Submitting Evidence in Support of a Motion for Summary Judgment (Federal)

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This article discusses how to submit evidence with a summary judgment motion in federal court and covers topics such as the burden to show admissibility, declarations and affidavits, the sham affidavit doctrine, expert witness declarations, exhibits, deposition transcript errata, requests for judicial notice, oral testimony, stipulations, and how to make objections to evidence.

THE SUMMARY JUDGMENT PAPERS MUST CLEARLY IDENTIFY what evidence in the record supports an asserted fact, as well as where that evidence is located in the record.[1] The trial court has no obligation to consider evidence that is not cited to in the papers, even if the evidence is in the record.[2] The court may, however, consider admissible evidence in the record even if a party does not cite to the evidence.[3]

Burden to Show Admissibility

Evidence submitted in connection with summary judgment does not have to be presented in an admissible form. The trial court may consider the evidence on summary judgment provided the submitting party demonstrates that it would be possible to present the evidence in admissible form at trial.[4]

The submitting party bears the burden of showing that the evidence is admissible as presented, or that it could be presented in admissible form at trial.[5]

For example, a trial court did not err in considering expert reports in connection with summary judgment. Although the reports themselves would not be admissible at trial, the experts submitted declarations attesting that they would testify to the matters

set forth in their reports. As their testimony would be admissible at trial, the submitting party met its burden of explaining the admissible form of the reports' content.[6]

Declarations or Affidavits

The declaration/affidavit must be based on the declarant's personal knowledge.[7] The personal knowledge requirement for a declarant on summary judgment is minimal; if reasonable persons could differ as to whether the witness has personal knowledge of the facts stated, the declaration testimony is admissible.[8]

Whether the personal knowledge requirement is met may be inferred from the contents of the affidavit or declaration.[9]

For instance, an affiant's personal knowledge can be reasonably inferred from his or her position and from the nature of his or her personal participation in the matters sworn to in the affidavit.[10]

Similarly, if the affidavit's content makes clear that the affiant relies on information from others rather than firsthand participation or experience, the court may properly refuse to consider the affidavit as not based on personal knowledge.[11]

A statement by a declarant/affiant that she believes a fact to be true or attests to a fact upon information or belief does not satisfy the requirement that the witness have personal knowledge of the fact.[12]

The declaration/affidavit must set out facts that would be admissible in evidence at trial.[13] As previously noted, the facts do not have to be in an admissible form.[14] A declaration is generally not admissible at trial; however, the facts asserted to in the declaration are admissible on summary judgment if they would be admissible if testified to by the declarant at trial.[15]

Hearsay statements in a declaration that would be inadmissible if testified to at trial are not admissible on summary judgment.[16]

For example, in a civil forfeiture action, the district court's grant of summary judgment had to be reversed because the government's sole evidence in support of summary judgment was a declaration based entirely on hearsay. The district court should have struck the declaration as inadmissible.[17]

The declaration/affidavit must show that the declarant is competent to testify on the matters stated in the declaration.[18]

For instance, in an Americans with Disabilities Act case a plaintiff was competent to submit a declaration describing her injuries and symptoms, such as her pain and difficulties while walking, standing, and lifting. As the plaintiff was not a medical professional, however, she was not competent to diagnose her condition or state how that condition limited her major life activities. Those matters were beyond the plaintiff's common experience and instead required an expert.[19]

Declaration Versus Notarized Affidavit

A declaration instead of a notarized affidavit is acceptable provided the declaration is signed under penalty of perjury.[20] The declaration should be signed with the following: "I declare (or certify, verify, or state) under penalty of perjury that the

foregoing is true and correct. Executed on (date)."[21] An undated declaration may be stricken as noncompliant with 28 U.S.C.S. § 1746.[22]

If, after giving a party notice and an opportunity to be heard, a court finds that a declaration or affidavit was submitted on summary judgment in bad faith or for the purposes of delay, the court may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result of the submission of the declaration or affidavit. The court may also impose other appropriate sanctions on the offending party or attorney.[23]

Sham Affidavit Doctrine

A party may not create a material issue of fact to defeat summary judgment by submitting an affidavit that disputes prior sworn testimony of the affiant. This rule is known as the sham affidavit doctrine.[24]

The practical reason for the rule is that deposition testimony is deemed more reliable than a declaration or an affidavit.[25] If a party could raise an issue of fact defeating summary judgment simply by submitting an affidavit contradicting prior sworn testimony, the utility of summary judgment would be greatly diminished.[26]

For example, at her deposition a witness was unable to identify the manufacturer of a fuel canister. In an affidavit submitted in opposition to summary judgment, the witness identified the fuel manufacturer. In resolving the summary judgment motion, the district court properly disregarded the affidavit statement.[27]

To be properly disregarded, the trial judge must find that the declaration statement directly and unambiguously contradicts the prior sworn testimony such that it could be considered a sham.[28]

For instance, the plaintiff's deposition testimony could reasonably be interpreted as the plaintiff testifying that she had never complained to a particular person that the plaintiff had suffered age discrimination. In the plaintiff's summary judgment declaration, she testified that she had complained to that particular person about other people being discriminated against on account of race. The court of appeals held that the declaration testimony did not directly contradict the plaintiff's testimony that she had never complained about her own discrimination, and therefore the district court erred in disregarding the declaration on summary judgment.[29]

An affidavit that satisfactorily explains an apparent contradiction between the affidavit testimony and the prior sworn testimony should not be disregarded as a sham.[30] A non-moving party is not precluded from elaborating upon, explaining, or clarifying prior testimony elicited by opposing counsel at deposition, and minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence are not grounds for excluding an affidavit.[31]

The sham affidavit doctrine should be applied with caution because it is in tension with the rule that the trial judge should not make credibility decisions or weigh the evidence in resolving summary judgment motions.[32]

Declaration Contradicts Objective Evidence

A declaration statement that contradicts objective evidence such as an unambiguous videotape may not create a dispute of fact defeating summary judgment.[33]

For example, the plaintiff's summary judgment testimony that he was not fleeing from police and was not driving recklessly and therefore was not a threat did not create a "genuine" dispute of fact as to whether he posed a threat in a Section 1983 action where the plaintiff's testimony was "blatantly contradicted" by videotape of the incident.[34]

Self-Serving Declaration

A declaration may not be disregarded merely because it is self-serving.[35] Its self-serving nature bears on the weight to be given by the trier of fact and not whether on summary judgment the trial judge must draw all reasonable inferences from the declaration testimony.[36]

Attorney Declaration or Affidavit

A declaration or affidavit from an attorney representing a party in the case must meet the same requirements as a declaration from any other witness.[37] Counsel rarely has the personal knowledge needed to properly testify to the facts in the case.[38]

For instance, counsel's declaration in opposition to summary judgment was not entitled to any weight because counsel lacked personal knowledge of the facts stated.[39]

A party's attorney generally cannot authenticate documents; instead, the authentication must be provided by a witness with personal knowledge.[40] However:

- An attorney can authenticate documents of which the attorney has personal knowledge, such as documents created by the attorney.[41]
- An attorney can also authenticate documents by attesting that the documents were produced by the opposing party in the litigation, provided the attorney has personal knowledge of such fact.
- An attorney cannot authenticate a deposition transcript even if the attorney was present at the deposition.[42]

A party's attorney can submit a declaration on certain matters:

- An attorney can offer testimony on matters of which the attorney has personal knowledge, such as interactions with opposing counsel.
- An attorney declaration can attach documents that are otherwise authenticated via stipulation or self-authentication or the documents' distinct characteristics.[43]
- An attorney declaration can attach documents about which the attorney has personal knowledge, such as the opposing party's discovery responses or written communications with opposing counsel.

If a document's authenticity is stipulated to or it is self-authenticating, say so in the declaration paragraph that identifies the document attached to the attorney declaration.

On summary judgment counsel frequently submit declarations that improperly argue the case's merits or the meaning of certain evidence. For example, a declaration from an attorney will attach a document and then assert what the document means. The attorney has no personal knowledge of the document and thus may not testify as to what the document means.[44] Whenever an attorney submits such a declaration, the opposing party feels the need to object to the declaration, or at least these

inadmissible portions. Such declarations thus increase the costs and burdens on the parties. Moreover, the declarations are a waste of time as the trial judge will disregard them. All arguments should be in the summary judgment memorandum with citations to the admissible evidence in the record that supports the argument.

Expert Witness Declaration

The expert's declaration must show that the expert is competent to testify to the matters stated.[45] For an expert witness, that means showing that the expert is qualified "by knowledge, skill, experience, training, or education" to testify as to the matters stated.[46]

For example, a clinical psychiatrist was not competent to testify as to the rates of drug use among a certain population. A social scientist or statistician with experience conducting surveys or analyzing their results might be competent to so testify; however, the expert clinical psychiatrist did not have such expertise. The district court therefore did not abuse its discretion in refusing to consider the expert's summary judgment declaration.[47]

Set Out Admissible Facts

The expert's declaration must set out facts that would be admissible at trial.[48] This requirement means that the expert declaration must do more than merely state the expert's conclusion; the declaration must identify the facts upon which the opinion is based.[49]

For instance, an expert declaration that stated in conclusory terms that the officer defendant's use of force was unreasonable was insufficient to create a genuine issue of material fact on plaintiff's excessive force claim.[50]

The requirement that an expert summary judgment declaration include the facts upon which an opinion is based initially appears to contradict Federal Rule of Evidence 705, which provides that an expert may give an opinion without first testifying to the underlying facts or data. Rule 705 also provides, however, that the expert may be required to disclose the facts or data upon cross examination.[51] As there is no cross examination on summary judgment, the courts have required the disclosure of the facts and data to be included in the declaration.[52]

Courts have drawn a distinction between the declaration, including the facts upon which the opinion is based, and the underlying facts and data, with the latter not having to be disclosed in the expert's declaration.[53]

Explain Expert's Reasoning

Some courts of appeals require the expert's declaration to set forth the expert's reasoning in reaching the expert's opinion, in addition to the facts upon which the opinion is based.[54] The U.S. Courts of Appeal for the Ninth and D.C. Circuits expressly do not require the expert to set forth the reasoning.[55]

To avoid having an expert's summary judgment declaration stricken, have the expert's declaration include the reasons for the opinion as well as identify the facts supporting the opinion. An unsworn expert report may be admissible on summary judgment if the expert submits a declaration attesting that the expert could testify to the report's content.[56]

Unlike a lay witness, an expert witness is not required to show personal knowledge. The expert may rely on facts or data that the expert has been made aware of if they are the kinds of facts or data that experts in the relevant field would reasonably rely upon in forming an opinion.[57]

Reliability

The expert's testimony must be sufficiently reliable; that is, based on sufficient facts or data and the product of reliable principles and methods. Further, the expert must reliably apply the facts, data, principles, or methods to the alleged facts of the case.[58]

For example, in a products liability personal injury case involving an alleged toxic substance, the plaintiff's expert opined that the plaintiff's injuries were caused by the toxic substance. The opinion did not satisfy *Daubert* and thus was properly excluded from consideration on summary judgment because the expert did not use a reliable differential diagnosis method to determine causation.[59]

This reliability test, known as the *Daubert* test, applies to non-scientific expert testimony as well.[60]

For instance, in a lawsuit in which the plaintiff college student alleged that the defendant college was liable for her sexual assault in campus housing by a stranger, the district court erroneously excluded all of the summary judgment testimony of plaintiff's premises-security expert. The expert's testimony about industry security standards and the lack of an alarm on a basement door were sufficiently reliable and should not have been excluded. Accordingly, summary judgment was reversed and the case remanded to the district court.[61]

Challenging Expert Declarations

Parties are required to disclose the identities of proposed expert witnesses accompanied by an expert witness report.[62] The default deadline for such submission is 90 days before the date set for trial.[63] The parties frequently stipulate to a different deadline or courts order a different deadline as part of the case schedule. Failure to comply with the deadline for expert disclosures can result in the court striking an expert declaration from the summary judgment record.[64]

An opposing party can move to strike an expert declaration, or portions thereof, on the grounds that the expert's opinion is unreliable. Such motion to strike is known as a *Daubert* motion.[65]

If the party moving for summary judgment is relying upon expert testimony, such reliance is essentially telegraphing to the trial judge that there are genuine disputes of material facts as the opposing party will most likely produce an expert to contradict the moving party's expert.

Since expert testimony is often used only at trial and not in connection with summary judgment, consider stipulating with the opposing parties to defer expert discovery until after the court's summary judgment ruling to avoid the unnecessary expenditure of resources on expert discovery.

Exhibits

Exhibits must be authenticated before they can be considered on summary judgment.[65] Authentication requires the submitting party to produce evidence sufficient to support a finding that the item is what the submitting party claims it is.[67]

The content of the exhibits may be considered on summary judgment only to the extent the content would be admissible at trial.[68]

For example, interrogatory responses that are based on the responding party's personal knowledge should have been considered by the trial court on summary judgment since the responding party could testify to those facts at trial; however, the district court properly disregarded the interrogatory responses based on hearsay not subject to any exception.[69]

Exhibit Examples

Note the following examples:

- **Pleadings from other cases**. To admit pleadings in opposition to summary judgment, the submitting party should submit a Motion for Judicial Notice. Pleadings from the current case do not need to be attached as exhibits since they are part of the case file. Identify the case pleadings by their electronic filing number to make it easy for the trial court to locate them in the electronic file
- **Deposition transcripts**. To authenticate a deposition transcript, the plaintiff should include (1) the deposition cover page or sheet and (2) the court reporter's certificate.[70] An attorney cannot authenticate a deposition transcript even if the attorney was present at the deposition.[71] For ease of court review of the deposition transcript, highlight the relevant portions of the submitted deposition transcript pages.
- **Deposition transcript errata.** A deponent can make changes to a deposition transcript if certain requirements are satisfied. The deponent or a party must request before the deposition is complete the opportunity to review the deposition transcript.[72] The court reporter must certify that the deponent or a party properly requested review of the deposition transcript.[73] The deponent has 30 days after being notified by the court reporter that the transcript is available to submit changes to the deposition transcript.[74] District courts are entitled to enforce Rule 30(e)'s time limit strictly and strike untimely errata.[75] If the deponent makes changes in form or substance, the deponent must sign a statement reciting such changes and give the reasons for making them.[76] The failure to include the required statement of reasons for the changes justifies striking the errata.[77] For more on errata, see Errata below.
- **Trial transcripts.** Transcripts of testimony under oath in a trial or other court proceeding have the same authentication requirements as deposition transcripts.[78]
- **Interrogatories.** A party can submit verified answers to interrogatories.[79] The trial court can consider the content of interrogatory responses provided the responses would be admissible if testified to at trial.[80] For example, interrogatory responses that are based on the responding party's personal knowledge should be considered by the trial court on summary judgment since the responding party can testify to those facts at trial; however, if the responses are based on hearsay not subject to any exception, the district court can properly disregard them.[81]
- **Requests for admissions.** Responses to requests for admissions from an opposing party are proper summary judgment exhibits.[82] The responses are admissible nonhearsay as the statement of a party opponent.[83]

Errata

The courts of appeals are split as to the effect of a deposition transcript errata. Some courts hold that if the procedural requirements are satisfied, there is no limit on what changes a deponent can make to a deposition transcript even if the changes directly contradict the deposition testimony and the reasons given for the change are unpersuasive.[84] However, the change does not eliminate the earlier testimony; it is merely additional testimony and thus may not be sufficient to defeat summary judgment.[85]

For instance, in a Fair Credit Reporting Act action, in which an issue was whether the defendant credit reporting agency had mailed a report to the plaintiff, pursuant to Rule 30(e) the plaintiff could change his testimony that he might have received the report to that he unequivocally did not receive the report. However, the errata did not eliminate his testimony before the correction was made. The district court correctly concluded that there was no genuine issue of material fact as to whether the credit reporting agency mailed the report given the credit reporting agency's evidence that it did mail it and the plaintiff's previous deposition testimony that he might have received the report. His errata changing the substance of his testimony was insufficient to create a genuine dispute of fact as to whether the report was mailed.[86]

The majority of courts hold that although the language of Rule 30(e) permits corrections "in form or substance," a deponent cannot make a change solely to create a material factual dispute to evade an unfavorable summary judgment ruling.[87]

Documents

All documents must be authenticated before being admissible as exhibits. Documents produced by the opposing party are deemed authenticated.[88]

Attach documents to an attorney declaration attesting that the documents were produced by the opposing party.[89]

Documents can be authenticated by deposition or declaration testimony of a witness with personal knowledge.[90]

Documents can be authenticated based on their distinctive characteristics considered together with all the circumstances.[91]

Videos and audio may be authenticated by personal knowledge of a person present during the taping as well as by circumstantial evidence.[92]

Think twice before objecting to a summary judgment exhibit on the grounds that it was not properly authenticated. Most judges expect that a party will not object unless there is a genuine question as to authenticity.

In advance of filing a summary judgment motion, meet and confer with opposing counsel and stipulate to the authenticity of documents so that the parties do not have to expend resources to authenticate documents not in dispute.

Requests for Judicial Notice

A court may take judicial notice of a fact that is not subject to reasonable dispute because (1) it is generally known within the trial court's territorial jurisdiction or (2) the fact can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.[93]

A court must take judicial notice of a fact if requested by a party and the party supplies the necessary information.[94] A court may also take judicial notice of a fact without a party request.[95]

Courts typically take judicial notice of matters of public record, such as pleadings from other cases, filings with the Securities and Exchange Commission, and records and reports of administrative bodies.[96]

Courts may take notice of any fact that is indisputably "common knowledge."[97]

- In a false imprisonment lawsuit involving a big box store, the court could take judicial notice that the store had emergency exits because such fact is "common knowledge." The court could take notice of the existence of emergency exits on summary judgment even though plaintiffs disclaimed knowledge of the exits, and knowledge of the exits' existence was imputed to the plaintiffs.[98]
- In a products liability action, the trial court erred in taking judicial notice that by 1969 it was common knowledge that smoking caused certain specific illnesses.[99]

A party has a right to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard."[100]

Stipulations

On motions for summary judgment, courts regard stipulations of fact as admissions of the parties, which are conclusive without further evidentiary support in the record.[101]

A trial court may relieve a party from a stipulation of fact for purposes of summary judgment upon a showing of manifest injustice. However, if a party's request for relief from a stipulation is made before significant prejudice to the other parties, promotes important equitable and legal considerations, and is not controlled by a rule of procedure, the party seeking to relief must simply show good reason for the request.[102]

Oral Testimony

Although Rule 56 does not discuss oral testimony, Federal Rule of Civil Procedure 43(c) permits a court to hear a matter in whole or in part on oral testimony when a motion relies on facts outside the record. Thus, Rule 43(c) gives a trial court discretion to hear oral testimony on summary judgment.[103]

District courts should only rarely permit oral testimony on summary judgment.[104] Receiving oral testimony at the summary judgment stage creates a risk that the judge will improperly assess the credibility of the witness.[105]

Objections to Evidence

Rule 56 requires a party to raise any admissibility objections to an opposing party's evidence.[106] Rule 56 does not require the filing of a separate motion to strike; instead, the objections are part of the summary judgment procedure.[107]

A party's failure to object to an opposing party's evidence waives any objection for purposes of summary judgment.[108]

The district court may therefore consider the evidence on summary judgment.[109] "If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and [this Court] will review such objections only to avoid a gross miscarriage of justice."[110]

The U.S. Court of Appeals for the Eleventh Circuit has held that it is improper to consider hearsay evidence on summary judgment, notwithstanding the opposing party's failure to object, if such evidence could not be presented in admissible form at trial.[111]

The failure to challenge admissibility at the summaryjudgment stage does not forfeit the right to challenge admissibility at trial.[112]

Check the district court's local rules and the judge's standing order to determine if the objections should be set forth in a separate pleading or within the summary judgment brief itself. Some courts require objections to be made within the brief itself because it reduces the number of boilerplate and unhelpful objections and puts the objections in context.

Regardless of whether required by local rule, object to critical evidence (if objectionable) in the body of the memorandum/ brief. Placing the objection in the brief tells the judge that the objection is serious enough that the party used memorandum pages to make the objection and also makes it more likely that the objection will not be overlooked.

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1. Fed. R. Civ. P. 56(c)(1)(A). **2**. Fed. R. Civ. P. 56(c)(3); Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir. 2001). **3**. Fed. R. Civ. P. 56(c)(3). **4**. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Humphreys & Partners Architects, L.P. v. Lessard Design, Inc., 790 F.3d 532, 538 (4th Cir. 2015); *see also* Alexander v. CareSource, 576 F.3d 551, 558 (6th Cir. 2009) (submissions by party opposing summary judgment need not themselves be in form admissible at trial, but party "must show that she can make good on the promise of the pleadings by laying out enough evidence that will be admissible at trial to demonstrate that a genuine issue on a material fact exists, and that a trial is necessary"); Jones v. UPS Ground Freight, 683 F.3d 1283, 1294 (11th Cir. 2012) ("The most obvious way that hearsay testimony can be reduced to admissible form is to have the hearsay declarant testify directly to the matter at trial"). **5**. *See* Humphreys, 790 F.3d at 538-39. **6**. Humphreys, 790 F.3d at 539. **7**. Fed. R. Civ. P. 56(c)(4). **8**. *See* Strong v. Valdez Fine Foods, 724 F.3d 1042, 1045 (9th Cir. 2013). **9**. *See* Barthelemy v. Air Lines Pilots Ass'n, 897 F2d 999, 1018 (9th Cir. 1990). **10**. *Id*. **11**. *See* Block v. City of L.A., 253 F.3d 410, 419 (9th Cir 2001). **12**. *See, e.g.,* Josendis v. Wall to Wall Residence Repairs Inc., 662 F.3d 1292, 1317 (11th Cir. 2011); Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 282 (3d Cir. 1988). **13**. Fed. R. Civ. P. 56(c)(4). **14**. Celotex, 477 U.S. at 324. **15**. *See, e.g.,* Johnson v. Weld Cnty., 594 F.3d 1202, 1210 (10th Cir. 2010). **16**. *See* Lang v. Wal-Mart Stores East, L.P., 813 F.3d 447, 456 (1st Cir. 2016). **17**. United States v. $92,203.00 in U. S. Currency, 537 F.3d 504 (5th Cir. 2008). **18**. Fed. R. Civ. P. 56(c)(4). **19**. Felkins v. City of Lakewood, 774 F.3d 647, 652 (10th Cir. 2014). **20**. 28 U.S.C.S. § 1746; Fed. R. Civ. P. 56(c)(4); Ion v. Chevron USA, Inc., 731 F.3d 379, 382 n.2 (5th Cir. 2013); *see also* Jajeh v. Cnty. of Cook, 678 F.3d 560, 568 (7th Cir. 2012) (observing that Rule 56 no longer requires a formal affidavit); Fed. R. Civ. P. 56(c) advisory committee's notes to 2010 amendment (same). **21**. 28 U.S.C.S. § 1746(2). **22**. *See* Bonds v. Cox, 20 F.3d 697, 702 (6th Cir. 1994). **23**. Fed. R. Civ. P. 56(h). Rule 56(h) is little used. *See* Fed. R. Civ. P. 5 advisory committee's notes to 2010 amendment (provision (h)). **24**. Jiminez v. All Am. Rathskeller, Inc., 503 F.3d 247, 251–52 (3d Cir. 2007). **25**. *Id*. at 253-54. **26**. Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 577–78 (2d Cir. 1969). **27**. Kalis v. Colgate-Palmolive Co., 231 F.3d 1049, 1055–56 (7th Cir. 2000). **28**. Baker v. Silver Oak Senior Living Mgmt. Co., L.C., 581 F.3d 684, 690–91 (8th Cir. 2009); *see also* Markut v. Verizon N.Y. Inc. (In re World Trade Ctr. Lower Manhattan Disaster Site Litig.), 758 F.3d 202, 213 (2d Cir. 2014) (principle that parties may not create material issues of fact by submitting affidavits that dispute their own prior testimony does not apply if statements are not actually contradictory or later sworn assertions address issue not thoroughly or clearly explored in prior testimony). **29**. Baker, 581 at 690–91. **30**. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999). **31**. Van Asdale v. Int'l Game Tech., 577 F.3d 989, 998–99 (9th Cir. 2009). *see also* Rojas v. Roman Catholic Diocese of Rochester, 660 F.3d 98, 106 (2d Cir. 2011) (if plausible explanation for discrepancies in party's testimony exists, court should not disregard later testimony simply because earlier account was ambiguous, confusing, or incomplete). **32**. *See, e.g.,* Castro v. DeVry Univ., Inc., 786 F.3d 559, 571 (7th Cir. 2015); Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012). **33**. Scott v. Harris, 550 U.S. 372, 379–81 (2007). **34**. *Id*. **35**. Widmar v. Sun Chem. Corp., 772 F.3d 457, 459–60 (7th Cir. 2014). **36**. SEC v. Phan, 500 F.3d 895, 909 (9th Cir. 2007). **37**. Fed. R. Civ. P. 56(c)(4); 28 U.S.C.S. § 1746; SEC v. Smart,

678 F.3d 850, 856 (10th Cir. 2012). **38**. *See* Eguia v. Tomkins, 756 F.2d 1130 & n.7 (5th Cir. 1985). **39**. Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1412–13 (9th Cir. 1995). **40**. *See* Pittman v. Inc. Vill. of Hempstead, 49 F. Supp. 3d 307, 311 (E.D.N.Y. 2014) (observing that despite the requirement that a declarant have personal knowledge of the matters stated, attorneys will often improperly submit summary judgment declarations for the purpose of introducing documents into the record). **41**. Fed. R. Civ. P. 56(c)(4). **42**. *See* Orr v. Bank of Am., 285 F.3d 764, 773 (9th Cir. 2002). **43**. Fed. R. Evid. 901. **44**. Fed. R. Civ. P. 56(c)(4). **45**. *Id*. **46**. Fed. R. Evid. 702. **47**. Lebron v. Sec'y of the Fla. Dep't of Children & Families, 772 F.3d 1352, 1369 (11th Cir. 2014). **48**. Fed. R. Civ. P. 56(c)(4). **49**. Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1985); Ambrosini v. Labarraque, 966 F.2d 1464, 1466 (D.C. Cir. 1992); *see also* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008) (holding that an expert's conclusory opinions in a summary judgment motion are inappropriate). **50**. Medina v. Cram, 252 F.3d 1124, 1133 (10th Cir. 2001). **51**. Fed. R. Evid. 705. **52**. *See, e.g.*, Bulthuis, 789 F.2d at 1318; Ambrosini, 966 F.2d at 1466. **53**. *See, e.g.*, M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 165 (4th Cir. 1992) ("Fed. R. Evid. 705 can be reconciled with respect to data supporting the facts. Neither rule requires prior disclosure of the supporting data . . . Furthermore, both rules contemplate supplementation of the expert's affidavit to disclose supporting data if the court deems the disclosure to be necessary before it decides the motion for summary judgment."); Monks v. Gen. Elec. Co., 919 F.2d 1189, 1192 (6th Cir. 1990) (court erred when it excluded expert's affidavit because it failed to specify which depositions and Army documents expert used to support his position; expert opinion based on review of depositions, government documents, official Army reports, and historical data of helicopter clearly met specificity standard imposed by Fed. R. Civ. P. 56). **54**. *See, e.g.*, Hayes v. Douglas Dynamics, Inc., 8 F.3d 88, 92 (1st Cir. 1993); Mid-State Fertilizer Co. v. Exch. Nat'l Bank, 877 F.2d 1333, 1338–39 (7th Cir. 1989); Celestine v. Petrolelos de Venez., SA, 266 F.3d 343, 357 (5th Cir. 2001). **55**. Bulthuis, 789 F.2d at 1318; Ambrosini, 966 F.2d at 1466. **56**. *See* Humphreys, 790 F.3d at 539; DG&G, Inc. v. FlexSol Packaging Corp., 576 F.3d 820, 826 (8th Cir. 2009). **57**. Fed. R. Evid. 703; Major League Baseball, 542 F.3d at 310. 579, 597 (1993). **58**. Daubert v. Merrell Dow Pharms., 509 U.S. **59**. Chapman v. P&G Distrib., LLC, 766 F.3d 1296, 1308–11 (11th Cir. 2014). **60**. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 149 (1999). **61**. Lees v. Carthage Coll., 714 F.3d 516, 526–27 (7th Cir. 2013). **62**. Fed. R. Civ. P. 26(a)(2). **63**. Fed. R. Civ. P. 26(a)(2)(D). **64**. *See* Tokai Corp. v. Easton Enters., 632 F.3d 1358, 1365 (Fed. Cir. 2011) (affirming district court's exclusion of expert summary judgment declaration where expert report was submitted late); Genereux v. Raytheon Co., 754 F.3d 51, 60 (1st Cir. 2014) (district court did not abuse discretion in striking egregiously late expert declaration). **65**. *See* Samuels v. Holland Am. Line-USA, Inc. 656 F.3d 948, 952-53 (9th Cir. 2011). **66**. Orr, 285 F.3d at 773. **67**. Fed. R. Evid. 901(a). **68**. Fed. R. Civ. P. 56(c)(4); Jones, 683 F.3d at 1294 (holding that a statement in an email would not be admissible at trial and thus could not be considered on summary judgment). **69**. Johnson v. Holder, 700 F.3d 979, 982 (7th Cir. 2012). **70**. Alexander, 576 F.3d at 560 (deposition excerpt); Orr, 285 F.3d at 773. **71**. Orr, 285 F.3d at 773. **72**. Fed. R. Civ. P. 30(e)(1); EBC, Inc. v. Clark Bldg. Sys., 618 F.3d 253, 265 (3d Cir. 2010). **73**. Fed. R. Civ. P. 30(e)(2); EBC, 618 F.3d at 265. **74**. Fed. R. Civ. P. 30(e)(1); Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1224 (9th Cir. 2005). **75**. EBC, 618 F.3d at 265. **76**. Fed. R. Civ. P. 30(e)(1); Hambleton Bros., 397 F.3d at 1224. **77**. EBC, 618 F.3d at 265. **78**. Orr, 285 F.3d at 776. **79**. Fed. R. Civ. P. 56(c). **80**. Fed. R. Civ. P. 56(c)(4). **81**. Johnson, 700 F.3d at 982. **82**. Fed. R. Civ. P. 56(c)(1)(A). **83**. Fed. R. Evid. 801(d)(2). **84**. *See* Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997). **85**. *See* EBC, 618 F.3d at 267 (citing Podell and district court cases following Podell interpretation). **86**. Podell, 112 F.3d at 103. **87**. *See* EBC, 618 F.3d at 268; Garcia v. Pueblo Country Club, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002); see also Thorn v. Sundstrand Aero. Corp., 207 F.3d 383, 389 (7th Cir. 2000) (holding that "a change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of

an error in transcription, such as dropping a 'not.'"). **88**. Orr, 285 F.3d at 777 n.20; Snyder v. Whittaker Corp., 839 F.2d 1085, 1089 (5th Cir. 1988); Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1423 (10th Cir. 1991). **89**. Orr, 285 F.3d at 777 (memorandum was not properly authenticated for summary judgment purposes where submitting party did not identify who produced the document in discovery). **90**. Fed. R. Evid. 901(b)(1); Orr, 285 F.3d at 777. **91**. Fed. R. Evid. 901(b)(4); United States v. Fluker, 698 F.3d 988, 999–1000 (7th Cir. 2012) (email properly authenticated by circumstantial evidence). **92**. Fed. R. Evid. 901(b)(2), (4), (5). **93**. Fed. R. Evid. 201(b). **94**. Fed. R. Evid. 201(c)(2). **95**. Fed. R. Evid. 201(c) (1). **96**. United States v. 14.02 Acres, 530 F.3d 883, 894 (9th Cir. 2008). **97**. *See, e.g.*, Ohio Citizen Action v. City of Englewood, 671 F.3d 564 (6th Cir. 2012). **98**. Zavala v. Wal-Mart Stores Inc., 691 F.3d 527, 546 (3d Cir. 2012). **99**. Rivera v. Philip Morris, Inc., 395 F.3d 1142, 1151–52 (9th Cir. 2005). **100**. Fed. R. Evid. 201(e). **101**. *See* Kirtley v. Sovereign Life Ins. Co. (In re Durability Inc.), 212 F.3d 551, 555 (10th Cir. 2000). **102**. *Id*. **103**. *See* Vital v. Interfaith Med. Ctr., 168 F.3d 615, 621–22 (2d Cir. 1999); Thompson v. Mahre, 110 F.3d 716, 720 (9th Cir. 1997); Young v. City of Augusta ex rel. DeVaney, 59 F.3d 1160, 1170 (11th Cir. 1995) (same); Waskovich v. Morgano, 2 F.3d 1292, 1295–1296 (3d Cir. 1993). **104**. Archdiocese of Milwaukee v. Appeal of Doe, 743 F.3d 1101, 1109 (7th Cir. 2014). **105**. *See* Seamons v. Snow, 206 F.3d 1021, 1026 (10th Cir. 2000). **106**. Fed. R. Civ. P. 56(c)(2). **107**. *See* Cutting Underwater Techs. USA, Inc. v. Eni U.S. Operating Co., 671 F.3d 512, 515 (5th Cir. 2012); Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendments. **108**. Rushing v. Kan. City S. Ry., 185 F.3d 496, 506 (5th Cir. 1999). **109**. Powers v. Hamilton Cnty. Pub. Def. Comm'n, 501 F.3d 592, 613 n.3 (6th Cir. 2007). **110**. Johnson v. U.S. Postal Serv., 64 F.3d 233, 237 (6th Cir. 1995). **111**. Jones, 683 F.3d at 1294 n. 37. **112**. Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendment.