

# Summary Disposition on Appeal

By Christopher S. Perry

The federal appellate courts have the power to streamline appeals by granting motions for summary disposition. In some cases, a successful motion for summary affirmance or reversal may help you to achieve precisely the result that you seek on appeal, but without the need for full merits briefing or oral argument. Unfortunately, even experienced appellate lawyers sometimes overlook this potential avenue of relief. This article discusses the standards and procedures applicable to motions for summary disposition in the federal appellate courts, as well as some of the strategic issues to consider when making and opposing such motions.

## Background

Although the procedures for summary disposition vary among the federal courts, the critical inquiry in each case is whether the court will affirm or reverse the judgment below upon motion, without the full merits briefing and oral argument that would typically attend an appeal in that court.

Motions for summary disposition are not specifically contemplated by the Federal Rules of Appellate Procedure (FRAP). Nevertheless, the courts have the authority to grant such relief under the broad powers given to them by statute to decide appeals,<sup>1</sup> as well as their authority under the FRAP to decide motions and to apply flexible, expedited procedures in the interests of justice and efficiency.<sup>2</sup> Furthermore, many courts have explicit provisions in their local rules and practice guides prescribing the procedures for summary disposition.<sup>3</sup>

## Standards for Obtaining Summary Disposition

To succeed on a motion for summary disposition, the movant must overcome a high hurdle. There are several principles that the courts typically consider in deciding whether to grant summary disposition.

First, the movant must clearly be entitled to relief on the merits. An appeal need not be frivolous to satisfy this standard, but there must be no “substantial” question for the court to decide.<sup>4</sup> The merits of the case must be “so clear” that “plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the] decision.”<sup>5</sup>

Second, summary disposition is rarely appropriate where the case turns upon a complicated legal question. The courts are reluctant to grant motions for summary disposition in cases involving questions of first impression in that court, or where there is a conflict among the courts on a controlling legal principle.<sup>6</sup>

Third, the record before the court must be sufficient to allow meaningful consideration of the appeal. Although the facts need not be simplistic, the court must be satisfied that it can thoroughly grasp the issues without full briefing or oral argument.<sup>7</sup>

Fourth, in some instances, the court may insist upon a showing of exigency. The courts are more likely to grant summary disposition in cases in which a delay will substantially harm the moving party, and where an expedited schedule for briefing an oral argument will be insufficient to prevent that harm.<sup>8</sup> This is especially true in cases in which important public policy considerations are at stake.<sup>9</sup>

Finally, it must be efficient and equitable to resolve the case through summary disposition instead of a “traditional” appellate process “with all the trappings.”<sup>10</sup> The moving party should aim to satisfy the court that its resources are better expended on other cases, and that the non-moving party will still receive all of the consideration that it is due on appeal.<sup>11</sup>

## Formal Requirements

A successful request for summary affirmance or reversal will dispose of the appeal, and in many cases, a memorandum of law supporting such a motion may be

similar in substance to a merits brief.<sup>12</sup> But it is important not to confuse the two. The FRAP and each court’s local rules have different procedural requirements for motions and merits briefs, including the structure, organization, length, and more.<sup>13</sup> It is critical to consult the applicable rules of court to ensure that your motion, response, or reply conform to these requirements.

The timing of a motion for summary disposition is especially important, and may have a major impact on your decision to request such relief. Some courts have strict timing requirements for filing motions for summary disposition, which will only be excused in extraordinary cases. For example, in the D.C. Circuit, such motions must ordinarily be filed within 45 days of docketing of the appeal, and in the Tenth Circuit, within 15 days of the filing of the notice of the appeal.<sup>14</sup> In the Third Circuit, motions for summary disposition typically should be filed before the appellant’s brief is due, but in the Ninth Circuit, it is acceptable to file any time before briefing is complete.<sup>15</sup> And one court, the Fourth Circuit, will only entertain motions for summary disposition *after* the merits briefs are filed.<sup>16</sup>

There are exceptions to these timing requirements. Because the federal courts must be assured of their jurisdiction, a party may raise a motion for summary disposition at any time on jurisdictional grounds.<sup>17</sup> Furthermore, most courts are willing to excuse a delay in seeking summary disposition for good cause, including “change in circumstances or a change in law.”<sup>18</sup> But the more a party delays, the less likely it is that a motion for summary disposition will streamline the appeal, or that a court will find that there is an exigency warranting summary disposition. The courts are loath to entertain late-filed motions for summary disposition that abuse the judicial process or waste the court’s resources. For example, in *United States v. Fortner*, the Seventh Circuit

warned litigants against using motions for summary disposition “to obtain a self-help extension of time” to file a merits brief “even though the court would be unlikely to grant an extension if one were requested openly.”<sup>19</sup>

### Strategic Considerations

In addition to these formal requirements, you should ask whether it is to your client’s advantage as a strategic matter to seek summary disposition. In performing this calculus, there are several things that you should consider.

First, you must evaluate the likelihood of winning the motion on the merits. In this respect, the attorney’s ethical obligations are paramount. Although there are many cases in which summary disposition may be an appropriate remedy, in the aggregate, such motions are rarely granted. A frivolous motion for summary disposition, or one that is brought merely to cause delay or for another improper purpose, will be looked upon with great disfavor and will do nothing to serve the interests of your client.<sup>20</sup> On the other hand, if you have a good-faith basis for seeking summary disposition and a reasonable chance of success, you can then determine whether other factors weigh in favor of filing your motion.

Second, consider whether your motion will actually streamline the appeal, and thereby save your client time, money, and aggravation. In certain cases, particularly where you are practicing in a jurisdiction that suspends briefing and oral argument while a motion for summary disposition is pending, winning a motion for summary disposition may obviate the need for full merits briefing and oral argument, which could save your client considerably.<sup>21</sup> But in other jurisdictions, where such motions cannot be filed until late in the appellate process, or where oral argument is often permitted even on the motion for summary disposition itself, your motion might do little to save costs or to expedite the appeal.<sup>22</sup> In all events, if you lose your motion, you may simply be adding another layer of potentially costly briefing and oral argument, perhaps *worsening* things for your client.

Third, you should evaluate whether

the court will look favorably upon the filing of a motion for summary disposition. Certain courts, including the D.C. Circuit, have made clear that they welcome such motions in appropriate circumstances, particularly where the motion may save the resources of the parties and the court.<sup>23</sup> But other courts have instructed counsel to be extremely cautious and to file for summary disposition only in the rarest cases. In the Seventh Circuit, for example, counsel should only file for summary disposition “in an emergency,” “when the arguments in the opening brief are incomprehensible or completely insubstantial,” or “when a recent appellate decision directly resolves the appeal.”<sup>24</sup> In all other cases, counsel “should follow the usual process” of full merits briefing and argument.<sup>25</sup> If you seek summary disposition in jurisdictions where such motions are strongly discouraged, you may raise the ire of the court, particularly if the motion merely wastes the court’s time and energy.<sup>26</sup> In addition to examining the court’s rules, practice guides, and case law, you should also consult with experienced practitioners in the jurisdiction

**It is critical to consult the applicable rules of court to ensure that your motion, response, or reply conform to these requirements.**

where your appeal is pending, and learn more about their experiences with motions for summary disposition in that court.

Fourth, be especially cautious when seeking summary reversal. Although the standards for summary reversal essentially mirror those for summary affirmance,<sup>27</sup> in practice, not surprisingly, summary reversal is more difficult to obtain. The best case for summary reversal is one in which there has been an intervening, controlling legal decision or piece of legislation that makes

the lower court’s ruling clearly incorrect.<sup>28</sup> Summary reversal may also be appropriate in extremely rare cases where there has been a clear denial of constitutional rights without a reasoned decision from the court below.<sup>29</sup>

Finally, your approach will be different when you *oppose* a request for summary disposition. Consider whether your opponent’s motion for summary disposition is procedurally sufficient; you may be able to argue that the motion is untimely or otherwise fails to conform to the court’s standards. But even if the motion is procedurally sound, you are likely to have the advantage. Relatively few cases are decided on a motion for summary disposition. Furthermore, it is the moving party that bears the burden, and it is a heavy one. Like a party opposing summary judgment in a trial court, your goal in defeating a motion for summary disposition is not necessarily to win the case outright, but instead, to “live to fight another day.” You need only convince the court that the appeal presents a genuine question, and that the court should not deviate from its ordinary procedures for allowing full merits briefing and oral argument.

### Conclusion

Summary disposition may be appropriate where one party is clearly entitled to relief, exigent circumstances or important public considerations are paramount, and the court can fairly decide the appeal on the basis of the record and the motion papers. A successful motion for summary disposition may earn the relief that your client seeks on appeal without the need for full merits briefing and oral argument. ■

---

*Christopher S. Perry is an associate with Jones Day in Washington, D.C.*

### Endnotes

1. See 28 U.S.C. § 2106 (giving the federal appellate courts broad authority to issue rulings “as may be just under the circumstances”).
2. Fed. R. App. P. 27 (motion practice); Fed. R. App. P. 2 (permitting an appellate court to “suspend” its rules for “good cause,” and to “order proceedings as it directs”); Joshua

v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994)(citing Fed. R. App. P. 2 as a basis for the Federal Circuit's authority to decide motions for summary disposition).

3. See, e.g., D.C. CIR. HANDBOOK OF PRACTICE & INTERNAL PROCEDURES at 35–36 (D.C. CIR. HANDBOOK)(describing the procedures for seeking summary disposition); 3rd Cir. R. 27.4 & I.O.P. 10.6 (same).

4. See *Joshua*, 17 F.3d at 380 (summary disposition is proper “when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists”); *Sills v. Bureau of Prisons*, 761 F.2d 792 (D.C. Cir. 1985) (granting a motion for summary reversal because the merits of the appeal were “clear”); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969)(summary disposition is appropriate where “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case,” or where “the appeal is frivolous”).

5. *Sills*, 761 F.2d at 793–94.

6. See, e.g., D.C. CIRCUIT HANDBOOK at 36 (“Parties should avoid requesting summary disposition of issues of first impression for the Court.”).

7. See, e.g., *Cascade Broad. Group, Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (summary disposition is appropriate “only where the moving party has carried the heavy burden of demonstrating that the record and the motion papers comprise a basis adequate to allow the fullest consideration necessary to a just determination”) (internal quotation marks and citation omitted).

8. A motion for summary affirmance will not necessarily expedite the progress of the appeal in every court. If time is truly of the essence, it may be advisable to seek an expedited schedule and other emergency relief as permitted by court rules.

9. *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006) (“Summary disposition is appropriate in an emergency, when time is of the essence and the court cannot wait for full briefing and must decide a matter on motion papers alone.”); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (“A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified.”); *Groendyke Transp.*, 406 F.2d at 1162 (summary disposition may be warranted “where time is of the essence,” including “situations where important public policy issues

are involved or those where rights delayed are rights denied”).

10. *Groendyke Transp.*, 406 F.2d at 1162.

11. *Id.* at 1162–63 (“[T]he appellate court is not compelled to sacrifice either the rights of other waiting suitors, its own irreplaceable judge-time or administrative efficiency. . . . The fact that we term this a ‘summary’ reversal does not imply that the legal question presented was not thoroughly considered on its merits.”); *Sills*, 761 F.2d at 794 (the party against whom summary disposition is granted must “have been given the fullest consideration necessary to a just determination”).

12. See, e.g., *Fortner*, 455 F.3d at 754 (“The government’s submission in this case is fifteen pages long, and but for the formal requirements of Federal Rule of Appellate Procedure 28, it is essentially a brief on the merits.”). The Seventh Circuit denied the government’s motion for summary affirmance, however. *Id.*

13. Compare, e.g., Fed. R. App. P. 27 (motion procedures) with Fed. R. App. P. 28, 31–32 (briefs and appendices).

14. D.C. CIRCUIT HANDBOOK at 28; 10th Cir. R. 27.2(a)(3)(A).

15. 3rd Cir. R. 27.4(b); 9th Cir. R. 3-6.

16. 4th Cir. R. 27(f).

17. See, e.g., 1st Cir. R. 27.0(c); 4th Cir. R. 27(f).

18. 3rd Cir. R. 27.4(b); see also, e.g., 10th Cir. R. 27.2(a)(3)(A).

19. 455 F.3d at 753–54.

20. See, e.g., *Fortner*, 455 F.3d at 754 (denying the government’s motion for summary affirmance and chastising the government for “wast[ing] the resources of [the] court”).

21. E.g., D.C. CIR. HANDBOOK at 28 (“Normally, cases will not be given oral argument dates or briefing schedules until all pending motions have been resolved.”).

22. E.g., 4th Cir. R. 27(f) (noting that the court typically will not entertain motions for summary disposition until briefing is completed); 2D CIR. HANDBOOK at 16 (allowing oral argument on motions for summary disposition).

23. D.C. CIR. HANDBOOK at 28.

24. *Fortner*, 455 F.3d at 754.

25. *Id.*

26. In *Fortner*, for example, the motion for summary disposition required the attention of six judges, three each on the motions and merits panels. 455 F.3d at 754. The motion therefore “wasted the resources of [the] court,” especially since it was tantamount to a merits brief.

27. See, e.g., *Sills*, 761 F.2d at 794–96 (granting a motion for summary reversal).

28. See, e.g., D.C. Cir. Frequently Asked Questions at 23–24 (Motions for summary reversal “are appropriate where intervening Supreme Court or D.C. Circuit Court of Appeals decisions render the District Court or agency disposition incorrect,” but “are almost always inappropriate in other circumstances.”); 9th Cir. R. 3-6 (Summary reversal may be granted where “an intervening court decision or recent legislation requires reversal or vacation of the judgment or order appealed from or a remand for additional proceedings.”).

29. See, e.g., *Sills*, 761 F.2d at 795 (summarily reversing the dismissal of a complaint that “clearly raised a viable claim for relief,” namely, the deprivation of the plaintiff-appellant’s constitutional right to gain access to legal research materials).