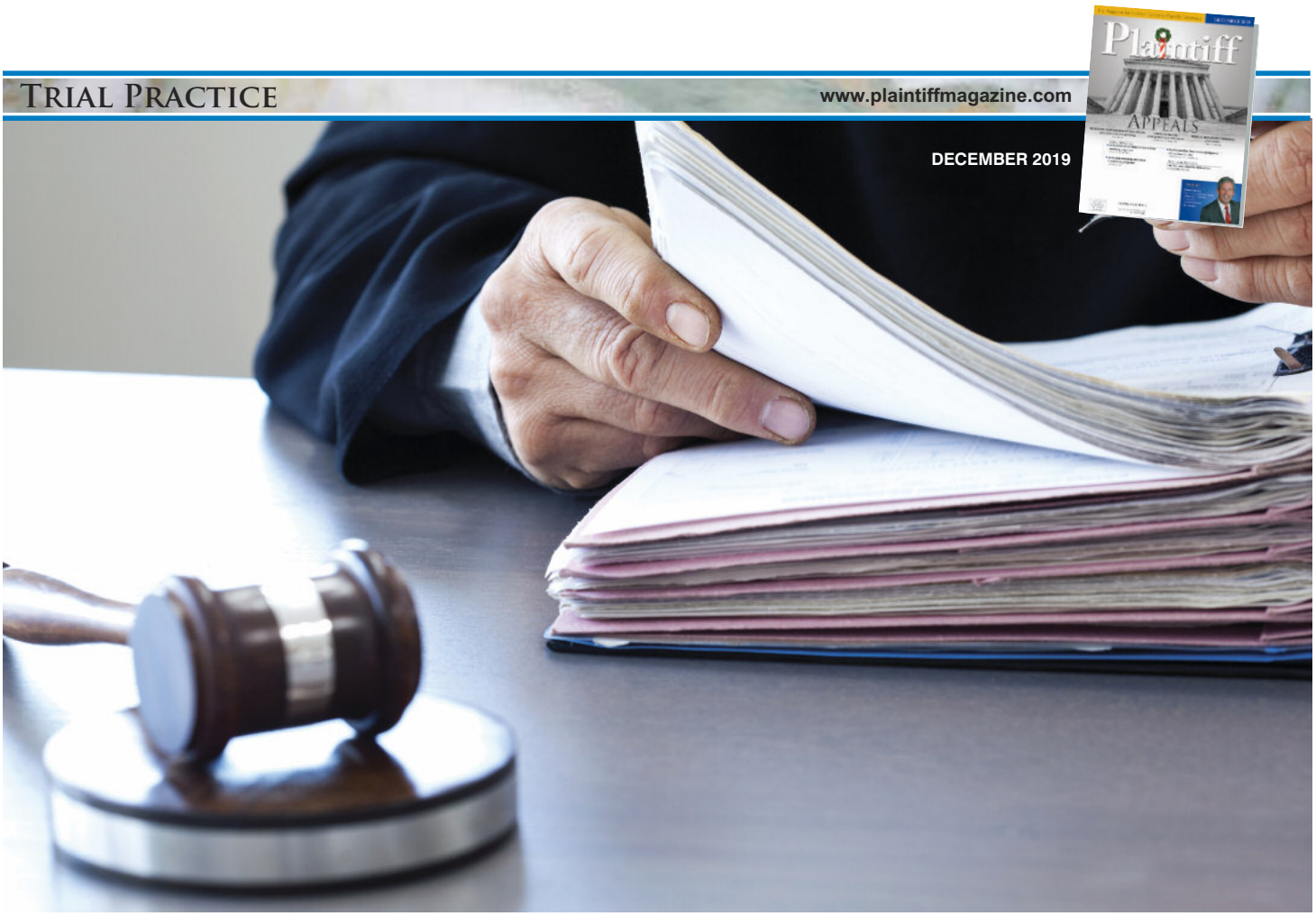


Taking advantage of evidentiary objections to defeat summary judgment

The motion for summary judgment is a trial on the papers and the rules of evidence apply

By Alexandra A. Hamilton

Even if you have a fool-proof case, there is nothing like receiving a motion for summary judgment to ruin a day. Before the panic sets in, turn to defendant's declarations and evidence. Many attorneys file motions for summary judgment without ensuring that the evidence in support of the motion is admissible. If you can successfully knock out defendant's evidence, you give the court more ammunition to deny the motion.

Admissible evidence is required

Many attorneys will file a motion for summary judgement as if it is a discovery motion – relying solely on the existence of the evidence rather than the admissibility of the evidence. To prevail on a motion for summary judgment, the moving party has the initial burden of demonstrating, *through admissible evidence*, that a cause of action has no merit, either because one or more elements of the cause of action cannot be established or because there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (o)(2) & 437c subd. (p)(2) ; *IT Corp. v. Superior Court* (1978) 83 Cal.App.3d 443, 451-52; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.) The plaintiff does not need to produce evidence to demonstrate that a triable issue of material fact exists, until the defendant meets its burden. (Code Civ. Proc., § 437c, subd. (d).) "If the defendant does not satisfy its burden as the moving party, the motion must be denied…" (*Chevron U.S.A., Inc., v. Superior Court* (1992) 4 Cal.App.4th 544, 548 (citations omitted), overruled in part by *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245.)

If the defendant claims that a fact is a material fact but the only evidence cited is inadmissible, then the defendant has not met its burden. To win the motion, focus on knocking out defendant's evidence and shoring up your own. Below are some common examples of evidentiary objections you can raise in opposing a motion for summary judgment.

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Documentary evidence

For the documentary evidence (e.g., emails, correspondence, contracts, photographs, etc.), consider whether the evidence is even relevant. Next, has someone – either through deposition testimony or a declaration – laid the foundation for the evidence? Does that person have personal knowledge? Is the evidence authenticated? Has the foundational evidence been included in the moving papers?

A frequent occurrence is when the moving party's attorney files a declaration attesting to the relevance and authenticity of the document. For example, the attorney may state: "Attached as Exhibit 6 is a true and correct copy of a photograph of the scene on the day of the incident." Assuming the attorney was not present on the day of the incident, the attorney has no personal knowledge to support his or her statement that the photograph is true and correct or that it accurately depicts the incident scene on the day of the incident. If defendant has not provided any percipient witness testimony (including how that witness has personal knowledge) to lay the foundation, that photograph should be excluded under Evidence Code section 403.

Next, is the document hearsay? Is the evidence an out-of-court statement asserted for the truth of the matter asserted? If so, is there evidence that establishes an exception? Attorneys are familiar with this rule for trial but oftentimes forget that the motion for summary judgment is a trial on the papers, so exceptions for the hearsay must be established.

When opposing a motion for summary judgment, you should shore up your own evidentiary support from deposition testimony, discovery responses, or stipulations with defense counsel regarding the authenticity or admissibility of documents. These should all be carefully laid out in the declaration. I make sure that my evidentiary foundation and hearsay exceptions are included in my declaration in the same paragraph as the exhibit I wish to admit, e.g.:

> 3. Attached as Exhibit 12 is a true and correct copy of a document titled "Report" produced by Defendant Doe Corporation at CORP000082-83 and which was marked as *Exhibit 3* during Jane Doe's deposition. According to Jane Doe's testimony, Exhibit 12 was written by Jane Doe approximately one to two hours after the incident and included information provided to Jane by Individual Defendants and other Defendant Doe Corporation employees. (See Exhibit 11 [Jane Doe Depo.] at 12:24-13:1, 30:15-17, 35:4-6, 36:23-37:11, 38:07-13, 39:11-15, 40:11-23, 41:6-11; see also Exhibit 1 [John Doe Depo.] at 122:06-123:18.)

This allows the court to quickly find the evidentiary support for the document's admissibility.

Expert declarations/affidavits

Expert declarations must be scrutinized carefully. First, has the defendant included just an expert report attached to the attorney's declaration and not an expert declaration? If so, then the report is hearsay and should be excluded.

If the moving party included an expert declaration, look to see whether it has set forth the necessary foundation. An expert opinion is inadmissible if it is based on guess, speculation, conjecture, or matters not reasonably relied upon by experts in their field. If the expert has not laid the foundation in his or her declaration, you can use *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 and other cases to knock out the declaration.

Examine the declaration to determine if the expert: (1) laid out his or her qualifications; (2) included the citations to the studies or materials he or she relied on; (3) explained what the "industry standards" were or the basis for his or her knowledge; and (4) included the evidentiary foundation that he or she relied on to get the ultimate conclusions. It is also important to consider whether the expert cited to case-specific hearsay to support his or her declaration. If so, the moving papers must have established the hearsay exception. (*People. v. Sanchez* (2016) 63 Cal.4th 665, 685-686.)

When I receive a motion for summary judgment with an expert declaration, I immediately notice the expert's deposition under *St. Mary Medical Center v. Superior Court.* (1996) 50 Cal.App.4th 1531. California courts have acknowledged a party's right to depose an expert in preparation for opposing to a motion for summary judgment, pursuant to the *St. Mary* case. The court in *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703, 719 stated: "if respondents had desired to do so, they could have deposed [the expert] in an attempt to demonstrate his opinions had no basis in fact or science." Using the deposition, you can demonstrate that the expert's opinions, as contained in the declaration, are inadmissible.

Conclusion

If you can successfully knock out some or all of defendant's evidence, you provide the court with an additional reason to deny the motion. To prevent defendant from trying to rehabilitate its evidence, it can be helpful to remind the court and defense counsel in the opposition papers that the moving party cannot introduce new evidence in its reply.


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