

# TEXAS LAWYER

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## How to Prevail at a Summary Judgment Hearing

by **JAMES M. STANTON**

My time on the state district court bench taught me that summary judgment hearings generally are too long, too confusing and too overwhelming for the judge. To prevail at a summary judgment hearing, consider keeping it short, direct and familiar for the court, and be prepared to make a stimulating presentation by using visual aids. This will make the judge eagerly await the summary judgment hearing.

- **Short and direct:** When you have the burden to establish something as a matter of law, leave out the boilerplate legal standard and instead go with the best legal and factual arguments. Try not to argue in the alternative. Remember, there is no legal requirement to include all possible grounds in a single motion for summary judgment in Texas state court. If a lawyer has three summary judgment arguments — one winner, one close call and one loser — nothing prevents him from moving only on the winning argument first. After a lawyer earns a summary judgment ruling on one claim and gains some credibility and momentum with the court, he can return for the close call argument.

Remember that the judge's decision to grant summary judgment is subject to *de novo* review at the court of appeals. This means that at least nine people — three court of appeals justices and collectively their six law clerks — will evaluate the decision with substantially more time and resources than the trial judge. This is another reason to take the most direct legal and factual route to getting the trial court to grant summary judgment. Pay attention

to the judge's concerns about the argument, then look for the right opportunity to plug in secondary and rebuttal arguments.

- **Familiar:** Trial judges use the pattern jury charge all the time. Summary judgment is the procedural device to resolve certain claims without a jury's intervention. A summary judgment motion becomes easier for the judge to understand when put in the familiar context of a question the trial judge has to decide in every case: What is going to be submitted to the jury?

When arguing a traditional motion for summary judgment, the movant must establish that no legally cognizable claim exists to be submitted to the jury. What better way for the movant to meet its burden than to demonstrate there is no way to submit the nonmovant's claim in the charge because it is not in the pattern jury charge or, even better, that it has never been done in the history of reported Texas case law?

When arguing a no-evidence motion for summary judgment, the nonmovant must produce enough evidence to support a jury finding. Stated differently, if the jury heard all the admissible evidence and returned a verdict on the nonmovant's claim, would the trial court enter judgment notwithstanding the verdict because the jury's verdict was not supported by legally competent evidence? Using the pattern jury charge to show the exact question the jury will consider is a powerful tool to make this point.

Particularly helpful for nonmovants is the jury instruction that jurors are the sole judges of the credibility of the witnesses and the weight to be

given their testimony. When arguing a no-evidence motion, the skillful advocate should remind the trial judge that she cannot grant summary judgment if the credibility of a witness must be assessed. Under Texas law, a jury must decide whether a witness is telling the truth.

- **Stimulating:** Pay attention to what piques the judge's curiosity during the hearing. Any questions or verbal observations about the arguments are fertile ground, but also look for body language. Psychologists have said that 90 percent of communication is nonverbal, so watch the judge to see when she signals interest by closely following along and, conversely, when she checks her online docket or the clock to find out how much longer she has to listen to you talk. A skillful advocate must be able to react to the judge and quickly shift gears to avoid wasting time on arguments the judge already has mentally addressed.

On whole, summary judgment hearings are boring and, because summary judgment is such a severe remedy, judges grant few motions. Summary judgment practice essentially is a "trial on paper" and the judge cannot consider arguments outside the summary judgment record. But, this doesn't mean a lawyer cannot emphasize his best points at the hearing. For example, don't be afraid to play video of the crucial deposition testimony or use enlarged or highlighted copies of key documents, especially in response to questions from the court or in rebuttal to opposing counsel's presentation.

Finally, and perhaps most importantly, judges want to make the right decision. This means using the head and heart to make legally sound decisions while being fair to the parties. When the court expresses a concern that counsel's proposed result would be unjust, it is poor advocacy to respond with, "That's just the law even if it is unfair." Instead, be prepared to explain why the legally sound argument

being made also is the fair result given the facts of the case. Tell the judge why she should feel good about making her decision.

*James M. Stanton is a commercial trial counsel at Andrews Kurth in Dallas. He represents corporations and entrepreneurs in business disputes that go to court. He previously served as a state district judge in Dallas. He is board certified in civil trial law by the Texas Board of Legal Specialization. As a lawyer and judge, his experience includes more than 100 trials and thousands of hearings.*



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