The Trial on Paper:
Key Considerations for Determining Whether to File a Summary Judgment Motion

by Michele L. Maryott

Winning may come in many different forms, but for the litigator, the most exhilarating win comes at trial. After all, recounting how you dismantled the opposition's key witness on cross-examination, or sharing your brilliant argument that sealed victory for your client, makes for considerably more scintillating cocktail party banter than the story about the amazing summary judgment motion you wrote, argued, and won. There's a reason why legal thrillers don't lead to a climactic summary judgment hearing scene: It's just not dramatic enough. Despite its lack of sexiness, however, the summary judgment motion is a critical weapon in the litigator's arsenal that must be examined at every stage of a case and used whenever possible.

Deciding whether to file a motion for summary judgment or partial summary judgment entails careful strategy and detailed analysis. Although summary judgment motions are typically filed after the case has been litigated for a while, the process of deciding whether to file a summary judgment motion and preparing for that eventuality begins on day one.

Not all of the issues you will need to consider before deciding whether to file a summary judgment motion will be clear at the outset of the litigation. Granted, many of us have early visions of prevailing on a summary judgment motion because we think our client has the better case. But obviously, this belief is not enough. In many cases, you need to see how the litigation unfolds before such an important decision can be made. That is why careful planning from the outset is critical. Counsel must take the time at the beginning of the case to think through the issues and to research and understand the law that will apply—not just the general principles, but the cases upon which a summary judgment motion would rest. While many unforeseen circumstances may arise in litigation, having a clear plan and a comprehensive understanding of the key factual and legal issues in the case will help you determine how to deal with unexpected developments as well as recognize what deserves concern and what does not. A clear plan will also guide and make more efficient the entire litigation process.

Plan ahead. It sounds simple and obvious, but we all know it's not always so. Think about how many days you've sat down at your desk, looked at your calendar for the day, jotted down those three or four critical items that must be accomplished, and then the phone rings. Forget about your to-do list; one of your clients has an emergency and you are off to put out fires all day long. Distractions happen, and they can happen on a larger scale in litigation, so it is critical that you don't let the day-to-day flurry of activity distract you from careful planning. When it comes to strategizing about dispositive motions, counsel must be on the ball with respect to the procedural and the substantive issues. "What will happen if . . . ?" is a critical question to ask about every step you consider taking. If you do not think everything through, you might find yourself in an unexpected—and unpleasant—position. In a federal court case a few years ago, our opposing counsel brought a motion to dismiss our client's counterclaim for breach of contract on an indemnity issue. They were sophisticated, excellent counsel, and they probably thought they had a good motion. After we submitted substantial extrinsic evidence as part of our response, the judge ordered limited discovery and a submission from each side that included all relevant extrinsic evidence and explanations of its significance. After reviewing those submissions, the judge put on the best poker face I have ever seen and told us that our case had no triable issues. He instructed us to file cross-motions for summary judgment. We were quite sure that the opposing attorneys had not foreseen how their motion to dismiss would lead to cross-motions for summary judgment and a relatively swift victory for our client.

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Other procedural issues you must consider, such as timing, may not be quite as complicated or substantive. These days, summary judgment motions often involve expert evidence, particularly in patent, securities, and toxic tort litigation. When expert issues will feature prominently in your summary judgment motion, be sure that the applicable rules allow sufficient time to complete expert discovery before your motion for summary judgment is due. If they do not, negotiate a case management order that will give you a comfortable amount of time to work within. For example, in California state court, the notice period for a summary judgment motion is 75 days, and by statute, expert discovery need not be completed until well after your motion would need to be filed. For this reason, obtaining a case management order will be critical if your anticipated motion will rely heavily on the lack of expert evidence presented by the other side.

The same holds true in an arbitration setting. If there is a possibility that you will want to file a motion for summary judgment, raise this at the preliminary hearing and request a schedule that accommodates such a filing. If the arbitrator indicates he will not allow such motions, request the opportunity to address the issue, with a formal request to file a motion, at a later time.

With rare exception, counsel should approach every case as if they know it will go to trial. This approach applies equally to summary judgment motions. Anticipate that you can obtain during discovery the specific testimony and documents you need for your motion, and plan for it. And by that, I don't mean think about what you might need. I mean craft your discovery plan to make sure you get the evidence you need. It can be particularly worthwhile drafting and re-drafting particular questions designed to get the key admissions you need to win a summary judgment. After all, one crucial answer from your opponent's star witness to a pithy question will carry greater force than all the bits and pieces of testimony that, when put together, mean the same thing.

To that end, it is worth your time to outline potential summary judgment arguments prior to commencing discovery and tailoring the discovery to specifically address points you'll want to make in your motion. Counsel can do well focusing written discovery to obtain verified statements from key witnesses that, when drawn to their attention in deposition, will require them to answer a certain way—a way that is good for you. The opposing party can get caught looking if you signal emphasis on a particular issue, when in reality, you are setting up your opponent to make critical admissions on another. One of my colleagues employed this technique by focusing her opponent, through meticulously prepared written discovery, on a specific compliance issue in a CERCLA case, all the while preparing to obtain admissions that would, and did, secure a statute of limitations defense.

Depositions offer the potential for even more fun. Another colleague enjoys telling the story about a wrongful discharge case in which the plaintiff's common law claim could not survive a statute of limitations challenge if it were based on the same set of facts as a particular statutory claim. During the plaintiff's deposition, he methodically walked the plaintiff through the complaint and after identifying each factual allegation asked him, "You believe that is a violation of state law; correct?" With enthusiasm, the plaintiff repeatedly affirmed "Yes!" and talked himself right into a summary judgment in our client's favor. You can imagine how compelling that Q&A segment must have appeared to the judge. Had my colleague somehow signaled during discovery where he was going on that issue, the plaintiff might have answered those questions a little differently.

The lesson here is plan, plan, plan, but try not to signal where you are going or why until the time is right. And if you would prefer not to be on the receiving end of this strategy, make sure you take the time to truly understand your case and all of the potential arguments the other side may make.

There is no magic formula for deciding whether to file a motion for summary judgment. Each decision depends on many things, including the specific facts of your case, the applicable law, your client, your judge, and your overall strategy. Attempting to determine whether a summary judgment motion will be successful, like many other strategies in litigation, ultimately leads to an educated guess (unless you happen to own a crystal ball). However, asking yourself a few key questions and discussing your ideas thoroughly with your client should help you make your decision.

Being able to say "we should win" is a lot different from being able to say "we can win." More often than not, we think our clients should win even though we understand and appreciate that they may not. "Should we win?" and "can we win?" are, thus, two critical questions to ask yourself about each claim on which you intend to bring a motion. While these questions are not litmus tests, answering either question in the affirmative means you should probably bring the motion unless there is some compelling reason not to do so. If the truthful answer to either question is no, you should think long and hard about why the answer was no before you file a summary judgment motion. For example, if the answer to "can we win?" is no because there is a material fact in dispute, you will be taking a big risk if you file the motion. If the answer to "should we win?" is no because the judge would be going way out on a limb to rule in your favor, again, think long and hard. However, if the answer is no because you believe your judge never grants a summary judgment, you might not let that stop you if you believe you have a strong case. You may be pleasantly surprised with a victory.

Most commercial arbitration rules do not preclude summary disposition.

"Can we win?" is not a question you should ask only once. This question must be asked throughout the litigation process. You may think based on early witness interviews that you will have strong arguments on summary judgment, only to have a key witness go sideways under oath and crush your hopes of winning summary judgment. However, if this happens to the other side, you may find yourself with an opportunity to prevail that may not have existed before.

"Can we win?" may be a more difficult question to answer in an arbitration setting because it also requires an analysis of whether summary disposition is allowed in your proceeding. The issue of summary judgment in arbitrations warrants some discussion here because there are different considerations in the arbitration forum, where there seems to be a common

perception that arbitrators are reluctant to grant summary judgment. Reasons cited for this include the notion that an arbitrator is more likely to allow the parties to have their "day in court," given the limited right to appeal (although in California, the parties may contract for a wider scope of judicial review under the recent decision in *Cable Connection, Inc. v. DirecTV, Inc.*, 44 Cal. 4th 1334 (2008), unless the Federal Arbitration Act governs, in which case they cannot under *Hall Street Associates, L.L.C. v. Mattel, Inc*., __ U.S. __, 128 S. Ct. 1396 (2008)). Another reason is the lack of resources available to an arbitrator who receives mammoth summary judgment motions delivered in multiple bankers' boxes. While these explanations have some traction, this author wonders whether the perceived likelihood that summary judgment or summary adjudication will not be granted in arbitration is really a common misperception, and whether it is keeping more disputes out of the arbitration system. This issue deserves further exploration another day, but here are a few additional points to consider if you are trying to decide whether to file a summary judgment motion in an arbitration setting.

Most of the commercial arbitration rules do not preclude summary disposition, and there is support for the argument that an arbitrator does not exceed his powers merely by granting it. Very few of the arbitration rules promulgated by well-known arbitration providers explicitly authorize the filing of motions for summary judgment; however, it is also true that very few of the rules specifically prohibit the filing of dispositive motions. For example, JAMS Comprehensive Rule 18 and Employment Arbitration Guide Rule 18 both provide that the arbitrator may allow parties to file motions for summary disposition, either by agreement or upon the request of one party. AAA Employment Arbitration Rule 27 similarly allows the filing of dispositive motions at the discretion of the arbitrator:

> Dispositive Motions: The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.

However, the other AAA rules do not contain similar provisions. So what does this mean? It's hard to say. The private nature of arbitration makes outcomes difficult to track, and it is nearly impossible to develop a comprehensive understanding as to whether (and why) summary judgment motions are granted or not. This is particularly true because federal and state law narrowly define the scope of review and the circumstances under which an arbitration award can be vacated (the arbitrator got it wrong is not one of them), thus making motions to vacate an arbitrator's award not worth the effort in many cases. While the precise grounds vary depending on the jurisdiction, grounds for vacating an award may include a "manifest disregard for the law," violation of public policy, arbitrator misconduct, refusal to admit material evidence to the substantial prejudice of a party, or issuance of an award that exceeds the arbitrator's powers. See David E. Robbins, "Calling All Arbitrators: Reclaim Control of the Arbitration Process—The Courts Let You," *Dispute Resolution Journal* (February/April 2005), for a detailed discussion of the extreme deference given to arbitration awards.

To the extent these issues have found their way through the appellate system, the case law addressing whether an arbitrator exceeds his powers by granting summary judgment is scant and unfortunately offers little in the way of clear guidance. Nevertheless, there is authority, among the few published cases directly addressing the issue, for the proposition that an arbitrator does not exceed his authority simply by granting a pre-hearing dispositive motion. The cases unfortunately offer little assurance that this view is well established because the facts and procedural issues vary significantly from case to case. For example, in *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (1995), the court held that an arbitrator does not exceed his authority by granting a dispositive motion even though the arbitration rules do not expressly allow the parties to bring such a motion. While this decision has broad implications, other decisions upholding an arbitrator's summary judgment have been more narrow. For example, in *Jefferson Woodlands Partners, L.P. v. Jefferson Hills Borough*, 881 A.2d 44 (Ct. Comm. Pa. 2005), the court upheld an arbitrator's award granting summary judgment even though the arbitration statutes did not provide for such a procedure because the losing party failed to challenge the arbitrator's authority prior to the ruling. In another state court case, *Ungar v. Ormsbee*, 2002 WL 221973 (Ohio App. Feb. 11, 2002), the court concluded that the arbitrator did not exceed his powers by failing to apply a civil court rule governing summary judgment motions where the parties stipulated that the court was vested with the power to grant summary judgment, but did not expressly agree that the arbitrator was required to follow the rule itself.

There are few federal court decisions addressing, as a general matter, whether an arbitrator exceeds his powers under the Federal Arbitration Act by granting summary disposition prior to an evidentiary hearing. Although it is well established that arbitrators have full authority to grant a pre-hearing motion to dismiss with prejudice based solely on the parties' pleadings so long as the dismissal does not deny a party "fundamental fairness" in NASD arbitrations, this authority is not as clear outside the NASD setting. For example, in *Sherrock Brothers, Inc. v. DaimlerChrysler Motors Co*., 2006 WL 2927636 (M.D. Pa. Oct. 12, 2006), aff'd, 260 Fed. Appx. 497 (3d Cir. 2007), the court held in an arbitration conducted under the AAA Rules and Procedures that the arbitrator did not exceed his authority or commit misconduct under the Federal Arbitration Act by granting summary judgment on the grounds of res judicata, collateral estoppel, and waiver. However, the court went on to note that "the AAA Commercial Arbitration Rules do not expressly provide for summary judgment, nor does it appear that dispositive motions are even contemplated by these rules." *Id.* at *8 n. 7.

Despite the absence of any well-established guidelines, the overall takeaway appears to be that if the applicable rules do not specifically provide for such a procedure, and neither the rules nor the parties' agreement expressly preclude it, an arbitrator generally has the power to determine whether to grant a summary disposition without exceeding his authority.

An important point to bear in mind is that the need for summary disposition in arbitration has expanded as the arbitration process becomes less streamlined and more expensive. As the complexity of matters submitted to arbitration has increased over the years, it is no longer a truism that arbitration will be less expensive or more streamlined than proceeding in court. The rules allowing dispositive motions in arbitration

proceedings signal a recognition by arbitration providers that requiring a full-blown evidentiary hearing in every case would contravene this hallmark of arbitration. And as parties to arbitration agreements have identified the pitfalls associated with simple arbitration provisions over the past decade, arbitration agreements have become more sophisticated in terms of expanding discovery and other aspects of the arbitration process. While many view this development as necessary, so too, becomes the ability to dispose of ill-fated claims as early and as efficiently as possible.

It is no longer a truism that arbitration will be less expensive.

If you are before an arbitrator, and you think she may not dispose of the entire case on a motion or is inclined to issue split awards, you may consider moving for summary adjudication on all of the issues you credibly can with the goal of winning on at least a few (or even one) and narrowing the issues going forward. Giving the arbitrator the opportunity to do this may appeal to her notion that each side should get its day in court and mitigate the effect of a split ruling after an evidentiary hearing. Also, if you move for summary disposition in arbitration, be sure to ask the arbitrators if they have any procedural preferences; if they do not, prepare whatever documentation you think will assist them in analyzing the issues. For example, if the civil procedure rules in the jurisdictions where your arbitrator practiced or served in the judiciary require a separate statement of undisputed material facts or a memorandum of undisputed facts and contentions of law, submit that document along with your points and authorities. Bringing familiarity to the process may go a long way toward the desired result.

Because the upside of summary judgment—winning—is so obvious and exciting, you may overlook the downside to filing a motion. Unless you can honestly say your client has nothing to lose by filing a motion, you have to consider the risks.

For example, one of the major drawbacks of a summary judgment motion is that you will telegraph, most likely in a way you have not before, the facts and witnesses that you believe are most important and, to some extent, how you will present your case at trial. After all, a summary judgment motion is a trial on paper. For that reason, it should have all the hallmarks of a good trial presentation: a clear theme that grabs the reader's attention, a persuasive story, and, most importantly, a clear analysis of the facts and the law that demonstrates why it should be granted. If you do this, your motion may provide your opponent with insight that may otherwise be lacking and thus create a disadvantage for you. If you think there is a slim chance you will prevail on summary judgment, you may not want to tip your hand. This is not as much of a concern in arbitration because you will likely file a pre-hearing arbitration brief that will, if done well, lay out your arguments and evidence thematically, except perhaps for a few show-stopping facts that you save for the hearing.

You also should consider the effect that your loss of an ill-fated summary judgment motion may have on your opponent's psyche. That is, if your adversary has repeatedly told you that her client can "get past summary judgment" and has taken unreasonable positions in settlement negotiations, and you think it is unlikely you will prevail on summary judgment but have a reasonable basis to file the motion and are doing so to create leverage or draw out your opponent's evidence, a loss on summary judgment may bolster your opponent and have an undesirable effect on his or her settlement position. On the other hand, if your opponent is expecting you to file a summary judgment motion and you do not (perhaps because your resources are better spent getting ready for trial), this may leave your opponent slightly confused. Deciding not to file a motion may also deprive opposing counsel of the ability to use a pending motion as leverage with an unrealistic client so, again, do your best to understand your opponent and the dynamics on the other side of the table when making these decisions.

Another obvious downside to filing a summary judgment motion is the considerable time and expense involved with preparing the motion. However, if you believe you have a reasonable chance of prevailing and your strategy requires you to do so, the expense of a trial will dwarf the cost of preparing the summary judgment motion, and hence will be viewed by your client as well worth the time and effort.

At the end of the day, whether to file a dispositive motion is a judgment call that counsel must make with their clients, based on the circumstances of the case. In my view, if you have a reasonable chance of winning and there are not any unique circumstances that make filing a motion problematic, it is, in most cases, worth a shot. Many of the clients I have worked with have been of the same mind. Clients understand that a summary judgment can be difficult to win, but given the costs associated with proceeding to trial, many clients want to file the motion.

Given that the job of a corporate defense lawyer is not only to win but also to make our clients look good, winning on summary judgment is extremely satisfying even if it is not at all glamorous. It is particularly satisfying to win a summary judgment motion that everyone thinks is a long shot because nobody will be surprised if you lose, but you will be a hero if you win.

As discussed, asking yourself whether you can win the motion is not a question that can be asked just once. Continue to reassess your arguments and overall strategy as you prepare your motion. If arguments do not work, scrap them. And keep in mind that "throwaway" arguments can be very obvious and taint the rest of the motion. Above all, maintaining your credibility with the judge or arbitrator is critical. If you are not able to win the motion and cannot settle the case, you will very soon find yourself in front of the judge again—this time for trial.

Sometimes, decisions about whether to file summary judgment are influenced by perceptions regarding the judge hearing the case. The views can be extreme. But, in most cases, you should take with a grain of salt any advice regarding whether to file a summary judgment motion based on the judge who will consider it. Look for ways to gauge the judge's interest in hearing such motions. If you are lucky, the judge will signal her views regarding the prospects for summary judgment if she knows enough about the case. In a recent case, the judge all but told the other side, on several occasions, not to bother

filing a summary judgment motion. They filed it anyway, but the judge never ruled on it. In another case, a federal court judge told us and our opponents to file cross-motions for summary judgment.

If you are not lucky enough to have the judge tell you to file a summary judgment motion, it is my view that perceptions about the judge should not, in most cases, be a strong influence over whether you decide to file a motion. It is simply another factor. If you believe you have a very strong position on summary judgment, there are no extraordinary reasons not to file, and your only hesitation is that your judge is known for denying motions, you should probably file the motion. If, on the other hand, your judge would have to go out on a limb to rule in your favor, there are no compelling strategic reasons for filing the motion, and your judge is known for denying them, you might decide to concentrate your efforts elsewhere.

If you planned ahead, chances are that you started a comprehensive outline of the arguments before you sat down to actually write the motion. Every motion is a unique work of art. Even if you are preparing a motion that is nearly identical to a motion you have filed before, there will be something different about it. That said, here are a few general tips to keep in mind as you prepare your motion to win.

Tell your story persuasively. Although your witnesses answered deposition questions truthfully and accurately, the summary judgment motion still offers the first real opportunity to tell your client's whole story. This makes your motion an especially important event, even if you do not prevail. You should tell your story as persuasively as possible in the summary judgment motion.

Keep in mind that in telling your story, there is a difference between material facts, which must be undisputed to win, and storytelling facts, which are not essential to winning but will help you tell your client's story in a compelling way. Be sure you know and understand the difference. If you are practicing in a jurisdiction that requires a separate statement of undisputed material facts, be sure to include only the material facts in the statement. In some cases, the material facts set forth in a separate statement may be worded precisely the same way as some of the facts you set forth in the motion, but they need not be identical. For example, you may describe the plaintiff's agent in the motion by including information about his title, job duties, and interactions with other witnesses because it helps you tell the story, but the material fact might be "Joe Smith worked at XYZ Corporation in the R&D Department in 2007."

In addition, be careful not to be over-inclusive or too argumentative when setting out your material facts. If you are, this could spell doom for your motion because, at least in California, by including a fact in the separate statement of undisputed material facts, you are admitting that the fact is material. If the other side contradicts it, you cannot later argue that the fact is not really material. In a recent case, our opponent filed a motion for partial summary judgment on a significant issue. There had been a substantial amount of discovery, and while the facts were relatively straightforward, the ultimate issue was not so straightforward. Our opponent filed a separate statement, as required under California law, which included 368 material facts. Most of these material facts were storytelling facts and not actually material to the issues. Many of them were undisputed, but plenty of them were disputed, and all we needed to defeat the motion was to establish a dispute as to a single one of those 368 "material" facts. Be sure to distinguish between truly material facts and the storytelling facts, and leave the storytelling facts for the motion itself.

Although your summary judgment motion may be the most important thing you have going on at the moment, without question, that is not the case for your judge. Making life easier for the judge may sound like obvious advice, but I have seen many summary judgment motions and oppositions that overlook this very simple, yet important, concept. Consider ways that you can lessen the burden on the judge and her staff. One way may be to submit an appendix or index of exhibits if you have an extensive evidentiary submission. You may also consider preparing binders for the judge (in addition to your properly formatted filing) that make it easier for the judge to work with the materials. If you have a technologically savvy judge, you might submit a CD containing the motion papers and supporting evidence, with hyperlinks from the motion and supporting papers to the evidence.

Also, if you are required to submit a separate statement, and the other side submits an opposing statement, consider submitting a response to the opposing statement with your reply. This may not be required, but it will help you to focus your arguments on reply and will make the judge's life easier.

We have all heard the saying: If the facts are not on your side, argue the law; if the law is not on your side, argue the facts. But be careful. It would be quite embarrassing to have a judge call you out on the authorities you cite and the propositions for which you cite them, and tell you that the cases just do not say what you claim they say. I have seen this happen to an opponent, and it is not pretty being on the receiving end of that kind of public display of disappointment. Such an event should be avoided at all costs. If you do not demonstrate intellectual honesty at all times to the court, you will lose your credibility and do a disservice to your client and yourself.

Every motion is a unique work of art.

The unique circumstances of every case—the facts, the witnesses, the law, the forum, the specific judge or arbitrator, and the attorneys—make it impossible to predict whether you will win or lose on summary judgment. We have all seen motions that we thought would be granted end up being denied (and vice versa). Even though the most careful planning will never guarantee victory, put your best foot forward in the planning process to increase your chances of prevailing. And keep in mind that deciding whether to file a summary judgment motion is a process that you should re-visit throughout the litigation. If you do, you may snatch victory from the jaws of defeat even in what appeared initially to be the most dire of cases. And while winning summary judgment may keep you from displaying your brilliance at trial, your client will be better off for it. Providing that kind of value to your client is the reward, even if it leaves you without a good story to tell at cocktail parties.