

## Appellate Tips

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### **Make Sure Your Summary Judgment Pleadings Are Appeal Ready**

**By: Eileen Dennis GilBride, Jennifer B. Anderson, Jonathan P. Barnes and Justin M. Ackerman**

Because summary judgment rulings are reviewed under a de novo standard, they are one of the most common types of orders overturned on appeal. Here are some suggestions for stacking the deck in your favor.

Evaluate summary judgment opportunities early and develop a discovery plan to obtain needed evidence. Identify the elements of the case and focus on getting discovery in those areas. Consider deposing witnesses early when they are more likely to give straightforward answers. Use requests for admission and interrogatories strategically to force the disclosure of critical information and to head off factual disputes.

Remember that less is usually more. Summary judgment motions are most likely to succeed when they focus on narrow legal theories with the fewest possible facts. Trying to “prove too much” by adding extra facts or legal arguments gives the opposing side a larger target to attack, both in the trial court and on appeal. A movant who asks for too much may get nothing in the long run.

Support the motion with admissible evidence, and object when your opponent does not do so. A summary judgment ruling that relies on inadmissible evidence may be overturned on appeal. Make sure the evidence supporting your motion is admissible at trial or capable of being presented in an admissible form. Attach affidavits and written declarations made by competent witnesses based on personal knowledge. Know and follow the rules of evidence relating to expert testimony, hearsay, and authentication.

When relying on deposition testimony to support your motion, it can become critically important to have followed up and made sure your witnesses have corrected and returned their deposition signature pages to you with any changes, and that those changes get back to the court reporter timely. The consequences of not following up with your witness could be costly. Suppose your witness made a mistake during his deposition (he seemed to have unwittingly contradicted earlier testimony) because the opposing counsel asked a very confusing question. The mistake wasn’t corrected right then; there is no signature/change page in the file; and the court reporter states she did not get a correction/signature page back. This could be quite problematic for your summary judgment motion.

Avoid fact questions. Remember that the summary judgment statement of facts will be reviewed in the light most favorable to the non-movant on appeal. Draft the statement of facts persuasively, but be careful not to draw inferences in favor of your client. It might be tempting to treat inferences as facts, but be sure to save that for your argument. Otherwise, you open the door for your opponent to object and create the appearance that facts are in dispute. Limit your statement of facts to “just the facts” and explain in the motion why reasonable minds could not disagree on a particular inference.

If opposing counsel’s controverting statement of facts tries to attach or rely on inadmissible evidence, be sure to

preserve your objections by including them in your summary judgment reply. Do not file a separate pleading outlining your evidentiary objections. Both the Arizona and Federal local rules prohibit filing a separate pleading containing evidentiary objections to a non-moving party's statement of facts. See Ariz. R. Civ. P. 7.1(f)(2); LRCiv. 7.2(m)(2). Including your objections in a separate pleading could result in a failure to protect the record if the court strikes your separate pleading. See e.g., *Kinnally v. Rogers Corp.*, CV-06-2074-PHX-JAT, 2008 WL 5272870, at \*1-2 (D. Ariz. Dec. 12, 2008). Conversely, if your opponent moved for summary judgment and then objected to your controverting facts via a separate pleading, move to strike that pleading under the same rules.

If your summary judgment motion is not successful, preserve unsuccessful arguments for appeal by raising them again in a motion for judgment as a matter of law (JMOL) at trial. [The exception is that purely legal issues are preserved simply from filing the summary judgment motion.] But don't take a chance. Include all reasonable grounds asserted in the summary judgment motion, along with any new grounds you might have. This is an important step in preserving the record for appeal.

Rule 50(a) governs motions for JMOL in cases tried to a jury. The motion needs to be filed after the opposing party has been fully heard on the issues, and before the case is submitted to the jury. If the Rule 50(a) motion is denied, be sure to renew it after trial under Rule 50(b).

The process is a little different in cases tried without a jury, which are governed by Rule 52. Rule 52(c) authorizes the filing of a motion for "judgment on partial findings" after the opposing party has been fully heard on the issues.

If you need assistance with these types of motions, please contact the Jones, Skelton & Hochuli appellate department for advice and/or assistance. 602.263.1700.

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