

Tips & Tricks for Persuasive Summary Judgment Motions

By Thomas M. O'Toole, Ph.D.

Many legal scholars have argued that litigation in the United States has undergone a “shift from trial-centered to motion-centered adjudication.”¹ Yet, the termination rate of litigation by summary judgment hovers around only 4-5% according to data from some federal districts. This low success rate is a common source of frustration since parties frequently devote significant time and resources to summary judgment.

This article focuses on the role of the attorney and how the attorney's case presentation through briefing and oral argument influences the likelihood of whole or partial success at summary judgment. Even when termination of the litigation through summary judgment is not achieved, partial summary judgment can still significantly change the value of the case, thereby increasing the likelihood of a favorable settlement.

A key issue that can undermine effective preparation for summary judgment is attorneys' beliefs about the difference between judges and jurors. No matter how often some notable judge lectures attorneys on the fundamentals of human persuasion and basic writing, there continues to be a belief among many attorneys that judges hold some special power for logic and reasoning that excels well beyond that of the ordinary person.

The shortsightedness of this belief cannot be overstated. The famous study by Kalven and Tiesel that examined judges' and jurors' case leanings, showed alignment between the two in approximately 86% of cases. That's remarkably similar leanings for groups of folks believed to be so fundamentally different in their decision-making processes

The reality is that judges are people too. They get bored, confused, frustrated, angry, distracted, excited, and interested like any other decision-maker. To presume their decision-making processes are not constrained by fundamentally human characteristics is misguided. Consequently, the focus on capturing interest, providing psychological satisfaction through thematic frameworks and language, and simple organizational patterns in briefing and oral argument is as crucial as in a jury trial.

Strategies for Effective Summary Judgment Motions

Persuasive strategy development begins with an audience-centered approach to communication and presentation. The following 12 tips focus on capturing the judge's attention and interest, establishing and maintaining credibility, motivating the judge to want to find in your favor, and providing a thematic framework that persuasively sets forth the tools to justify a ruling in favor of your client.

1. **Recognize your audience.** Judges are incredibly busy with overwhelming caseloads. This has important implications for the judge who is reading your brief.

¹ Paul W. Mollica. “Federal Summary Judgment at High Tide.” *Marquette Law Review*, Vol 84:141 (2000).

When people are overwhelmed, they approach a task with apathy, shortened attention spans, dread, or something even worse. But this can be a strategic advantage for attorneys who are able to set their briefs apart from others by deploying an entertaining writing style. This doesn't mean attorneys should engage in any sort of outlandish tactics in their summary judgment briefs. Instead, an attorney can entertain in briefing through simplicity, clarity, and psychological appeal. Keep every section short and simple and be sure your thematic framework runs continuously throughout the brief. Insert graphics into the brief where appropriate. These simple strategies will set your briefing apart from others making it more interesting and appealing to read.

2. **Know the psychological satisfaction of your case and make it obvious.** The goal at summary judgment is to communicate a compelling story to the court and give the judge a reason to want to enter judgment in favor of your client. If you cannot explain, in one sentence, why the judge should feel good about ruling in favor of your client, it suggests your case may be lacking psychological appeal. People do not like to make decisions they cannot feel good about. It's the attorneys job to determine which core principle best encapsulates the entirety of the case while providing the necessary motivation and tools for the judge.
3. **Develop a controlling idea and use it as the guide for both the briefing and oral argument.** Identifying the case's controlling idea through a single, value-laced sentence that tells the judge everything he or she needs to know about the case is the most effective way to simplify briefing and argument and guide strategy choices. It's painfully simple and extremely difficult at the same time. But while narrowing the case to one sentence is difficult, it's not impossible. If everything is important, nothing is important. The controlling idea forces attorneys to make difficult choices. The result is a framework that allows the attorneys to determine what is important and what is not important in summary judgment.
4. **Co-op the plaintiff's offense in your theory of the case.** Political preferences aside, a defining characteristic of Karl Rove's career was his ability to turn his opponents' strengths into weaknesses (see "swift-boating"). The best controlling ideas or thematic frameworks accomplish the same effect in one of two ways: 1) the thematic framework reframes the opponent's strength to undermine the credibility of its overarching case theory while simultaneously reinforcing the prominence of your client's case theory; or 2) it establishes a framework where everything the opposing party says can be true without disproving the client's theory of the case. These opportunities exist more often than many attorneys realize; it's simply a matter of having the outside perspective to recognize how various frameworks can re-align evidence and testimony in the case.



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5. **Identify the central facts that tell the judge everything he or she needs to know about the case.** Any single case has hundreds if not thousands of facts associated with it. Don't drown the judge in all of them. Knowing which facts to make most prominent is more difficult than it seems. Jury research and mock bench trials frequently reveal that facts that attorneys thought were important are not actually important and facts no one ever considered to be relevant turn out to be highly influential. The ideal facts, given the standard for summary judgment, are those that are easy to understand, undisputed or difficult to discount or disprove, and interesting to think and think about. The central facts should have symbolic value in terms of telling the judge everything he or she needs to know about the case.
6. **Think about oral argument before drafting the brief.** Judges frequently complain about oral presentations that contradict the briefs or add factual points that were not briefed. This can damage credibility, imply disorganization, and undermine the overall persuasiveness of your summary judgment argument. Some of this can be attributed to judges pushing lawyers about specific factual details, but some of it can also be attributed to poor planning by an attorney who treated oral argument as an afterthought. Briefing and oral argument must be considered in tandem. Oral argument should be a natural extension of the briefing. As you prepare, consider this question: does your briefing hit all of the key points and establish the essential framework that you would want to address if you only had a short amount of time (10-15) minutes for oral argument.
7. **Open with an attention getter.** The first page of your SJ brief should tell the judge everything he or she needs to know about the thematic framework of the case and establish a compelling (and psychologically-satisfying) reason to rule in favor of your client. Think of a movie trailer or the short paragraph on the back of the book at the bookstore. The opening paragraph should serve the same purpose. It should motivate the judge to want to read on and interpret the facts and the law in a manner that favors the client. Despite the "obviousness" of this point, I continue to see summary judgment briefs where the opening paragraphs address the procedural history, a recitation of the counts of the complaint, or some other bland combination of data points that essentially tell the judge the task before him or her is going to be arduous, boring, and painful.
8. **Use the plaintiff's own words.** Since the summary judgment standard is that no material facts be at issue, the strategic use of the opposing party's testimony can be particularly effective since it is much more difficult for the opposing party to argue that the issues are disputed when you are using his or her own words. Anyone who follows my publications knows that I strongly believe the opposing



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party's deposition transcripts are vastly underutilized throughout the litigation process. There are always sound bite gems in the deposition transcript that can reinforce your case theory. Identify and use them aggressively!

9. **Keep it short and concise.** Drafting is easy; editing is difficult. It's hard to delete portions of the brief you worked hard on, particularly if the work on the portion in question was time-consuming. But the difference between good and bad writers is that good writers have no difficulty going back and deleting the bad stuff, even if it means they are trashing 70% of their work. The delete key is your best friend. Short, concise arguments increase clarity and persuasiveness and significantly enhance your credibility with the judge. Within the specific context of MSJ where you must show there is no question of material fact, consider the fact that short statements of fact are harder to dispute. Lengthier arguments naturally create more opportunities for disagreement.
10. **Provide mental breaks.** At a recent CLE, a judge commented that "long paragraphs or sentences in briefs indicate dysfunctional thought," adding that long paragraphs and sections are "just brutal to have to read." The solution is to break the brief up into short sections with clear section headers. This will help the judge better track the arguments and increase the overall clarity of your client's position.
11. **Incorporate graphics.** We live in a visual culture. Some researchers suggest people have learned more than 80% of what they know visually. A 1986 3M study found that combining verbal with visual presentations led to significantly greater retention of information. Graphics bring entertainment value that keeps issues fresh and entertains through variety in form. They can make bland issues interesting and can capture persuasive concepts much more effectively than verbal communication.
12. **Avoid cliché, hyperbole, feigned outrage, and exaggeration.** There's a fine line between effective thematic frameworks and cheesy, exaggerated narrative appeals. The former closely integrates the themes with the case facts to create a uniquely compelling case story. The latter relies on generic appeals inserted into a brief as an afterthought as if pulled from a clip-art-like file. Some attorneys argue that judges are not persuaded by narrative, but the more accurate statement is that judges are not persuaded by poorly-constructed narratives. Effective thematic frameworks integrate the facts, legal argument, and story in a natural, seamless fashion. They highlight facts and legal argument rather than overshadow them with contrived appeals.

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