

insurance
bad faith
coverage
litigation

mediation
litigation

fiduciary liability coverage

coverage counsel

D&O

complex policy analysis

Dos and Don'ts of Summary Judgment Practice

negotiation
coverage
counsel
insurance
strategic advice
insurance
advice
coverage
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fiduciary liability
resolution
prompt payment of claims
complex claims
negotiation
mediation
insurance
strategic advice
litigati

DBA Presents
13 Building Blocks for Becoming a
Great Trial Lawyer

policy analysis

Why on earth?!



But I'm a trial lawyer! Why in the *world* would I need to know anything about disposition without trial?!

Disclaimer



WARNING: This 30-minute presentation contains ***highlights*** only.

Do Take Inventory

- What are the legal issues?
- Are the facts in dispute?
- Are the disputed facts *material*, based on the legal issues?
- Does the plaintiff have the evidence to prove its case?



To MSJ or not to MSJ?

Your case	MSJ?
Do questions of law predominate?	√
Do the parties disagree on a legal issue for which there is no clear answer?	√
Does your opponent or her client completely misunderstand the law and needs a little friendly guidance from the court?	√
Are so-called “disputed” facts immaterial based on applicable law?	√
Does the opposing party does have insufficient evidence to support its claim?	√
Do the parties have a genuine dispute regarding material facts?	X

Don't Panic!



KEEP
CALM
AND
KNOW THE
MSJ RULES

Don't Forget the Purpose



The summary-judgment procedure is designed to facilitate the prompt disposition of cases that involve unmeritorious claims or defenses.

Do Understand the Rules



Federal Rule of Civil Procedure 56
Texas Rule of Civil Procedure 166a

Do Understand the Rules

- Several options—
 - **Traditional MSJ** → movant presents summary-judgment evidence
 - **No-evidence MSJ** → movant does not present any evidence, forces respondent to present evidence sufficient to raise a fact issue
 - **Hybrid** → presents grounds for both a traditional MSJ and a no-evidence MSJ
- NOTE:** Make sure the motion clearly specifies the grounds on which summary judgment is sought.

Don't Overlook Burdens of Proof

- Movant has initial burden to demonstrate court should enter summary judgment
 - Must prove all elements of movant's affirmative claim or defense or disprove at least one element of non-movant's claim or defense
- If movant meets this burden, non-movant has burden to present evidence sufficient to raise a genuine issue of material fact
 - Non-movant is not required to prove its case or marshal all of its proof

Do Remember the “Rubric”

In deciding a motion for summary judgment, the court must—

- Assume the non-movant’s proof is true
- Make every reasonable inference in favor of the non-movant
- Resolve doubts about the existence of a genuine issue of material fact against the movant
- If the MSJ is based on the pleadings, ensure that any defects cannot be cured by amendment

Don't Miss the Deadlines

Under Texas rules—

- The non-movant is entitled to at least 21 days' notice of the hearing or submission* date (Tex. R. Civ. P. 166a(c))
- The non-movant may then file a response no later than 7 days before the hearing or submission date (Tex. R. Civ. P. 166a(c))
- Any reply must comply with local court rules

Don't Miss the Deadlines

Under the federal rules—

- Unless the local rule or court sets a different deadline, a movant may file a motion for summary judgment at any time until 30 days after the close of all discovery (Fed. R. Civ. P. 56(b))
- Check local rules for response and reply deadlines (in fact, always check local, and “local local” rules)
- Typically, federal courts consider summary judgment motions on submission, unless the court grants a party’s request for hearing

The Motion

Preliminary Statement

- Use this as an introduction to your motion
- The preliminary statement should be crafted purposefully to convey your most persuasive and important points concisely
- At this point, you have the court's attention—do not lose it!

The Motion

Grounds for Summary Judgment

- **Must be clearly stated**—we use a separate section, clearly labeled “Grounds for Summary Judgment”
- The grounds should not be argumentative, but should be stated persuasively, so the court understands why your client is entitled to summary judgment
- If the MSJ will resolve all claims asserted in the case, make that clear. If you are seeking partial summary judgment, make that clear.

The Motion

Summary Judgment Facts

- Summary judgment will not be granted if facts are in dispute; we call this section “Undisputed Facts”
- Persuasively stated, but not argumentative
- Make sure you have evidence to support each fact and cite the evidence

Argument + Authorities

- Should be persuasively stated and carefully organized

The Response

- **Do** present evidence demonstrating genuine issues of material fact
- **Do** ensure that responsive evidence is in admissible form and properly authenticated
- **Do** object to any defect in the form or substance of the movant's motion, pleadings or evidence
 - Summary judgment grounds must be supported by the movant's pleadings—failure to object waives error
 - Must object to movant's summary judgment evidence that is not admissible or properly authenticated

The Response

- If permitted, consider filing an amended pleading to avoid summary judgment—
 - Add new claims or issues, if supported by the evidence
 - Omit factual admissions that have been used to set up the motion for summary judgment

Don't Overlook Timing Factors

- Would early resolution of one or more legal issues facilitate a settlement?
- Do the parties agree that certain legal issues could be resolved before conducting expensive discovery?
- Are there core issues involving questions of law?
 - Employment
 - ERISA
 - Insurance
 - Declaratory judgment actions

Do Consider Settlement Impact

- Do the parties have a fundamental disagreement about a legal issue that could be resolved by summary judgment?
- Would a ruling on a particular legal issue impact the parties' perspective regarding settlement value?
 - For example, if the court decides an insurer defendant has a duty to provide a defense (which is a question of law), the parties may be better positioned to settle issues relating to indemnity and damages.

Questions?



Thanks!



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