



“All We Want Are the (Material) Facts, Ma’am”

Focus on the Material Facts for a Successful Motion for Summary Judgment

By Michael L. Reitzell

A motion for summary judgment is one of the most powerful tools that defense attorneys have at their disposal. It is a motion that can take all of the risk out of a case for a client. It is a motion that can give a client a victory without ever having to put a case in the hands of a jury. It is incumbent upon defense attorneys to draft these motions with care and to give a trial court what it needs to dismiss a case. Yet too many motions today end up buried in facts that do not assist a court in deciding a motion.

No matter the jurisdiction, or what rules you have to follow in drafting a motion for summary judgment, the goal is the same. Defendants must prove that there is no genuine issue of material fact for the jury to decide. If a defendant meets this burden, a court will grant summary judgment, and the case will be over. To achieve this result, attorneys should follow three basis rules for presenting material facts: (1) state only the material facts; (2) separate each material fact carefully; and (3) attack the opposing party's disputed facts, whether material or not.

There is no hard and fast rule on how many facts in a particular case are material. It certainly depends on the number of causes of action and the complexity of the issues. But it is essential that defendants limit the facts at issue to those that are material. Whether parties have to prepare a separate statement of these facts or not, it is necessary to focus only on the material facts. Unnecessarily listing facts that are not material can create an immaterial dispute that results in a denied motion.

It is generally true that a defendant need only negate one element of a claim to summarily adjudicate that claim. If, for example, the cause of action is negligence, and the element under attack with a motion is duty, the only material facts in the motion should relate to the

duty element. It will certainly be important to offer background facts for a court somewhere in the motion, which may discuss other elements, such as causation and damages, but the only material facts should go directly to the issue of duty, if that is the only element that the motion seeks to negate.

Once you have settled on the truly material facts, make sure that you have broken down those facts individually. Do not combine facts because a court will read and consider those facts to constitute one fact. For example, “Plaintiff testified that she signed the liability release after reading it for 10 minutes.” In that example, you want the admission about executing the document separate from how long the plaintiff read the document. Separating the facts will force a plaintiff to focus on the individual facts in a dispute. Additionally, it will help you to avoid combining a material fact with an immaterial fact.

Following your best efforts to carefully set out the undisputed material facts, you can be assured that plaintiffs will respond with the kitchen sink of facts—material or not. First, they will attempt to dispute the facts offered by defendants—whether disputes exist or not. But their true enjoyment lies in providing every conceivable fact as an “additional disputed material fact.” Do not simply accept this plaintiff's strategy, or expect a judge to ignore those facts. In a reply brief or reply separate statement, respond strongly to a plaintiff's approach. First, point out that the plaintiff failed to follow the rules, which require reference to material facts only. It will likely displease a judge if he or she has to comb through a plaintiff's 200 facts. Second, object to each fact that is not material as “immaterial and irrelevant.” These facts simply have no bearing on the motion. And finally, attack the underlying evidence supporting a plaintiff's “facts” with objections and motions to strike. Oftentimes, plaintiffs will have little support for their facts. This is your opportunity to attack the little support that a plaintiff has—whether the support is from deposition testimony or declarations of witnesses. If the underlying evidence cannot support a

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fact, then the court should not consider it. Taking these steps will arm a trial court with the necessary ammunition to grant your motion.

Far too many motions for summary judgment drafted by defendants include extraneous and immaterial facts. This is exactly what a plaintiff wants a defendant to do. The more facts included in a motion,

the higher the probability that a court will find a dispute and deny that motion. Therefore, carefully consider the facts that are material not only to the cause of action at issue, but to the specific elements of that cause of action that frame a defendant's motion. Doing so will limit the issues before a court and allow it to focus on the facts that will truly guide its decision.

Motions for summary judgment are won

and lost with the facts. No matter the legal issues raised by a motion, the facts ultimately control the outcome. The manner in which defendants present the facts to a court is crucial to a successful motion. Carefully drafting only the material facts at issue will put a plaintiff's counsel on his or her heels and put you in a position to claim victory for your client. 