you contacted counsel and proposed a solution, but he or she refused to withdraw the motion.

- A motion to dismiss for failure to prosecute may be employed in some circumstances as an alternative to a motion for summary judgment under FRCP 56. Such a motion should also cite FRCP 37(b)(2)(C) and 41(b) and the policy goals supported by those rules, in order to persuade the court to dismiss, rather than go through the more difficult process of summary adjudication.

[§§7:91-7:94 Reserved]

XIV. MOTIONS FOR SUMMARY JUDGMENT

A. Moving for Summary Judgment

§7:95 Summary Judgment Standard and Requirements

Pursuant to FRCP 56(a), a party is entitled to summary judgment if the law and evidence show that (1) no genuine issue exists as to any material fact (*i.e.*, no dispute or disagreement about a material fact); and (2) the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A material fact is a fact which, if different, would affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For example, in a products liability action, whether the defendant manufactured the product is a material question of fact. *Mercado Garcia v. Ponce Federal Bank, F.S.B.*, 779 F.Supp. 620, 625 (D.P.R. 1991). Beliefs and opinions are not enough to create a genuine issue of fact. *Cleveland v. Porca*, 38 F.3d 289 (7th Cir. 1994). All reasonable inferences from the facts will be viewed by the court in the light most favorable to the non-moving party.

Evidence supporting or opposing a motion for summary judgment must be admissible. FRCP 56(c)(2). The court is entitled to consider the following sources of evidence when ruling on a motion for summary judgment, including:

- The pleadings.
- Affidavits and declarations.
- Depositions.
- Answers to interrogatories.
- Admissions.
- Oral testimony or other evidentiary materials, such as prior testimony exhibits from previous cases.
- Facts for which the court has taken judicial notice.
- A FRCP 56(d) affidavit by a party opposing a motion for summary judgment.
- Note: Parties are almost never allowed to offer oral testimony during summary judgment hearings in federal court. *March v. Levine*, 249 F.3d 462, 473 (6th Cir. 2001).

Even if you cannot obtain summary judgment on the whole case, it is common to move for "partial" summary judgment: Consider filing a motion for partial summary judgment pursuant to FRCP 56(a) to dispose of specific claims or defenses. For example:

- A defendant could move for partial summary judgment on some of the claims in a complaint, even though summary judgment on others may be inappropriate. FRCP 56(a).
- The plaintiff or defendant could move for partial summary judgment on a liability issue even though a genuine issue exists as to the amount of damages, or vice versa. *Pacific Future Express Co. v. Akron, Canton & Youngstown R.R. Co.*, 524 F.2d 1025 (9th Cir. 1975).
- Although partial summary judgments are not judgments and do not become final orders until the district court enters a judgment disposing of the entire case, the partially adjudicated legal issues do become "law of the case." *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999).

Examples of issues on which summary judgments have been granted include:

- Insufficient evidence of causation. *Pennington v. Vistron*, 876 F.2d 414, 426 (5th Cir. 1989).
- Post-sale product modifications. *Trevino v. Yamaha Corp.*, 882 F.2d 182, 184 (5th Cir. 1989).
- Immunities and privileges. *Dorsey v. National Enquirer*, 973 F.2d 1431 (9th Cir. 1992).
- Government contractor defense. *Walk v. Baltimore & O.R.R*, 890 F.2d 688 (1989).
- Statutory construction or legislative interpretation. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

- Interpretation of unambiguous language in a contract. *Tzung v. State Farm Fire & Gas Co.*, 873 F.2d 1338 (9th Cir. 1989).
- Standing to sue. *Solinger v. A&M Records*, 718 F.2d 298 (9th Cir. 1983).
- Whether an arbitration agreement is binding. *Int'l Union v. Young Radiator Co.*, 904 F.2d 9 (7th Cir. 1990).
- Whether res judicata or collateral estoppel attaches to a state arbitration on the same claims. *Clark v. Bear Stearns & Co.*, 966 F.2d 1318 (9th Cir. 1992).

There are important strategic considerations that factor into the decision to move for summary judgment, because summary judgment has both advantages and disadvantages. The advantages of moving for summary judgment include the following:

- If successful, you resolve the case without trial by obtaining a judgment on the merits with *res judicata* effect.
- It forces opposing counsel to reveal their best evidence and legal arguments to oppose the motion.
- Even if the judge denies your motion, it sets the stage for the court to consider a motion for a judgment as a matter of law by pointing out the flaws in the opponent's case. *See* FRCP 50(a).
- Even a partial summary judgment can save money by allowing you to focus on necessary issues for trial.
- A partial summary judgment may enhance the chance of settlement if it weakens the opponent's case.

The disadvantages of moving for summary judgment include:

- If unsuccessful, the opposition will be alerted to deficiencies in their case. They also will be alerted to problems in your case that could weaken your position in settlement negotiations.
- The motion is expensive because of the necessary research and persuasive writing and the number of documents that must be prepared under most local rules. A motion for summary judgment is a major undertaking (but much less expensive than trial).
- Summary judgments can be difficult to win despite the Supreme Court's statement in *Celotex Corp. v. Catrett*, 317 U.S. 322, 322-323 (1986) that summary judgment motions are "not disfavored." They are especially difficult to win for the party with the burden of proof at trial.
- Your client, expert, and key witness affidavits and declarations may be used for impeachment at trial if inconsistent with their trial testimony.

Technically, FRCP 56 applies to issues involving the merits and not matters in abatement, such as jurisdiction or venue. As a practical matter, however, whenever a declaration or supporting evidence is added to a motion to dismiss on a purely technical issue, the court will treat it as a motion for summary judgment. In fact, FRCP 12(d) instructs the court to convert a Rule 12 motion to a motion for summary judgment if one of the parties presents evidence (and then allow the other parties to submit evidence). Moreover, when the merits are intertwined with jurisdictional issues, the standards applicable to summary judgments may be applied. *Bennett v. United States*, 102 F.3d 486, 488, n.1 (11th Cir. 1996).

In general, a denial of a motion for summary judgment is not appealable, but an order granting the motion and entering judgment on the entire case is appealable. For a good primer on what constitutes a final and appealable summary adjudication, *see California ex rel. Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772 (9th Cir. 1998).

§7:96 Timing

A party can move for summary judgment at any time before either the deadline specified in the scheduling order or local rule, or if no deadline is specified, until 30 days after the close of discovery. As a practical matter, however, plan to file the motion after you collect sufficient evidence to rule out genuine issues of material fact, although not so early that the opposing party will be able to secure a Rule 56(d) continuance, arguing discovery is not sufficient yet to permit a meaningful response (see below for further discussion).

If a motion for summary judgment involves complicated issues, consider a request to allow a summary judgment discovery schedule, during which discovery can be taken solely in response to (or on issues related to) the motion. An attempt should be made to work out such a schedule with opposing counsel before applying to the court for an order. This is similar to splitting discovery on class certification issues from discovery on the merits of the claim (*i.e.*, an opportunity for cost-effective discovery that could make other discovery unnecessary).

Deadlines for summary judgment come from various rules and orders. Be sure to review the jurisdiction's local rules and the specific court's "local local" rules which may limit the time for filing. *See, e.g.*, *Pridemore v. Rural Legal Aid Soc'y*, 625 F.Supp. 1180, 1182 (S.D. Ohio 1985). Review the pretrial scheduling order. One court has held that a pretrial order may not prevent bringing the motion at any time. *Manetas v. International Petroleum Carriers, Inc.*, 541 F.2d 408, 413 (3rd Cir. 1976).

If almost no discovery has occurred, the Rule 56(d) can protect a non-moving party. In particular, many courts will not grant the motion for summary judgment until the opposing party has an adequate chance to conduct discovery necessary to develop its claims or defenses. *Redmond v. Burlington N. R. Co. Pension Plan*, 821 F.2d 461, 469 (8th Cir. 1987); *McWay v. LaHood*, 269 F.R.D. 35 (D.D.C. 2010). In fact, the Supreme Court has specifically held that summary judgment may be granted only after the non-moving party has had an adequate amount of time for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986). Rule 56 does not, however, mean that discovery must be closed before a motion for summary judgment can be heard. *Alholm v. American Steamship Company*, 144 F.3d 1172 (8th Cir. 1998). If a party seeks relief from a premature motion for summary judgment and an opportunity to do more discovery, he or she will have to comply with FRCP 56(d) and present a declaration or affidavit to have the court hear the request for an extension of discovery pending summary judgment. *Bradley v. United States*, 299 F.3d 197 (3rd Cir. 2002).

Although technically, there is nothing barring a second attempt at a motion for summary judgment (if you have a reason), courts do not like them and parties will certainly attack them as a "second bite at the apple." A second attempt is proper, however where the court has suggested the nature of the missing evidence needed to prevail and new evidence has been located. *Whitford v. Boglino*, 63 F.3d 527 (7th Cir. 1995); *Williamsburg Wax Museum v. Historical Figures*, 810 F.2d 243, 251 (D.C. Cir. 1987).

§7:97 Procedure

Begin the process by reviewing your proof outline to identify the elements of each cause of action that you must prove or disprove. A defendant can prevail on a summary judgment motion if it disproves only one element of the cause of action or shows that the plaintiff cannot meet its burden of proving each element. *Smith v. Freland*, 954 F.2d 347, 351 (6th Cir. 1992). Specifically, a party can win summary judgment if the opposing party has the burden of proof at trial and you can show the court that the opposing party has insufficient evidence to meet that burden on an essential element of a cause of action or defense. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In contrast, for the plaintiff to win its case by summary judgment, it must prove that there is no genuine issue of fact as to each and every element of its causes of action and that there are no genuine issues of fact as to defendant's affirmative defenses. *Zands v. Nelson*, 797 F.Supp. 805 (S.D. Cal. 1992).

Identify the facts that relate to the element(s) you need to prove or disprove and determine whether any factual dispute exists. If a dispute over the facts exists, determine if the disputed facts are material, *i.e.*, whether the case's outcome would be different if the facts are as your client claims, rather than as the opposing party claims. Review the substantive law to determine whether the facts are material to the resolution of the elements. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the facts are not material, the dispute will not defeat summary judgment. A party moving for or opposing summary judgment must use pinpoint citiations to specific portions of the record that support the presence or absence of a genuine issue of material fact. FRCP 56(c)(1).

Local rules sometimes require a document called a "Separate Statement of Undisputed Facts" (and this may become the requirement in all federal courts at some point). If required, use Form 7-19 as a guide to draft the statement. Include specific facts, not conclusions, and specific references to evidence that supports the facts.

If there is a dispute as to the material facts, and it is a "genuine issue" as to the material facts, *i.e.*, focus on the evidence to determine what can be established at trial if the case goes forward. In other words, determine if the evidence supports both party's versions of the facts. If it does, it will be for the jury to sort out and summary judgment is not appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248-52.

- Determine what evidence exists to prove or disprove each party's version of the facts.
- Some circuits impose strict requirements on the authentication of evidence that is used in support of a motion for summary judgment. For example, deposition excerpts should be accompanied by a court

reporter's certification, not just the affidavit of the attorney who attended the deposition. Moreover, courts may require that the parties identify deposition excerpts by page and line numbers or face the risk that the court will exclude the evidence in its discretion. *Orr v. Bank of America, NT&SA*, 285 F.3d 764 (9th Cir. 2002).

- Evaluate each party's evidence to determine whether it is admissible. The FRE apply to summary judgment motions. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252; *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir. 1989).

Evaluate your chances of winning summary judgment. Remember the court must find that no genuine issue of material fact exists after "viewing the evidence and the inferences that can be drawn therefrom in the light most favorable to the opposing party." *Program Engineer v. Triangle Publications*, 634 F.2d 1188, 1192 (9th Cir. 1980).

Deposition excerpts and affidavits are the most common evidence used in summary judgment practice to establish the existence or non-existence of genuine issues of material fact. In addition, the moving party will often attempt to establish that there is no genuine issue of material fact by attaching responses to requests for admission under FRCP 36, answers to interrogatories under FRCP 33, and written responses to request for production pursuant to FRCP 34. When excerpting depositions for use with a summary judgment motion or response, make sure to include the introductory pages of the deposition along with enough pages to reveal the context of the questions and answers that you rely upon in support of your motion.

After your evidence is together, draft a noticed motion for summary judgment and a supporting memorandum. *Jersey Century Power & Light Co. v. Lacey*, 727 F.2d 1103 (3rd Cir. 1985). To support your legal arguments, review the cases you used to establish your proof outline. They will help you establish the elements you are attempting to prove or disprove. Try to identify at least one case that is factually similar to your case to use as the focus of your memorandum (sometimes referred to as the "purple cow"). Include copies of all affidavits and supporting documents with the motion so that they will be easily available to the judge, and liberally refer to all affidavits and other evidence in the supporting memorandum. In fact, it may be insufficient to merely cite to affidavits or other evidence in the court files without actually attaching the exhibits to the motion. *Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1030 (9th Cir. 2001). Do not hesitate to quote any affidavits verbatim in the memorandum, as long as the quotes are not too long.

Finally, decide whether to ask for oral argument if the case merits it. FRCP 56(c) does not require a formal hearing on a summary judgment motion, and they are rare in federal court, even for dispositive motions. But you should always ask, especially if you are opposing the motion. Also, if appropriate, consider asking to offer oral testimony at the summary judgment hearing. FRCP 43(c); *see generally Argus, Inc. v. Eastman Kodak Co.*, 612 F.Supp. 904 (S.D.N.Y. 1985) (courts might take some testimony in a close case where there is no right to a jury trial).

§7:98 Affidavits and Declarations in Support of Summary Judgment

Draft an affidavit setting forth the facts to which your client can swear on personal knowledge. FRCP 56(c). You may use a declaration instead of an affidavit (this is typical). FRCP 56(c)(4); 28 U.S.C. §1746; *Summers v. United States Dep't of Justice*, 776 F.Supp. 575, 577 (D.D.C. 1991). Consider drafting this affidavit before any other moving papers to ensure a clear understanding of the precise facts you are attempting to prove.

Affidavits and declarations can only include admissible evidence, so be sure to properly authenticate all exhibits attached to the affidavits and declarations, lay a proper foundation for all the testimony, and avoid errors such as including hearsay that would be inadmissible at trial. *Swift Brothers v. Swift and Sons*, 921 F.Supp. 267 (E.D. Pa. 1995). In particular, use the client's affidavit to provide the evidentiary foundation for supporting evidence when appropriate, and avoid conclusory statements without factual support or foundation, because those are often stricken or excluded. *Evans v. Credit Bureau*, 904 F.Supp. 123 (W.D.N.Y. 1995).

FRCP 56(c)(4) requires that unless an expert is rendering an opinion, the affiant or declarant must have personal knowledge of the facts. Beware: The declarant cannot simply say "I have personal knowledge." The affidavit must include facts showing personal knowledge and must not be based on hearsay. *Cormier v. Pennsoil Exp. & Prod. Co.*, 969 F.2d 1559

(5th Cir. 1992). The affidavit must also show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. So-called "information and belief" affidavits are insufficient. *See Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990). The personal knowledge requirement can sometimes be satisfied by obtaining declarations from supervisors or managers, who through their position, are presumed to have personal knowledge over matters within their control. *Sheet Metal Workers v. Madison Indus.*, 84 F.3d 1186, 1193 (9th Cir. 1996).

An expert is permitted to render opinions in reliance upon the kind of hearsay normally relied upon by experts in the field. FRE 703. Thus, an expert affidavit may constitute an exception to the rule under FRCP 56(c)(4), that the affidavit must be based solely on personal knowledge. *Walker v. Kubicz*, 996 F.Supp. 336, 339 (S.D.N.Y. 1998).

Attorney affidavits are allowed, and do not make the attorney a witness, provided the attorney has personal knowledge and the matter is limited to authenticating documents received in discovery, events in the litigation, and other procedural matters that do not address the merits of the client's claims and/or defenses. If the attorney discusses substantive issues, however, s/he may become a witness in the proceeding.

Credibility is not at issue in summary judgment proceedings. Normally, affidavits are accepted as truthful. *United States v. Two Tracts Of Land In Cascade County*, 5 F.3d 1360, 1362 (9th Cir. 1993). However, affidavits cannot be used to contradict deposition testimony (although they can be used to supplement deposition testimony). *Soletro v. National Federal Independent Business*, 130 F.Supp.2d 906, 910 (N.D. Ohio 2001). Further, when preparing affidavits in support of a motion for summary judgment, recognize that opposing counsel may take the deposition of the declarants to undercut their statements.

When drafting the affidavit or declaration, cite evidentiary facts, not ultimate facts. When citing to a deposition, provide the page, line, and the verbatim response, if it is not too long. Also, consider asking the court to take judicial notice of adjudicative facts, such as court records and generally known reference data that can be found in an encyclopedia. FRE 201. Attach to the affidavit or declaration sworn or certified copies of all documents or parts of documents to which the affidavit refers.

Obtain affidavits or declarations from the drafter or record custodian to lay the foundation for admitting business or official records you wish the court to consider. Use requests for admission to authenticate and establish a foundation for documents obtained from opposing parties.

Under FRCP 56(h), if an affidavit has been presented in bad faith or solely for the purpose of delay, the court has the authority to impose sanctions. Bad faith in this context can arise where a party files affidavits that contradict deposition testimony. *In re Gioioso*, 979 F.2d 956, 962 (3rd Cir. 1992). Sanctions can include an order for the party using the affidavit to pay the other party's reasonable expenses, including reasonable attorney's fees (incurred as a result of the affidavit), and an/or order holding the offending party in contempt.

§7:99 Affidavits of Expert Witnesses

Expert affidavits are admissible in summary judgment proceedings as long as they meet certain requirements. FRE 702, 703; *Bulthuis v. Rexall Corp.*, 789 F.2d 1319 (9th Cir. 1985). First, the expert's opinion in the affidavit must be based on specific facts or personal knowledge gained during investigation and analysis. *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333 (9th Cir. 1989). Cf. *Triton Energy Corp. v. Square D Co.*, 69 F.3d 1216, 1222 (7th Cir. 1995) (affidavit insufficient where expert had not examined the product). Second, the stated facts must supply an adequate foundation for the opinion and reveal the analysis of the expert showing how the facts support his opinion. Simple conclusory opinions, or comments based on experience alone, are not sufficient. *Moisenko v. Volkswagon AG*, 20 F.Supp.2d 1129 (W.D. Mich. 1998). Finally, the foundational evidence and opinion must be admissible under FRE 702; that is, the expertise must aid the trier of fact and the opinion must be reliable. *See Daubert v. Merrell Dow Pharm.*, 113 S.Ct. 2786 (1993), *remanded* 43 F.3d 1311 (9th Cir. 1995). In accordance with Daubert, courts scrutinize expert declarations (*see* Chapter 6). Note that in complex cases, the court may hold an "in limine" hearing to determine if a proper evidentiary basis exists for the opinion before accepting the expert declaration. *In re Paoli*, 916 F.2d 829 (3rd Cir. 1990).

§7:100 Tips and Strategy

- Determine the expense of a summary judgment motion. Do not bring a costly summary judgment motion unless you believe you have a reasonably good chance of winning it

or getting a significant advantage or benefit from bringing it.

- Always file an affidavit or declaration with a summary judgment motion, even if it is not strictly necessary. It allows you to present evidence in support of the points in your memorandum.
- The court does not need to grant a summary judgment motion simply because all parties move for it or even stipulate to it; the court must determine that there is no genuine issue of material fact. *Reich v. John Alden Life Ins.*, 940 F.Supp. 418 (D. Mass. 1996).
- Always consider making the motion when the opposition has the burden of proof by a higher evidentiary standard, such as "clear and convincing." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).
- Plan the timing of your summary judgment motion strategically. For example, you may choose to bring the motion so it is pending during mediation. Or you may choose to bring the motion near or after the conclusion of discovery so that the other side cannot argue that genuine issues of material fact could be raised with more discovery and obtain a continuance to better prepare an opposition. *See* FRCP 56(f); *International Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 949 (3rd Cir. 1990).
- If your motion is denied and you acquire more supporting evidence, you should determine if it makes sense to refile your motion, although you will certainly be criticized for attempting a "second bite at the apple," and your client will likely question the expense.
- Normally, plaintiffs seeking damages are not inclined to seek summary judgments on liability. They wish to present the liability facts to the jury so that the jury will hear what the defendant did to cause the injury/incident and award higher damages. Exceptions to this conventional wisdom include the following circumstances:
  - Partial summary judgment of defense counterclaims or affirmative defenses.
  - Client problems involving inadequate funding for trial.
  - Older clients or other special cases where the delay and pressures of preparing and waiting for trial are intolerable.
  - Property damage cases with little jury appeal.
  - Cases where the damages are calculated mechanically.
- Plan your discovery (*i.e.*, depositions, requests for admissions, requests for production, interrogatories) with an eye toward obtaining evidence to use in a summary judgment motion as well as trial.
- The district court has the power to grant summary judgment sua sponte; however, before entering summary judgment, the court should permit the parties a fair opportunity to present evidence and legal argument opposing such a judgment. *Portsmouth Square v. Shareholders Prot. Comm.*, 770 F.2d 866, 869 (9th Cir. 1985). Normally, the court must afford the party affected at least 10 days' notice to file an opposition, and discovery must be completed or of no further benefit to the party being judged against. *St. Paul Mercury Insurance Company v. Williamson*, 224 F.3d 425 (5th Cir. 2000). Based on recent rule changes regarding timing, the court should probably provide at least 14 days' notice to the parties.
- Judicial consideration: If you decide to go forward with the summary judgment motion, take advantage of the opportunity to educate the judge about your case, especially if the case is complex. Many judges want to dispose of a case on a summary judgment if there is justification for doing so. If you have the proper basis for a summary judgment, seize the opportunity. Summary judgment motions are especially encouraged when the suit against certain defendants is wholly unjustified. Those defendants should be dismissed from the case before they are forced to become involved in extensive discovery and other procedures.

B. Opposing Summary Judgment

§7:101 Purpose

Failing to respond to a summary judgment motion may result in an entry of summary judgment against your client. FRCP 56(e); *Hill v. Human Rights Comm'n*, 762 F.Supp. 196, 198 (N.D.Ill. 1991). Accordingly, it is critical to oppose the

motion. Technically, there are two ways to oppose the motion. First, you may file a memorandum in opposition to motion. Second, you may file a cross-motion for summary judgment. *Towne Management Corp. v. Hartford Accidental & Indem. Co.*, 627 F.Supp. 170 (D. Md. 1985). As a practical matter, always file an opposition memorandum even if you intend to cross-move. Note that filing a cross-motion for summary judgment does not require the court to grant summary judgment in favor of one of the parties. *See Beattie v. D.M. Collections, Inc.*, 754 F.Supp. 383, 386 (D. Del. 1991). Often the court will deny both motions.

When opposing a motion for summary judgment, it is important to check local rules to determine what additional pleadings must be filed besides the opposition memorandum. Many jurisdictions require that the moving party file a statement identifying which genuine issues of material fact are allegedly in dispute, and which are not. The party opposing a motion for summary judgment must identify specific admissible evidence in the record that establishes a genuine issue of material fact. FRCP 56(c).

Recognize that the burden of proof at trial impacts the burden on summary judgment. For example, a defendant, who is attempting to win a summary judgment motion based on an affirmative defense, is the party with the burden of proof at trial on that affirmative defense. In that circumstance, it is the defendant and not the plaintiff who has the initial burden with regard to the underlying issues raised in the defense.

If the court denies a motion for summary judgment, the denial is not automatically appealable; however, there are exceptions to the non-appealability of a denial of a summary judgment motion, such as cases involving issues of immunity. *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S.Ct. 1203 (1995).

§7:102 Timing

Local rules provide the specific time requirements.

§7:103 Basis for Opposition

There are four basic mechanisms for opposing a motion for summary judgment:

- Show a genuine issue of material fact exists.
- Show movant cannot prevail as a matter of law.
- Pursuant to FRCP 56(d), object to the motion as premature.
- Object to evidence in moving papers. FRCP 56.

The most common method to oppose summary judgment is demonstrating that a genuine issue of material fact exists. As with a motion in support of summary judgment, your proof may include affidavits, admissions, and evidence obtained through discovery. FRCP 56(c); *Horta v. Sullivan*, 4 F.3d 2, 7-8 (1st Cir. 1993). You may not simply rest on your pleadings or on defects in the moving party's motion, but you must make an affirmative showing by setting forth specific facts that are disputed and material. FRCP 56(c); *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). One of the most effective methods of establishing a genuine issue of material fact is to take the deposition of the witness who has provided an affidavit in support of the motion. If you can establish that the witness either lacks personal knowledge or elicit testimony that is inconsistent with the affidavit, you may be able to show the existence of a genuine issue of material fact and overcome the motion for summary judgment. *Mahan v. Boston Water and Sewer Comm.*, 179 F.R.D. 49 (D. Mass. 1998).

Another method used to defeat a motion for summary judgment is to show that the movant should not win as a matter of law (although this could justify your own summary judgment motion and will usually lead you to bring a cross motion for summary judgment in your client's favor). To accomplish this, review the cases cited against your case in the moving papers and attempt to distinguish them. Pay special attention to whether the court granted or denied the summary judgment motion in the cited cases. If you are seeking summary judgment, try to avoid citing a case for even a helpful point of law when the court denied summary judgment, and vice versa. Even if a case seems to support the movant's position, carefully note the holding. You may be able to argue that the court denied the motion and sent it to the jury because the court could not decide the dispute as a matter of law. Finally, look for other cases supporting your position.

Object to the motion for summary judgment as premature. *See* FRCP 56(d). A FRCP 56(d) affidavit for continuance in response to a motion for summary judgment can be very effective when the motion is filed too early in the discovery process, or where the opposing party is in possession of essential facts for which discovery is necessary before the motion can be effectively opposed. *Resolution Trust Corp. v. Northridge Ass'n*, 22 F.3d 1198 (1st Cir. 1994). To succeed, file affidavits or declarations detailing the need for additional discovery before the motion is heard. *Martin Banks v. Mannoia*, 890 F.Supp. 95 (N.D.N.Y. 1995). Be prepared to show:

- A description of the discovery that you intend to seek;
- An explanation showing how that discovery would preclude a summary judgment; and
- An explanation of why this discovery could not have been obtained earlier. *Price v. Western Resources, Inc.*, 232 F.3d 779 (10th Cir. 2000).

Finally, object to evidence cited in the moving papers. Review the evidence rules and determine if the movant's evidence is inadmissible. You may attack the moving party's evidence by either filing a document entitled "Objections to Evidence" or by filing a motion to strike the improper evidence. *Allen v. Scribner*, 812 F.2d 426, 435 (9th Cir. 1987); FRCP 56(c)(2). Always object to the moving party's declarations (if you have a basis for objecting). Otherwise, the court will accept the facts alleged therein as admissible. *United States. v. Real Property Located at Incline Village*, 47 F.3d 1511, 1520, fn. 3 (9th Cir. 1995). Consult your local rules to determine if you must submit a separate document with your opposition memorandum entitled "Objections to the Evidence," or a motion to strike. *Nissho-Lwai Am. Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988).

§7:104 Tips and Strategy

- Judicial consideration: Theoretically, you do not need to prove your case in your opposition memorandum. You can win summary judgment just by showing that some evidence establishes that a material issue is in controversy. In fact, you win if you can merely show an inference. *See Thomas v. Transamerica Occidental Life Ins. Co.*, 761 F.Supp. 709, 711 (D. Or. 1991). However, use this opportunity to argue your case to the judge even if you do not have to prove it now. The judge will begin to form an opinion about which side's case is "just," and that opinion will inform future rulings. In other words, always weave your theme into everything you present to the court.
- Always consider filing a FRCP 56(f) opposition if a motion for summary judgment is filed before discovery cut-off, or even after cut-off, if additional discovery might enable you to defeat the motion. You may obtain a denial of the summary judgment motion if you can make a specific factual showing of a need for additional time to discover existing facts which are essential to justify the opposition. *See In re Hanford Nuclear Reservation Lit.*, 894 F.Supp. 1436 (E.D. Wash. 1995).
- Your opposition memorandum should be self-contained. The judge or law clerk should not have to review the movant's motion, memorandum, or affidavit to understand your memorandum. Briefly summarize the same facts and issues that the movant raised. If you disagree with statements in the motion, make that clear as you develop your argument.
- In employment discrimination cases, the nature of the proof required to overcome a summary judgment motion on the issue of whether dismissal was due to discrimination may involve indirect evidence and may include attacks on the credibility of the employer's evidence. *See Clements v. Airport Auth. of Washoe County*, 69 F.3d 321 (9th Cir. 1995); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (9th Cir. 1994).
- The affidavit of an expert may be necessary to lay foundation for the admissibility of treatise material used to avoid hearsay objections. In some cases, such as medical malpractice, medical textbook passages may be admissible to establish the general knowledge of the medical community concerning certain procedures and medical risks, as long as the passages are not offered for their truth. *Buttice v. GD Searle & Co.*, 938 F.Supp. 561 (E.D. Mo. 1996).

XV. MOTIONS TO CHANGE TRIAL DATE

A. Motions to Expedite the Trial

§7:105 Purpose

In most cases the court will set a trial date when it enters the scheduling order. File a motion to expedite trial if you wish to set the trial for an earlier date.

§7:106 Timing

Move as soon as you determine the need to expedite the trial. Review the local rules, "local local" rules, and scheduling order regarding the trial date. Recognize that the discovery and motion schedule may need to be revised if trial is expedited.