



## How to defeat (almost) every MSJ

### A STEP-BY-STEP GUIDE TO PREPARING YOUR OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

As consumer advocates, trial (or the imminent threat of it) is where we succeed for our clients. We must always be focused on achieving full justice. And this form of justice can only be realized when a case is on the direct path to trial. For this reason, it is essential that consumer attorneys are confident in their ability to defeat dispositive motions. When a motion for summary judgment arrives in our inbox, we must be prepared to defeat it and continue on our path to full justice.

This article presents a tried-and-true method for defeating almost every motion for summary judgment that comes your way. Of course, there are the occasional cases where discovery reveals that there is truly no dispute of material fact, and where the law mandates dismissal. But for cases that are not ripe for summary adjudication (i.e., the vast majority of civil actions), it is incumbent upon the consumer attorney to have the skills necessary to dispose of such motions.

#### **Day 1: Receive the motion and prepare your file**

Upon receipt of a motion for summary judgment, save it to your file, prepare a “master caption” which you will later use to draft the opposition and supporting documents, and calendar the hearing and your response deadline. The master caption will have your caption page, hearing information, proof of service, and a pre-filled attorney declaration into which you can later

plug your exhibits. This will ensure that when it comes time to write, you do not have to concern yourself with formatting and other technical aspects of the brief. It is a good practice to also calendar reminders one and two weeks out from your deadline.

Also, upon receipt, calculate whether sufficient notice was provided. In the California Superior Court, a motion for summary judgment *must* be served at least 75 days prior to its hearing (plus the allotted time for method of service). A motion that is not timely served is barred from consideration by the court. (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 299 [although the trial court may fashion procedures to mitigate the time problems in complex cases, it has no power to change the notice and filing periods of section 437c].) If a trial court shortens the time for notice to which a plaintiff is entitled, it commits a “due process violation and abuse of discretion.” (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1268.)

Immediately request an electronic version (i.e., in Word format) of the moving party’s separate statement. They must provide a copy within three days upon request. (Cal. Rules of Court, rule 3.1350(i).) This will save you considerable time when responding to the separate statement.

### Week 1: Research

Within the first week of receiving the motion, you will perform preliminary research on the prominent issues. You will need authority relevant to two broad matters: 1) Authority for why your case should proceed to trial, and 2) authority to counter the arguments presented in the motion for summary judgment. While your burden in opposing a motion for summary judgment is only to do the latter, a *persuasive* opposition will go further. Your opposition should not only convince the Court that summary judgment is improper, but that you will prevail at trial. This is the “overkill” approach, and it is highly effective.

To prove your case, begin with the relevant jury instructions. Go to

the “Directions for Use” and “Sources and Authority” sections of each jury instruction and use these as your leaping-off point for research. Bring up the cited cases in your preferred legal research database (e.g., Westlaw, Casetext) and find further citations to those authorities. Go through newly cited cases, secondary authorities, and even trial-court documents (these are actual documents filed in past cases, made publicly available on most legal-research databases). Regarding trial-court documents, you will often find an opposition that tracks the *exact* arguments you need to make. Do not hesitate to pull arguments from these documents. Rarely will you meet attorneys who are not eager to share their work product. We are a community, and when one thrives, we all thrive. If you find a trial-court document that persuasively opposes a motion for summary judgment on the same issue you are presently facing, download it and reference it later when writing your opposition.

As for the moving party’s arguments, begin your counter-research with their cited authorities. Again, use your legal-research database, pulling up the cited authorities and Shepardizing the cases and statutes. Find secondary sources and trial-court documents that lay out why a particular authority is inapplicable in a particular set of facts.

At this step, you are primarily becoming familiar with the applicable law, as it will guide you through the next step – the discovery process. You may pull citations that you find persuasive, but the real research is performed later (discussed below). For now, get a good sense of what is needed to defeat the motion and move your case forward.

### Weeks 2-5: Gather your evidence

The required notice period for a motion for summary judgment allows the opposing party sufficient time to perform any item of discovery under the Discovery Act. You can set depositions, perform site inspections, and propound written discovery. Starting this process as soon as you have performed your initial

research (and thus grasped the necessary scope of the issues) ensures that you will have everything you need to successfully oppose the motion.

A key step in most cases is deposing each witness who provides a declaration in support of the motion for summary judgment. In certain circumstances (such as to challenge foundation), you may even depose expert witnesses who provide such a declaration. However, specify that it is on the limited scope of the issues presented in the motion. This will ensure that you do not waive your right to later depose that witness when they are designated as an expert witness for trial. (*St. Mary Med. Ctr. v. Superior Ct.* (1996) 50 Cal.App.4th 1531, 1540.)

Also at this time, consult with any expert witness who may provide either an expert declaration in opposition to the motion, or who may simply provide work-product consultation. Performing this step early allows the expert to gather whatever information they need for their purposes, such as a site inspection. You may notice a site inspection for 10 days out (Code Civ. Proc., § 2031.010), or the expert may make an unannounced inspection if the subject area is a place of public access. (*Pullin v. Superior Court* (2000) 81 Cal.App.4th 1161.)

You must also ensure you have full written discovery. Go through previously received discovery responses. Make note of any key evidence that you did not inquire about and send a subsequent set of discovery on those topics.

### Week 6-7: Organize your evidence and authorities

*This is the most important step.* Once you have your file loaded with all the evidence necessary to oppose the motion, now is the time to organize that evidence. During this time, you will also continue to research the issues and have a seamless law/fact-finding process.

Start by preparing two Word documents titled “[Case Name] facts” and “[Case Name] research.” This is purely work product, and does not need

to be formatted in any particular fashion. These documents will not look pretty, but will be your goldmine for writing the opposition in the coming weeks.

In your “facts” document, you will place headers for all the sources of evidence you have in your case. For example, depositions, written discovery responses, and documents disclosed in discovery. Under each header, you will write every fact which may be relevant to the motion, followed by a citation to the particular point where it is found within the document (e.g., page and line number of a deposition, response number of an interrogatory, etc.).

This is a meticulous, but necessary, process. Read through all pages of every deposition that is key to the issues. Do not rely on previously prepared deposition summaries. Also read through each and every discovery response provided by the moving party. These are admissions that can often be used to controvert an alleged undisputed fact. Review all documents produced by the moving party. Often, you will find evidence that negates the arguments made in the motion for summary judgment. As you are reading through this discovery that you worked so hard to obtain, pull the key facts (with citations) and place them in your “facts” document. A sample “facts” document is below:

**PMK of City Defendant**

5:6-12: City has a duty to ensure roadway is clear of debris.

13:4-7: Admits that City did not inspect roadway on day of crash.

17:5-18: Indicates that City has a log of all prior crashes on this roadway.

**City Defendant responses to Special Interrogatories, Set One**

Response No. 2: City developed the subject roadway

Response No. 8: Another crash occurred 7 months before our subject crash.

**City Defendant document production**

Bates0087: Plans for subject roadway  
 Bates0112: City minutes for approval of subject roadway

As mentioned above, during this time you will also be continuing your

research. More specifically, this is the step where you will begin pulling case and statute citations for inclusion in your opposition. You can write the most persuasive argument, but it will fall flat if not backed up by strong authority. It is at this step that you need to pull citations for every argument you plan on making in your opposition.

For this step of the research process, you will have your “research” document open as you search through your legal database. As you read cases, pull the exact quotation (with citation) and place it into your document. Do this regardless of whether you will eventually quote this authority or merely paraphrase it while citing to other authority.

When complete, the “research” document will be your universe of legal authority. You will hinder your writing process if you need to return to your legal database and dive into further legal research. There is a reason that there are two weeks reserved for this process (the longest other than collecting discovery, which accounts for time for noticing discovery). You must be patient and collect all authority that will defeat the motion and support your case. Be confident that the research you perform is not only sufficient, but compelling, for your success.

**Week 8: Write the memorandum of points and authorities and attorney declaration**

With your facts and authorities well stocked, you can now begin writing the opposition. Open your Master Caption, create four sections (Introduction, Statement of Facts, Arguments, and Conclusion), and begin writing your introduction. Start with this section to set the tone for the opposition. Keep it short – explain why the motion should be denied, and why your client will prevail at trial – but also make it compelling. Your focus should be on telling the *rest* of the story – those critical parts that the moving party omitted from their briefing. Then, skip ahead to the conclusion and write, “For the foregoing

reasons, Plaintiff respectfully requests that this Court deny Defendant’s motion in its entirety.” Do not elaborate further, for the body of your opposition will be reason enough for denial of the motion. You do not want to save any critical points for the end.

Next, you will develop your client’s story through the section titled “Statement of Facts.” Do not use plain language here. While you are not quite to the arguments section, you are already convincing the court to adopt your position. Again, tell the story that the moving party failed to tell. Place your gathered facts throughout. After each material fact, insert a placeholder (e.g., “[CITE]”) so that you can later pull that fact and place it in your separate statement. If you have clear categories to the facts, insert subheaders to present a clean story. If the issue is singular (e.g., only duty is contested), then there is no need for subheaders in this section.

“Arguments” is the final section you will write. Organization is key. A simplistic, but effective, method is to track the moving party’s arguments. If they have four subheaders, so should your arguments section. A more technical, but still effective, method is to organize your arguments by 1) why the moving party fails to meet their burden, and 2) why your client’s claims should proceed to trial. No matter the layout, keep it very clean. Do not repeat large blocks of arguments, but *do* repeat key evidence if it defeats multiple aspects of the motion. Use emphasis, but with restraint. A paragraph should never contain an underlined sentence, then later a bold and underlined sentence, then even later an italicized sentence. You will drown out all emphasis if you overuse it. Use persuasive, but respectful language. Be firm, but concede facts if you truly have no counter. You will lose credibility if you fight even the indisputable parts of a motion.

It is also at this stage that you will draft the attorney declaration. This should not be argumentative because you are not a witness to the case and

arguments do not belong in declarations. Instead, use it solely to lay the foundation for exhibits, to explain any meet-and-confer process, and to detail any past procedures in the case. You will also use the declaration to support a request for continuance based on the need for further discovery, pursuant to Code of Civil Procedure section 437c, subdivision (h). As for exhibits, you will enumerate them at this time (and certify them with your declaration), as you will reference them in the next step.

### **Week 9: Write the separate statement and other supporting documents**

This is a controversial step. Yes, the separate statement is arguably the most important component of an opposition to a motion for summary judgment. Without it, the court has no evidence properly before it. However, it is *not* important to *draft* the separate statement first. [*Editor's note: Amen!*] In fact, this author recommends the contrary: Prepare the separate statement only after finishing your memorandum of points and authorities and supporting attorney declaration. Done in this order, your separate statement – again, the most important document – will perfectly complement your memorandum and will contain only the pertinent facts and supporting evidence.

Begin the separate statement with your *further* separate statement of material facts. This is where you list all critical facts that you compiled in your earlier “facts” document. Remember that you used all of these facts in the “Statement of Facts” section. Therefore, the process is as follows: 1) read through the “Statement of Facts” and pull all bookmarked facts, placing them in order in the further separate statement, 2) remove all persuasive language (e.g., “The defendant breached their duty when they wholly failed to place any warning sign at the dangerous site” becomes “the defendant did not place any warning sign at the subject site”), and 3) insert your supporting authority (this is simply done by pulling the specific page/line

citations from your “facts” document, and connecting it with whichever exhibit number you have designated that piece of evidence in your attorney declaration).

Once your further separate statement is complete, you can quickly counter the moving party’s separate statement of facts. Go through each fact, and in the opposing column, state whether it is undisputed, disputed (in which case you must provide supporting evidence), or whether you object to the statement. The separate statement is reserved only for *plain* and *concise* material facts. (Code Civ. Proc., § 437c, subd. (b)(1).) Therefore, always object to statements that are not true material facts, i.e., those that are conclusory or argumentative statements. As for those facts which you dispute, you can now pull from your completed further separate statement for the supporting evidence in opposition.

Now is the time to return to your memorandum of points and authorities and provide citations for your material facts. Remember, when placing your material facts throughout the “Statement of Facts,” you inserted placeholders such as “[CITE].” Run through those and replace them with the number designated to each fact in the further separate statement.

Finally, prepare all other supporting documents that you deem necessary. Draft a request for judicial notice if you need to reference pleadings of related cases. Draft any objections to the evidence relied on in the motion. California Rules of Court, rule 3.1354 sets forth the format for this document. Use that format, separating out each point of evidence (e.g., an exhibit, a paragraph of an expert witness declaration) and citing each evidentiary basis for objection. At this time, also format any expert declarations provided by your expert witnesses in the discovery process, above.

### **Day 74 (the day before the due date): Finalize the opposition**

Finalize your papers the day before they are due. This is a simple rule, but

an important one. The day your papers are due, you should only be reviewing for completeness (i.e., to ensure all pleadings are in order, that you attached all exhibits, etc.). Do not wait until this day to perform any substantive work on the opposition. With adequate preparation, you can file and serve the papers early in the morning on their due date and rest easy knowing you have submitted your best work.

### **The day before the hearing: Prepare your arguments**

Check the tentative ruling. Whether it is in your favor or not, be well prepared for the hearing. Review the motion, your opposition, the reply, and the separate statement. Review key evidence, but do not get bogged down. Focus on the high points. Your detailed preparation for writing the motion will mean you are already well-acquainted with the nuanced facts. Because you will already know those facts cold, you can focus on the winning arguments.

Draft a rough outline of your points. Include the important case cites. You will have this document open during oral argument. In fact, at the hearing, while the opposing side is arguing, take notes on this document so that you can accurately counter their arguments. Remote appearances help in this regard – mute yourself when they are speaking and type away.

While the moving party need not reply to your further separate statement of material facts, they often do so anyway. Use this to your advantage. Go through and make note of each disputed fact (both that you dispute of their facts, and that they dispute of your further facts). At oral argument, you will highlight these to show the Court that there remains a genuine dispute of fact.

### **At the hearing**

If planned well, your perfectly crafted written arguments should suffice. However, do not forget your advocacy skills. Be prepared to explain to the Court why summary adjudication is improper. If the court provides a tentative ruling,

and it is not in your favor, present your biggest points with great emphasis on the disputed facts. Tell the Court why the case must proceed. Present your case with the same zeal as if you were in trial, and you will succeed.

*Travis Davis is a partner at The Simon Law Group, LLP, where he runs the firm's Law and Motion Department. He practices primarily in personal injury and third-party bad faith cases. Travis earned his J.D. from Thomas Jefferson School of Law in San Diego, graduating Summa*

*Cum Laude. He was the executive editor of the Law Review in his final year of law school. He is admitted to practice in California and Arizona and can be reached at [travis@justiceteam.com](mailto:travis@justiceteam.com). He encourages anyone to reach out for templates or general help on their cases.*