IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

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Winning or losing summary judgment may turn on the admissibility of the evidence on which the parties rely. This article is a reminder that evidence supporting, or opposing, a summary judgment motion must be, or must forecast, evidence that will actually be admissible at trial. Don't foul up a righteous summary judgment motion by supporting it with evidence that is in the wrong form!

Summary Judgment Evidence

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The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice.

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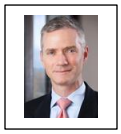

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Civil trial lawyers are all familiar with summary judgment. If a case is not otherwise dismissed or settled, then it will be resolved either in trial or, most commonly, by summary judgment. But just because most civil actions are not tried does not mean that trial lawyers can ignore the Rules of Evidence. Rule 56 of the Federal Rules of Civil Procedure states that a motion for summary judgment must be supported or opposed by "citing to particular parts of materials in the record," to include "depositions, documents, electronically stored information, affidavits or declarations, stipulations * * *, admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). Whatever "particular parts" of the record are cited, the content or substance of the evidence must either be admissible or capable of being presented in a form that would be admissible in evidence in order to be considered by the court. In short, the Rules of Evidence need to be understood not just by trial lawyers, but by the litigators and brief writers who, these days, are not in trial as much as they would like.

This article provides a brief overview of the admissibility requirements of Rule 56 of the Federal Rules of Civil Procedure, what evidence can and cannot be considered, and the obligations that the rule imposes in supporting and opposing a summary judgment motion.

Basic Requirements of Rule 56

Rule 56 allows a party to a civil lawsuit to move for summary judgment on a claim, counterclaim, or cross-claim on the ground that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. The court may consider only the materials cited by the parties to support or oppose the motion, although it has the discretion to consider other materials in the record. *See* Fed. R. Civ. P. 56(c)(3). But whatever materials the parties cite, that material must constitute admissible evidence. "An affidavit or declaration used to support or oppose a motion must . . . set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). A party may object that material cited in support of or in opposition to the motion "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ.P. 56(c)(2).

While Rule 56 only refers to admissible evidence in the context of affidavits or declarations, any materials offered in support of or in opposition to a summary judgment motion that would be inadmissible at trial, assuming the presence of all testifying witnesses in the courtroom, may be disregarded. This is implicit from the summary judgment standard that a court must determine whether there are any *genuine* disputes of material fact. 13 James Wm. Moore et al., Moore's Federal Practice ¶ 56.91[1] (3d ed. 2013). A genuine dispute is one that will go to the trier of fact, often the jury. Without admissible evidence regarding that material fact, no dispute of fact will exist.

As noted, Rule 56(c)(2) also makes clear that a party may object to material cited to support or dispute a fact on the grounds of admissibility. And Rule 56(d)(1) provides

that a motion that is not properly supported, even if no response is filed, may still be denied. Summary judgment by default is generally not available. But, if a party fails to object to the admissibility of evidence used to support or oppose a motion for summary judgment, the court may consider the fact as undisputed in deciding the motion. Fed. R. Civ. P. 56(e)(2). Depending on the jurisdiction and the local rules, a party can raise the objection in the motion papers, by filing a separate motion or paper with the court, or by waiting to object at a hearing on the motion. The court is permitted, however, to give a party an additional opportunity to support an assertion of fact or an objection to an assertion of fact. Fed. R. Civ. P. 56(e)(1).

Although the law is clear that only admissible evidence may be considered on summary judgment, that does not mean that the material must be presented in a form that would be admissible at trial. Affidavits and declarations are the classic examples. Affidavits and declarations are hearsay since they are out-of-court statements. And it is generally understood that hearsay cannot be considered on summary judgment. "When an affidavit contains an out-of-court statement offered to prove the truth of the statement that is inadmissible hearsay, the statement may not be used to support or defeat a motion for summary judgment." *Jenkins v. Winter*, 540 F.3d 742, 748 (8th Cir. 2008). However, if the proponent of the evidence can demonstrate that it will be possible to introduce the content or substance of the material at trial – for instance, the affiant will testify as a live witness – the court may take into account the material in deciding the summary judgment motion. The "form" of the evidence – that is, the affidavit or declaration – will not preclude the court from considering it. As the Ninth Circuit explained, "[a]t the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents." *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003).

Testimony

Deposition testimony is commonly used as summary judgment evidence. Rule 56(c)(1)(A) makes clear that both oral depositions and depositions on written questions can be used, as well as deposition testimony from another case. Rule 32(a)(8), for example, provides that a deposition taken and, if required, filed, "in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action." If deposition testimony is presented in support or in opposition to a motion for summary judgment, only testimony that would be admissible at trial may be introduced. Sworn testimony outside of a deposition, such as at a hearing, can be used so long as it is otherwise admissible. *Arceo v. City of Junction City*, 182 F. Supp.2d 1062, 1080-81 (D. Kan. 2002) (prior grand jury testimony may be considered). Courts have held that it is not necessary to submit the entire transcripts; excerpts are permitted. *See Alexander v. Caresource*, 576 F.3d 551, 560 (6th Cir. 2009).

Affidavits, Declarations, and Exhibits

Rule 56(c)(4) provides that a formal affidavit or a written unsworn declaration that complies with 28 U.S.C. § 1746 can be used to support or oppose a motion for summary judgment. Whether an affidavit or a declaration is used, it must be sworn or subscribed to under penalty of perjury, be based on personal knowledge, present facts that are admissible in evidence, and demonstrate that the affiant or declarant is competent to testify about the matters stated. Conclusory or self-serving affidavits that fail to set out each of these elements may be ignored.

Typically, the second and the fourth elements – personal knowledge and the witness's competency – are relatively easy to satisfy. It should be noted, however, that a witness's statements based on information and belief are not admissible. *Sehll Rocky Mountain Prod., LLC v. Ultra Res., Inc.*, 415 F.3d 1158, 1169 n.6 (10th Cir. 2005). Again, the witness must have personal knowledge and be competent to testify, just like in court. Guessing is not allowed in moving for or opposing summary judgment. The witness's statements must include sufficient factual information to establish that the conclusion is actually based on personal knowledge and that the witness is competent to testify, even if the affidavit or declaration recites that it is based on personal knowledge.

Admissibility of the evidence presented in the affidavit or declaration can prove more difficult. If exhibits (including electronically stored information) are attached to the affidavit or declaration and the documents are not self-authenticating, counsel must ensure that the witness has the requisite personal knowledge and is someone through whom the exhibit could be admitted into evidence. The witness also must be able to lay the proper foundation for admissibility. A copy of an e-mail of which the witness was not the author or recipient, for instance, may not be admissible because the person was not part of the communication and, thus, lacks personal knowledge, or because the e-mail is just reciting hearsay. But what if the e-mail might be admissible if submitted in another manner at trial? Again, as noted above, courts have held that a hearsay statement can be considered if there is a showing, or the possibility, that the statement would be submitted in admissible form at trial. If no such showing is made, however, Rule 56(c)(2) states that a party may object to evidence used in support or opposition to a summary judgment motion on the ground that it "cannot be presented in a form that would be admissible in evidence."

Expert opinions may be presented by affidavit or declaration. Such affidavits or declarations must satisfy the general requirements for summary judgment affidavits or declarations under Rule 56(c)(4). If the expert's report is submitted, the report should be verified by an affidavit or declaration or through deposition testimony. The expert's testimony also must be admissible and satisfy the requirements of Fed. R. Evid. 702 and 703.

Another important consideration arises if the affiant or declarant has previously testified at a deposition. Courts have held that witnesses, including experts, may not contradict or undermine their deposition testimony with a later affidavit. *See*

Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999). In such a circumstance, a litigant cannot rely upon an affidavit or declaration in support of or in opposition to a summary judgment motion if the witness testified previously to the contrary. An affidavit or declaration that contains statements inconsistent with the witness's earlier testimony is subject to a motion to strike.

Other Parts of the Record

Rule 56(c)(1)(A) specifies that other parts in the record may be considered on summary judgment. Those parts would include stipulations, admissions, interrogatory answers, and other discovery responses. In order to be considered, the materials must be placed into the record either by affidavit, declaration, or motion. If the materials are already in the record as part of previous proceedings, nothing more will be necessary. If not, then so long as the materials were obtained or exchanged in the case, they would not need to be authenticated by affidavit, at least in theory, if the nature of the document and its authenticity were clear on its face. To safeguard against any challenge, however, it may be prudent to have someone familiar with the materials, including counsel, authenticate them as true and accurate either by affidavit or declaration. Indeed, some local court rules require an accompanying affidavit or declaration if discovery materials are presented.

The materials still must satisfy admissibility standards. Interrogatory answers that are not based on personal knowledge, for example, cannot be used to support or oppose summary judgment. *See Hardrick v. City of Bolingbrook*, 522 F.3d 758, 761 (7th Cir. 2008). Admissions are generally considered admissible and can be used to support or oppose a summary judgment motion. These would include admissions under Rule 36, in pleadings, in court proceedings or hearings, or in briefs filed with the court.

Judicial Notice

Finally, courts may consider facts subject to judicial notice in ruling on a motion for summary judgment. Rule 201 of the Federal Rules of Evidence allows courts to take judicial notice of adjudicative facts. To be judicially noticed, Rule 201(b) provides that an adjudicative fact must either be (1) generally known within the trial court's territorial jurisdiction, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Types of facts that can be judicially noticed include but are not limited to current events, calendars and time, geography, and weather. One category of fact that often is the subject of a request for judicial notice is prior judicial proceedings. To what extent can a party point to the record from an earlier or parallel case to support or oppose a summary judgment motion? If a matter in another case was adjudicated such that the doctrine of issue or claim preclusion would apply, then the court can take notice of the adjudication in applying the doctrine. But a court cannot take judicial notice of the factual findings from another proceeding, otherwise the doctrine of collateral estoppel would be superfluous. *See, e.g., Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829-30 (5th Cir. 1998). Facts adjudicated in a prior case do not satisfy either test of indisputability

contained in Rule 201(b). Thus, although a court can take judicial notice that a pleading or motion was filed or that a judgment was entered in another judicial proceeding, or that certain allegations were made in that proceeding, the court cannot take judicial notice of the truth of the allegations or findings.

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