As a prominent feature of the procedural landscape, summary judgment has come to represent a defining moment in civil litigation. Empirical research from federal districts show motions for summary judgments have significantly increased since the 1970s, resulting in an increase in the termination of cases as a result of summary judgment rulings. Some blame summary judgment for the drastic decline in trial rates over the past fifty years. One federal judge, Judge Richard Posner, has suggested a shift over time from a trial-centered adjudication to a motion-centered adjudication. Even when summary judgment has not resulted in termination of the litigation, it has substantially impacted settlement negotiations or even the final verdict in the case.

Yet, despite this shift towards summary judgment, which many argue has been propelled by business interests, the termination rate of litigation by summary judgment hovers around only 4-5% according to data from some federal districts. Notably, there is significant variation by litigation-type. For example, employers have an 80% success rate for achieving whole or partial summary judgment in employment discrimination cases. However, when all litigation-types are combined, the success rate is surprisingly low, which can be particularly frustrating for defendants and general counsel. Parties frequently devote significant time and resources to summary judgment. I have personally heard horror stories of law firms blowing almost the entire litigation budget on summary judgment only to lose. Obviously, these are extraordinary
examples, but they reflect a frustrating gap between the focus on the importance of summary judgment and the results.

Many researchers and reformers have devoted significant attention to the legal system and potential reforms for summary judgment. This article sidesteps debates about the legal framework and focuses on the role of the attorney. Little attention has been given to the attorney’s role in the process and how the attorney’s case presentation through briefing and oral argument influences the likelihood of whole or partial success at summary judgment. The jury consulting industry, which specializes in message framing and presentation has yet to venture into this territory, which is odd, since, effective strategy development and message framing for summary judgment can fundamentally change the landscape of the litigation. 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. This is particularly advantageous for defendants struggling to balance the costs of litigation with success in the litigation. Consequently, this article takes principles and strategies from the field of jury consulting and demonstrates how they can be applied to summary judgment preparation in order to increase the likelihood of whole or partial summary judgment.

JUDGES VERSUS JURORS

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. In other words, there is a belief that judges hold some innate power to overcome the lowly emotional and irrational influences prevalent in lay decision-making. Of
course, if that were true, there would be no need for the court of appeals.

The shortsightedness of this belief cannot be overstated. First, it’s inconsistent with empirical research. The famous study by Kalven and Ziesel 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. If we want to get scientific about it, evidence in the field of neuroscience also calls into question this dichotomy. Studies of patients who suffered deficits to the “emotional” parts of their brains (i.e. emotions were disabled, leaving a purely logical being) revealed individuals left with purely logical brains were incapable of making decisions. They would spend half a day trying to decide whether to write with a blue pen or a black pen. In other words, even if judges could be the purely rational beings attorneys sometimes fictionalize them as, the result would be quite different from what one would expect. These studies show that emotions are a critical and central part of the human decision-making process whether one is a judge, juror, arbitrator, or mediator.

Furthermore, judges around the country have essentially begged attorneys to discard this fictitious dichotomy and focus on persuasive briefing and argument that simplifies the message, incorporates a thematic framework, supports it with evidence and case law, and provides the judge a compelling reason to rule in their favor. Look no further that Supreme Court Justice Scalia, who recently declared there is no such thing as legal writing. Scalia added, “I think legal writing belongs to that large, undifferentiated, unglamorous category of writing known as nonfiction prose. Someone who is a good legal writer would, but for the need to master a different substantive subject, be an equivalently good writer of history, economics or, indeed, theology… it became clear to me, as I think it must become clear to anyone who is burdened with the job of teaching legal writing, that what these students lacked was not the skill of legal writing, but the skill of writing at all.” In other words, Justice Scalia
is saying effective legal writing embraces the same principles as any other type of writing.

Judge Richard Kopf, a federal judge out of Nebraska, added his own two cents in a recent blog post, “Top ten legal writing hints when the audience is a cranky federal judge”:

“I have always appreciated the writing style used in the “Dick and Jane” books. In addition to being vaguely titillating (which is always a plus), even I could understand the prose without having to read a sentence twice. I wish that were true of most of the verbiage you send me.”

Addressing thematic elements, a former Seattle judge, who is now a mediator and arbitrator, in an interview a few years back, commented that the first thing he wants to know when he tackles each side’s briefing is how a ruling in favor of each party furthers justice. In other words, he is asking for a story of principles and psychological satisfaction.

In another example, in a recent mock bench trial, a prominent judge who had served on the bench for over 25 years, stopped an attorney after 2½ hours of presentation and asked, “what is your theory of the case?” The attorney stumbled over his own words for a few moments before the judge stepped in and stated, “if you can’t tell me your theory of the case in one sentence, it means you don’t have one.”

The point 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 and borderline malpractice. Consequently, 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 13 strategies set aside legal argument (law school already trained you in this area) and 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. In fact, the expanded use of summary judgment since the 1980s is the result of recognition of this fact. This has important implications for the judge who is reading your brief. When people are overwhelmed, they approach a task with apathy, shortened attention spans, dread, or something even worse. But this creates opportunities. It 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. Go one step further and consider incorporating graphics into the brief, which increases intrigue, comprehension, retention, and consequently, persuasiveness. These simple strategies will set your briefing apart from others making it more interesting and appealing to read, which puts you one step ahead of your competition.

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 can’t 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 doesn’t mean it’s impossible, but it certainly makes it a lot harder to rule in your client’s favor if there is no satisfaction that comes with doing so. Attorneys need to devote time to this issue. Any case has a variety of core principles potentially at play, each of which offers its own unique possibilities for a psychologically-satisfying ruling. 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.** Here’s how the famous screenwriting expert, Robert McKee, describes a controlling idea:

> “A true theme is not a word, but a sentence—one clear coherent sentence that expresses a story’s irreducible meaning...it implies function: the controlling idea shapes the writer’s strategic choices. It’s yet another creative discipline to guide your aesthetic choices toward what is appropriate or inappropriate in your story, toward what is expressive of your controlling idea and may be kept versus what is irrelevant to it and must be cut. The more beautifully you shape your work around one clear idea, the more meanings audiences will discover in your film as they take your idea and follow its implications into every aspect of their lives. Conversely, the more ideas you try to pack into a story, the more they implode upon themselves, until the film collapses into a rubble of tangential notions, saying nothing.”

Remember the mock judge I mentioned earlier in the article? He insisted that an attorney’s theory of the case should be expressible in a single sentence. 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.

5. **Identify the central facts that tell the judge everything he or she needs to know about the case.** Entitlement to judgment as a matter of law requires that there be no material facts at issue that must be resolved at trial. This makes the choice of central case facts crucial. The real science and art of litigation strategy development is fact selection. 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. For example, in a product liability case, the central fact that the plaintiff was drunk at the time of the incident goes far beyond the immediate meaning of this fact; it implies values that serve to frame the entirety of 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.** First impressions are vital. The first page of your MSJ 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. This significantly decreases the likelihood that the judge will understand or embrace your case theory and work towards ruling in favor of your client.

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 party’s deposition transcripts are vastly underutilized throughout the litigation process. There are always sound-byte 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. I’ve heard both attorneys and screenwriters argue that nothing is good until the 10th draft. It’s hard to delete portions of the brief you worked hard on, particularly if the work on the portion in question is time-consuming. Something about our psychology creates an unwillingness to just throw it away. But the inevitable truth of writing is that one has to write a lot of bad stuff to create good stuff. The difference between good and bad writers is the 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. I’ve heard some judges suggest that, the longer an attorney argues, the more it looks like there are facts in dispute. The same is true for oral argument. And the only solution is practice. Attorneys should practice their oral argument just like they would their opening statement or closing argument.

10. **Provide mental breaks.** Research shows the human brain takes a break approximately every 9 minutes. A writer or speaker can account for these natural mental breaks by providing for controlled breaks in the structure and organization of the presentation or they can relinquish control and leave it up to the judge. This is where the other value of short, precise sections lies. Short, concise sections of a brief or oral argument manage this neurological need and control when they occur. The alternative is long-winded, dense portions of the brief or oral argument that create numerous opportunities for the judge to mentally check out. No one enjoys page after page of dense text. This is a significant problem because it is difficult to recapture attention mid-argument and even when successful, this mid-argument break decreases the overall coherence and persuasiveness of the argument. If you have any doubts about this hurdle, consider a famous study of over 1,300 parole hearings before judges in Israel. The data showed that granted paroles spiked at the start of the day, after a morning break, and after lunch. However, the further in time a defendant’s hearing got from one of these breaks, the less likely he or she was to be granted parole. The researchers highlighted the cognitive complexity of the task: granting parole takes significantly greater cognitive effort. The judge has to closely scrutinize the evidence and articulate a justification for the parole. Denying parole requires neither of these and, consequently, is the easier path to take when a judge is mentally exhausted. Give your judge opportunities to mentally refresh. This can be accomplished through short, concise arguments, thematic framing that captivates the judge, and through visual persuasion such as graphics, which provides variety to the presentation form.

11. **Incorporate graphics.** We live in a visual culture. Studies have shown the average person watches 15,000 hours of television by the time he or she graduates from high school, compared to 11,000 hours spent in the classroom. 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. Specifically, the study found that when
information was presented in verbal form only, retention was 70% after three hours and 10% after three days. When presented in visual form only, retention was 72% after three hours and 20% after three days. However, when presented in both verbal and visual form, retention was 85% after three hours and 65% after three days. 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.

13. **Avoid ad hominem attacks.** In short, this will only detract from your credibility, but I’ll leave Judge Kopf’s colorful words (with one more reminder that he is, in fact, a sitting federal judge) from his blog post speak for themselves on this point:

   “Please don’t “bitch-slap” your opponent. It only makes me want to do the same to you, but in super slow motion.”

**THE ARGUMENT FOR USING CONSULTANTS TO ASSIST WITH SUMMARY JUDGMENT**

Traditionally, jury consultants have gotten calls from clients after a summary judgment loss as a case nears trial. But in the last decade, the industry has seen a shift, particularly with corporate defendants, where involvement has started earlier in cases as general counsel work to get litigation costs under control by using consultants to assist with making discovery more efficient. However, summary judgment is one area where consultants still have little
involvement. Given the way summary judgment can shape, if not terminate, the litigation, this is an area where clients would be well-served to involve consultants. As highlighted throughout this paper, the work that goes into an effective brief or oral argument is a natural extension of a jury consultants’ expertise, making it a low-cost/high-impact area of involvement. Consultants can add significant value at the cost of a few hours of document review, a short meeting with counsel, and a few hours reviewing drafts of the brief.

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