. Even if the court denies the motion, the client may benefit. The ruling may limit discovery or sharpen the issues in a way helpful to the case. If the client's hand is weak, the court's denial may include statements that help her see reason and settle before incurring unnecessary cost. If all else fails, the lawyer usually can renew the motion later if new evidence emerges.

• *Think of depositions as mini-trials in pursuit of early victory.* Of course, many cases require deposition discovery before summary judgment. Most of the time, the lawyer conducting the deposition will not only have the documents already in the client's possession but also those obtained in discovery. Because of the greater prevalence of up-to-the-minute recorded data and communications, trial lawyers now have access to a far greater level of detail about the activities, motivations and knowledge of key witnesses than they had 10 or 15 years ago. [*See "The Smoking E-Mail,"* Texas Lawyer, *July 25, 2007, page 34.*]

Confronting witnesses with these records in a deposition requires the same planning and skill as cross-examination at trial. If a lawyer does this well and with the motion in mind — that is, not just for the purpose of gathering more information — the prospects for winning summary judgment increase dramatically.

Charles Alan Wright understated the point when he wrote in "Federal Practice and Procedure" that, "because a deposition is taken under oath and the deponent's responses are fairly spontaneous, it is one of the best forms of evidence for supporting or opposing a summary judgment motion."

True, depositions lack some of the drama of the courtroom confrontation that sent many of us to law school in the first place. "To Kill a Mockingbird" and "The Verdict" lack heart-stopping, killer depositions. But those depositions happen all the same. And like an unexpected and daring gambit in chess, the effective deposition can short-circuit the process and end the case through summary judgment. In the end, the lawyer may not like that, but the client probably will.

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