DANIEL R. SCHRAMM, L.L.C.

Attorney at Law
121 Chesterfield Business Parkway
Chesterfield, Missouri 63005
Phone: (636) 532-2300
Fax: (636) 532-6002
Email: daniel@dschrammlaw.com
Web site: www.dschrammlaw.com

DRAFTING A PERSUASIVE MOTION FOR SUMMARY JUDGMENT

I am a solo practice attorney who concentrates, among other things, in helping other lawyers to write trial and appellate briefs. I also teach law students how to write briefs as an adjunct faculty member for the moot court program at Saint Louis University School of Law. This article is designed to provide general guidance to any Missouri lawyer contemplating a motion for summary judgment. The facts and the law in each case are different. And, of course, not every motion for summary judgment presents a winning argument. But in my experience, you can improve your chance of winning by considering a few basic rules in crafting a persuasive motion and legal memorandum.

Familiarize Yourself with the Summary Judgment Rule: Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. Summary judgment can be a useful procedural tool to dispose of the entire case, or to narrow the issues for trial. When you draft a motion for summary judgment, you must comply with Missouri Supreme Court Rule 74.04. The seminal Missouri case for interpreting the rule is *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993).

ITT Commercial Finance provides a blueprint for identifying the potential grounds for summary judgment and allocating the burdens for the claimant and defending party in deciding the motion. Defendants, of course, file the vast majority of motions for summary judgment. But in rare circumstances, a plaintiff also can pursue this remedy for a claim that is not subject to a genuine dispute. To see if summary judgment is appropriate, you must begin your analysis by reviewing Rule 74.04 and its interpretation by the Missouri Supreme Court.

Drafting the Motion: The motion for summary judgment itself "shall summarily state the basis for the motion."[1] In drafting the motion, you want to declare in a summary fashion that there is no genuine factual dispute on those elements or defenses that constitute a proper basis for granting summary judgment under *ITT Commercial Finance*. This helps to frame the issues for the trial judge. You should reserve a more detailed argument for the legal memorandum.

When putting together the motion, you should be selective and present only those issues on which you have a reasonable chance of winning. As a general proposition, you are more likely to prevail on legal over factual issues. For instance, good issues for summary judgment might include the argument that the defendant owed no legal duty to the plaintiff; that the plaintiff failed to produce a writing to satisfy the statute of frauds; or that the plaintiff's action is barred by a statute of limitations. By contrast, you are less likely to win if you claim that the plaintiff failed to present enough evidence to prove an element like causation. That kind of factual argument might be better left for the jury.

Drafting the Statement of Uncontroverted Material Facts: Under Rule 74.04(c)(1), you must present, in separately numbered paragraphs "each material fact as to which movant claims there is no genuine issue…." And each paragraph must contain specific references to pleadings, discovery, exhibits or affidavits to support the facts contained in the paragraph.

Judge Julian Bush admonishes lawyers, first, to confine their statement of uncontroverted facts to ultimate facts tied to the elements of a claim or defense, and second, to avoid getting bogged down in too much evidentiary detail.[2] This is excellent advice. The trial judge is likely to be turned off by dozens of purported facts that are not truly necessary to decide the motion. From a practical perspective, if you contend that too many facts are material, you give an opening for the opposing party to raise genuine disputes. For a majority of motions, less is more.

A few practical suggestions may be useful here. Despite Judge Bush's admonition to limit yourself to ultimate facts, I do not believe it hurts to present a couple introductory paragraphs to orient the judge to what the case is about. Yet you should never use these background facts to be argumentative – for that may lead to unnecessary factual disputes. When you get to the material facts necessary

[1] Mo.Sup.Ct. Rule 74.04(c)(1).
[2] Hon. J. Bush, "How to Write a Motion for Summary Judgment," J. Mo. Bar (March–April, 2007).

to set up your motion, you want to present unassailable facts from the record. So, for instance, the best evidence usually is an admission from a deposition, pleading, or a response to a request for an admission. Or it could be an uncontroverted fact from an authenticated exhibit or a public record. An affidavit will work if it cannot be rebutted with a counter-affidavit from another witness. But deposition testimony is harder to refute. Once the moving party shows that a witness admitted a material fact in a deposition, the opposing party ordinarily will not be able to create a genuine dispute by having the witness recant the prior testimony with an affidavit.

Just like with an appellate brief, I recommend that you not try to oversell your material facts with unprovable adjectives and adverbs. Those kinds of words open you up to potential factual disputes.

Drafting the Legal Memorandum: The third document required by Rule 74.04 is the "separate legal memorandum explaining why summary judgment should be granted."[3] Here is where you want to apply techniques for crafting a persuasive written argument. I will devote the balance of this article to the memorandum.

A. Grab the Judge's Attention with a Strong Introduction: You should not force the trial judge to sift through your written argument to figure out your main points. Instead, you want to grab the judge's attention as soon a possible with a strong introduction. The legal writing expert, Ross Guberman, identifies four types of introductions that are commonly used by the nation's top lawyers.[4] First, Guberman suggests a "brass tacks" model where you highlight the who, what, where, why and how of the motion. Second, he suggests that you can present a "short list" of numbered reasons why you should win. Third, Guberman suggests that you try to answer the question, "Why should I care?" Under this model, you try to highlight the potential adverse effects of a ruling for the other side. Finally, he identifies the "Don't be fooled" model. Under this last approach, you draw a distinction between the parties' two contrasting views of the motion and explain why the other side's view is wrong. In his recent book, Guberman provides examples of each of these four models.[5] I encourage you review the book and

[3] Mo.Sup.Ct. Rule 74.04(c)(1)
[4] See, R. Guberman, Point Made: How to Write Like the Nation's Top Advocates (Oxford Univ. Press 2011).
[5] *Id.*

apply one of his approaches in the introductory paragraph of your memorandum.

B. Structure Your Argument to Answer the Judge's Questions: I also encourage you to use Ross Guberman's approach to structuring the argument of your memorandum. Under the Guberman approach, you match your structure to the judge's questions, not your authority. Guberman places great emphasis upon the proper use of topic sentences. Make sure that the topic sentence of every paragraph, if true, helps you win. And make sure that the topic sentences, in sequence, create a cogent argument.[6]

Most law students are taught to use the traditional TREAT or IRAC format. TREAT stands for Thesis, Rule, Explanation, Application, and a restatement of the Thesis in the conclusion. IRAC stands for Issue, Rule, Application and Conclusion. The approach is essentially the same for both formats. I consider this format to be a useful way of answering the judge's questions for most summary judgment motions.

If you apply the TREAT or IRAC structure, I would weave into the format an explanation of why the judge should not adopt the other side's expected argument – assuming, of course, that you know what that opposing argument will be. In my mind, that is an essential question you ought to try to answer in your legal memorandum. Some lawyers disagree, but I normally will not hold back an argument and save it for the reply brief. In my opinion, this approach can be dangerous in summary judgment motions. Depending on the issue, the argument may not provide a proper basis for granting relief if it is not spelled out in your initial motion.[7] And as a practical matter, the judge may decide against your client before he or she ever gets to the reply.

C. Keep it Simple: Just like with an appellate brief, I encourage you to make the arguments in your memorandum simple and easy to read. You should not make the judge's task more difficult by using convoluted sentences, long paragraphs, abstract sentence subjects, passive verbs, and arcane legal jargon. Follow the trend of modern brief writing by simplifying your memorandum wherever possible.

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[6] *Id.*

[7] Under Mo.Sup.Ct Rule 74.04(c)(3), the moving party's reply ordinarily should be used to reply to the adverse party's legal memorandum, and to respond to any additional facts raised in the adverse party's response. The judge could question your motive for using the reply to raise a new issue.

To that end, I suggest a few basic rules: Try to use short and simple sentences. Resist the temptation to string together related concepts with conjuntions and dependant clauses. Keep your paragraphs down to no longer than half the page. If a paragraph is running too long, break it up into manageable parts. And to the extent you can, try to use parties, people or courts as the subject of your sentences, as opposed to abstract legal concepts. You should employ action verbs for the majority of your sentences. Consistent with this theme, Judge Mark Painter suggests that you use what he calls "the 1818 Rule."[8] You should try to structure your sentences so that they average no more than 18 words per sentence, and you should use a passive voice for no more than 18% of your sentences. Whatever approach you use, try to keep it simple.

Ross Guberman admonishes lawyers to trim "flab and clutter" with an extensive list of specific cuts lawyers should make.[9] I direct your attention to a few illustrative examples of such "flab and clutter." Avoid words like, "clearly," "obviously," "plainly" and "patently." They add nothing of substance and they can be an irritant to the judge. In a similar vein, avoid bombastic words like "absurd" and "ridiculous." One lawyer once described the use of such words as "the written equivalent of shouting."[10] Finally, minimize the use of archaic legal terminology. In my mind, there is no justification for using legal jargon like "aforesaid" or "hereinafter." In the words of Judge Myron Bright of the Eighth Circuit, "Write in English, not legalize."[11]

Conclusion: By following these basic rules and adhering to the requirements for presenting a motion for summary judgment under Rule 74.04, you can make the judge's life easier and give yourself a reasonable chance of success.

[8] M. Painter, The Legal Writer, pp. 66-79 (3d ed. Jarndyce & Jarndyce Press 2005).
[9] See, R. Guberman, Point Made: How to Write Like the Nation's Top Advocates (Oxford Univ. Press 2011).
[10] C. Lutz, "Why Can't Lawyers Write?" 15 Litigation 26 (Winter, 1989, ABA).
[11] M. Bright, "Appellate Brief Writing: Some 'Golden Rules," 17 Creighton L.Rev. 1069 (1984).

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