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Preface

Summary judgment and summary adjudication motions elicit strong reactions from almost everyone who has worked on them, whether representing the moving or opposing parties or deciding the motions themselves. They are one of the most powerful motions available for disposing of a case before trial. All attorneys who handle civil litigation cases will find themselves working on summary judgment and summary adjudication motions for one side or the other. Perils abound, from conforming to the timing and formatting requirements to drafting separate statements to meet the applicable burdens, from supporting those statements with admissible evidence to deciding admissibility and determining the ultimate question raised by the motion: Is a trial necessary to resolve the dispute, or are the facts settled such that a court need only apply the law to determine the controversy? The consequences of the motion are great because the decision may determine the fate of the entire case. Love them or hate them, summary judgment and summary adjudication motions are a fact of life in modern litigation.

CEB's purpose in publishing this book is to offer California attorneys the most practical guide to summary judgment and summary adjudication motions available. Printed in softcover with black chapter tabs on the pages for easy access to relevant text, it is light enough to slip into a briefcase to take it to court. The book's organization allows it to be used as a quick reference guide, fortified with an in-depth analysis of the law, strategies, and issues that arise in summary judgment and summary adjudication motions. Numerous case examples drawn from recent advance sheets show how the law applies to various fact situations in different practice areas. Each chapter contains practice tips, judicial perspectives, and checklists that clarify the material presented.

Chapter 1 offers a strategic overview of the motion, analyzing the benefits and risks, reviewing alternatives, and providing an analytic framework for determining the potential for success. The motions are statutorily based, and chapter 2 parses CCP §437c and analyzes *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841, and other cases that interpret and amplify *Aguilar* in practice. Chapter 3 sets out timing requirements, including those that apply to notices and continuances. The crux of a summary judgment motion is evidentiary, and the book discusses evidentiary considerations in three chapters. Chapter 4 analyzes evidentiary burdens, presumptions, and inferences, all of which are crucial to resolving the motion. Chapter 5 delves into developing and proffering evidence in support of or opposition to the motion, from initial case analysis and strategic discovery planning to preparing the evidence for submission. Chapter 9 covers evidentiary objections, including when and how to raise or to oppose them. Chapters 6, 7, and 8 discuss moving, opposition, and reply papers, respectively, and set out the requirements for compiling, organizing, and drafting the papers filed in summary judgment and summary adjudication motions. Chapter 10 demonstrates how to prepare for and handle the hearing and oral argument. Chapter 11 covers the decision and order rendered after the hearing. Chapter 12 analyzes the options available to any party considering a challenge to an adverse decision, whether attacking or overturning the decision at the trial court level and on appellate review. Chapter 13 discusses special rules that apply in particular cases, illustrating differences in unlawful detainer actions and employment discrimination cases. Chapter 14 includes sample documents to be filed in summary judgment and summary adjudication motions and a brief discussion of the formatting requirements for these documents.

CEB gratefully acknowledges the authors and consultants who contributed to this book. They were generous in their time, and we relied heavily on their expert advice. We are especially grateful to Stephen G. Blitch, Marshall C. Wallace, and James Neudecker for their suggestions on the overall organization of the book. CEB is also indebted to the many attorneys throughout the state who shared their expertise, insights, and war stories in many conversations during development of this book. We also owe a debt of gratitude to those attorneys and judges who worked on previous versions of the summary judgment chapter in Civil Procedure Before Trial (4th ed Cal CEB 2004) and Making and Opposing a Summary Judgment Motion (Cal CEB Action Guide March 2009), from which parts of this book were derived. Their names are listed on the Acknowledgments page.

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Marshall C. Wallace

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§1.1 I. INTRODUCTION

In assessing a new case, often the most important question the civil litigator asks is: "Can I get this case past summary judgment?" or "Can I defeat this case with a summary judgment motion?" The plaintiff's greatest weapon may be the threat of subjecting the defendant to the risk and expense of a jury trial. In turn, a summary judgment motion often is the defendant's best weapon for avoiding a trial by eliminating the case or inducing a reasonable settlement. A summary judgment motion is thus one of the pivotal events in many civil cases.

This book is a practical guide to California state court summary judgment and summary adjudication motions. Given the significant differences between state and federal statutes, case law, and procedural requirements, this book focuses only on state court motions and does not address motions made in federal court.

The book begins with a discussion of the key strategic and practical considerations for attorneys when assessing their case and the prospect of a summary judgment or summary adjudication motion (chap 1). It covers the governing law and evidentiary issues (chaps 2-5), and then, in chronological order, discusses the moving papers (chap 6), the opposition (chap 7), the reply (chap 8), objections to evidence (chap 9), at the hearing (chap 10), ruling on the motion (chap 11), and review of the decision by the trial court or courts of appeal (chap 12). Special rules applicable in unlawful detainer and employment termination cases are discussed in chap 13. Sample documents are presented in chap 14.

NOTE: Ordinarily, the defendant (or cross-defendant) makes a summary judgment motion under CCP §437c. Nevertheless, §437c applies equally to cross-complainants' and cross-defendants' motions, and the principles and authorities cited in this book apply equally to all such motions, unless otherwise indicated.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.2 A. Statutory Authorization: CCP §437c

§1.2 A. Statutory Authorization: CCP §437c

Summary judgment and summary adjudication motions are creatures of one statute, CCP §437c. Section 437c(c) succinctly sets forth the basic rule for summary judgment motions:

> The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Section 437c(f)(1) supplies the basic authorization for summary adjudication motions. Unlike federal court, where in principle any issue may be summarily adjudicated, §437c(f) limits summary adjudication motions to four types of issues:

> A party may move for adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in [CC §3294], or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

See §2.11.

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§1.3 B. Purpose of Summary Judgment

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841. See also 6 Witkin, California Procedure, *Proceedings Without Trial* §202 (5th ed 2008). Summary judgment procedure provides "a vehicle to weed the judicial system of an unmeritorious case which otherwise would consume scarce judicial resources and burden the parties with the economic and emotional costs of protracted litigation." *Juge v County of Sacramento* (1993) 12 CA4th 59, 69, 15 CR2d 598. Simply put, summary judgment and adjudication motions test whether evidence exists to prove any claim or affirmative defense.

The California Supreme Court in *Aguilar* distilled the essence of summary judgment to a single proposition (25 C4th at 855, quoting *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 374, 100 CR2d 352 (concurring opinion of Chin, J.)):

> If a party moving for summary judgment in any action … would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case … the "court should grant" the motion "and avoid a … trial" rendered "useless" by nonsuit or directed verdict or similar device.

NOTE: Unless otherwise stated, the discussion of motions for summary judgment also applies to motions for summary adjudication. *Grant-Burton v Covenant Care, Inc.* (2002) 99 CA4th 1361, 1370, 122 CR2d 204 (principles governing summary judgment also apply to summary adjudication). On the differences and similarities between summary judgment and summary adjudication, see §§2.13-2.29.

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§1.4 C. Summary Judgment Procedure Is Constitutional

Since the California legislature adopted CCP §437c, courts have rejected attacks on the constitutionality of motions for summary judgment on the ground that it deprives the opposing party of a jury trial and the right of cross-examination. See, *e.g., Scott v Farrar* (1983) 139 CA3d 462, 467, 188 CR 823; *Bank of America v Oil Well Supply Co.* (1936) 12 CA2d 265, 270, 55 P2d 885. See also *Bahl v Bank of America* (2001) 89 CA4th 389, 395, 107 CR2d 270 (summary judgment procedure is not inherently unconstitutional, but "technical compliance" with CCP §437c is required to ensure no infringement of litigant's right to have dispute decided by jury).

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§1.5 D. Procedure Is No Longer Disfavored

Courts historically pronounced summary judgment a "disfavored" remedy. See *Aisenson v American Broadcasting Co.* (1990) 220 CA3d 146, 154, 269 CR 379. Now, however, courts acknowledge that summary judgment is no longer considered a "disfavored procedure" (*Binder v Aetna Life Ins. Co.* (1999) 75 CA4th 832, 838, 89 CR2d 540), but some still characterize summary judgment as a "drastic" remedy (*Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 117, 94 CR3d 109, quoting *Sierra Craft, Inc. v Magnum Enters., Inc.* (1998) 64 CA4th 1252, 1256, 75 CR2d 681). Since its removal from disfavored status, "some judges and commentators have expressed concern that trial courts have moved too far in the other direction [and] 'summary judgment has spread … through the underbrush of undesirable cases, taking down some healthy trees as it goes.'" *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 286, 100 CR3d 296, quoting Wald, *Summary Judgment at Sixty,* 76 Tex L Rev 1897, 1941 (1998).

Because both the moving and opposing party can quote judicial sound bites supporting their positions, perhaps the most apt comment comes from *Reader's Digest Ass'n v Superior Court* (1984) 37 C3d 244, 252, 208 CR 137: "It is pointless to declare in the abstract that summary judgment is a favored or disfavored remedy. A more subtle analysis is required."

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.6 E. When Summary Judgment Is Appropriate

§1.6 E. When Summary Judgment Is Appropriate

Motions for summary judgment or summary adjudication are appropriate when:

- The dispositive issue in the case is one of law, not of fact.

EXAMPLES: Examples of legally dispositive issues include the court's subject matter jurisdiction (*Garofalo v Princess Cruises, Inc.* (2000) 85 CA4th 1060, 1068, 102 CR2d 754); statutory interpretation, including preemptive effect (*Garofalo v Princess Cruises, Inc., supra*); application of statute to undisputed facts (*Schachter v Citigroup, Inc.* (2009) 47 C4th 610, 101 CR3d 2); contract interpretation (*C. L. Smith Co. v Roger Ducharme, Inc.* (1977) 65 CA3d 735, 743, 135 CR 483), and existence of a duty (see, *e.g., Denton v City of Fullerton* (1991) 233 CA3d 1636, 1639, 285 CR 297).

- The admissible evidence reveals no issue of material fact as to the matters for which the party has the burden of proof.
- There is no admissible evidence to prove any material fact as to which the other side has the burden of proof.
- No reasonable jury would accept the adversary's position on a fact issue that is a necessary element of the adversary's claim or defense.
- There is no material fact issue as to an important cause of action, defense, or issue of duty, and the elimination of that issue would significantly improve the posture of the case at trial.
- No reasonable jury could find clear and convincing evidence of malice, fraud, or oppression, or approval/ratification by a principal against whom punitive damages are sought.

NOTE: In federal court, a motion for summary judgment is also useful because the court can issue an order establishing certain facts in the action, even if it denies the motion. Fed R Civ P 56(d). Code of Civil Procedure §437c does not permit such an order in state court.

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§1.7 II. STRATEGIC CONSIDERATIONS

Most seasoned trial attorneys outline their anticipated opening or closing argument at the outset of a case, then prepare their case based on that outline. If there is any possibility of a summary judgment or summary adjudication motion, the attorney should also prepare an outline of his or her client's separate statement, either in favor of or in opposition to the anticipated motion. Doing so helps the attorney rigorously analyze whether to file a summary judgment or summary adjudication motion, creates a roadmap for the investigation, discovery, and legal research needed to make or oppose the motion, and helps the attorney evaluate the chances of failure and success of the motion, thus informing settlement strategy. On the moving party's separate statement, see §§6.21-6.35; on the opposing party's separate statement, see §§7.23-7.29.

The determination of whether to file a summary judgment or adjudication motion involves multiple strategic issues, including benefits and risks associated with such motions. See §§1.8-1.22.

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A. Benefits of Summary Judgment and Summary Adjudication Motions

§1.8 1. Provide Victory Without Trial

The most obvious benefit of a summary judgment motion is a defendant's ability to eliminate the plaintiff's case without a trial. Trials are expensive and impose disruption on the parties and witnesses. In a jury trial, there is always the risk that the jury will be swayed by preconceptions or emotions and will not follow the law. Moreover, once a case has made it through to a jury trial, the trial judge may be less inclined to make decisions on issues of law, and instead defer to the jury. By contrast, a summary judgment motion is heard months before a jury is impaneled, and the judge may see an opportunity to lighten his or her docket by granting a motion that eliminates the case.

Even in cases tried by a judge sitting without a jury, a summary judgment motion can yield distinct benefits. Some trial judges—just as some arbitrators—may be inclined to reach a compromise result at trial, whereas on a summary judgment motion the moving party can present the dispute as one in which the judge must pick one side of a binary choice.

PRACTICE TIP: A plaintiff may want to avoid a jury trial less frequently than a defendant, but this can be just as important to the plaintiff in a proper case. For example, a bank or other large creditor usually will seek a judgment against a sympathetic debtor via a summary judgment motion, and will want to avoid a jury trial when the debtor's attorney may be able to sway the jury with matters tangential to the debt action.

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§1.9 2. Aid in Early Case Resolution

A motion brought early in the proceedings may result in an early resolution of the matter, before the parties incur the expense and disruption of full discovery.

NOTE: Under CCP §437c(a), the motion may not be made until at least **60 days** after the general appearance of the party against whom it is directed, unless the court permits the motion on a showing of good cause. Additionally, the moving party must provide at least **75 days'** notice of the hearing of the motion. Given these unusually long lead times, other dispositive motions may be more appropriate for resolution at the outset of the case. For alternative motions, see §§1.23-1.34. On timing requirements and strategy, see chap 3.

CAUTION: Usually it is not advisable to make a summary judgment motion before discovery is substantially complete because the court is required to deny the motion or grant a continuance for further discovery on a showing of good cause. CCP §437c(h). See *Bahl v Bank of America* (2001) 89 CA4th 389, 395, 107 CR2d 270 (plaintiff submitted sufficient affidavits in connection with her request for continuance); *Wachs v Curry* (1993) 13 CA4th 616, 623, 16 CR2d 496 (affidavit that plaintiffs submitted failed to provide sufficient justification for continuance). Even when it is questionable whether the opposing party has a bona fide need for discovery, courts tend to be liberal in postponing the opposition deadline and hearing date when the opposing party claims to need discovery. Indeed, a judge who expects he or she may grant a summary judgment motion almost always will continue the hearing, because an order denying discovery is less stable on appeal. Finally, if the court grants a motion under CCP §437c(h), then the moving party is disadvantaged in three ways: The hearing is postponed, the discovery is allowed, and the opposing party has a roadmap—the moving party's separate statement—for creating fact issues to defeat the motion. On motions under CCP §437c(h), see §§3.34-3.46.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.10 3. Educate Judge

§1.10 3. Educate Judge

In a single assignment court in which the trial judge hears law and motion on a case, even an unsuccessful summary judgment or summary adjudication motion will educate or precondition the judge. Not infrequently, a judge will, on denying a motion due to the presence of a fact issue, comment about the strength or weakness of the parties' positions on key issues.

CAUTION: Of course, an unsuccessful motion may precondition the judge *against* the moving party's case.

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§1.11 4. Provide Two Opportunities to Prevail

Filing a motion for summary judgment provides the moving party with two chances to win the case: once on summary judgment, and again at trial. The moving party can review the evidence of material facts presented by the opposing party, which gives the moving party a roadmap to the opposing party's case for trial.

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§1.12 5. Narrow Issues for Trial

Even if the case cannot be entirely resolved by a summary judgment motion, a grant of summary adjudication on key issues can dramatically alter the trial of the case. Elimination of causes of action by a summary adjudication motion can streamline the trial and limit the evidence that might be admitted on the causes of action formerly in the case.

A plaintiff might also benefit from early resolution of some issues via summary adjudication. For example, when the plaintiff obtains a favorable determination of an "issue of duty" before trial, in the opening statement counsel can emphasize that the court already has determined that issue in the plaintiff's favor.

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§1.13 6. Compel Disclosure of Opponent's Evidence

Even if the summary judgment motion fails, it compels the opposing party to disclose the evidence available to prove its case. After the moving party makes a prima facie showing of the nonexistence of a triable issue of material fact, the opposing party must produce sufficient evidence to prove that an issue of one or more material facts exists. *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 850, 107 CR2d 841.

WARNING: If the motion is brought primarily to find out about an opponent's evidence, counsel may be subject to sanctions for presenting papers to the court for an improper purpose. CCP §128.7(b)(1). On sanctions, see §§10.16, 11.40.

PRACTICE TIP: Keep in mind how the moving party's initial burden compares to that of the opponent. In *Aguilar,* the supreme court describes the movant's initial burden as one of persuasion rather than proof. 25 C4th at 850 n11. On the respective evidentiary burdens on the parties, see chap 4.

On developing and proffering evidence, see chap 5.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.14 7. Advance Trial Preparation

§1.14 7. Advance Trial Preparation

Even if a summary judgment motion is unsuccessful, the process of preparing the motion requires organization and preparation of evidence, and focuses the attorney's thinking on several key issues, including:

- Elements of the case;
- State of the evidence; and
- Establishing the necessary foundation for the evidence.

Simply put, a trial attorney will be much closer to trial-ready in a case in which there was a summary judgment or summary adjudication motion.

On case strategy, planning, and preparation of evidence for motion, see chaps 3, 5.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.15 8. Provide Chance to Eliminate Punitive Damages

§1.15 8. Provide Chance to Eliminate Punitive Damages

Under CCP §437c(f), a defendant is expressly authorized to make a motion eliminating a punitive damage claim. See *American Airlines, Inc. v Sheppard, Mullins, Richter & Hampton* (2002) 96 CA4th 1017, 1049, 117 CR2d 685 (summary adjudication granted; clear and convincing standard of CCP §3294 must be taken into account in ruling on motion to eliminate punitive damage claim). See §2.22.

PRACTICE TIP: Elimination of a punitive damage claim may substantially alter the settlement dynamic in a case involving small compensatory damages.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.16 9. Increase Chances of Settlement or Voluntary Dismissal

§1.16 9. Increase Chances of Settlement or Voluntary Dismissal

Many cases settle while a summary judgment motion is pending. The well-advised opposing party will recognize that its case is over, except for an appeal, if the motion is granted, and may prefer to compromise rather than risk a complete trial court loss.

Although it does not eliminate the case altogether, a summary adjudication motion may have the same effect: It may promote settlement by eliminating key causes of action, defenses, claims for punitive damages, and/or issues of duty.

Even an unsuccessful motion can encourage settlement, because it may help the moving party's client accept the case's deficiencies. Additionally, it may give the party opposing the motion a better grasp of the weaknesses of its own case, even though it avoided summary judgment and/or summary adjudication.

PRACTICE TIP: Both sides should consider serving the opponent with a CCP §998 offer to compromise that expires before the motion is heard. An opponent may be willing to accept the §998 offer to avoid the time, expense, and aggravation of preparing an opposition and risk losing the summary judgment motion. A moving party may also be persuaded that the cost of settlement will increase if its motion is denied. On §998 offers, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004).

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B. Downsides of Summary Judgment and Summary Adjudication Motions

§1.17 1. Add Significant Expense

Summary judgment motions are costly. In some cases, the costs of marshaling evidence, preparing the multiple required documents (*i.e.,* moving and reply papers), and preparing for the hearing may require almost as much time and cost as preparing for trial.

The expense issue is typically compounded by the expense that a summary judgment or summary adjudication motion imposes on the opponent. If the opponent must incur the expense of opposing such a motion, the case likely will be harder to settle because the opponent will feel that it needs to cover its (now higher) attorney fees. That issue is even more acute if the opponent has a right to recover the moving party's attorney fees by statute or contract. The moving party, if it fails, will be faced with a considerably greater attorney fee claim both in settlement and at trial.

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§1.18 2. Entail High Risk of Defeat

Put simply, summary judgment motions are hard to win. If the adversary shows the existence of a triable issue of material fact, the court must deny the motion. CCP §437c(c). Because summary judgment motions eliminate cases without trial by jury, courts approach such motions with caution (*Binder v Aetna Life Ins. Co.* (1999) 75 CA4th 832, 838, 89 CR2d 540), and doubts about the propriety of summary judgment generally will be resolved against granting the motion (*Keene v Wiggins* (1977) 69 CA3d 308, 311, 138 CR 3). See §1.5.

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§1.19 3. Weaken Settlement Position

Depending on the issues at stake, if a summary judgment motion is made and lost, the court's ruling likely will weaken the settlement position of the moving party. On the other hand, the party successfully opposing a summary judgment motion typically has a clear path to trial and can use the risks and cost of trial to extract a favorable settlement from the unsuccessful moving party.

NOTE: A party cannot move for summary judgment based on issues asserted in an earlier unsuccessful motion for summary adjudication unless it can show that the motion is supported by newly discovered facts or circumstances or a change of law. CCP §437c(f)(2). See §2.18.

A lost summary judgment or summary adjudication motion also may highlight difficulties in the moving party's case.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.20 4. Educate Opponent

§1.20 4. Educate Opponent

A summary judgment or summary adjudication motion will force the adversary to prepare its case more fully than it is likely to do in the absence of such a motion. If the motion fails, the adversary will almost certainly be better prepared for trial than it would have been without such a motion.

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§1.21 5. Generate Cross-Examination Evidence From Declarants

In most cases, the moving party must rely on declarations from friendly witnesses in support of the summary judgment motion. If the motion is lost, then the opposing party has the declarations as additional evidence to use in cross-examining those friendly witnesses at trial.

On use of declarations in support of summary judgment motions, see §§5.8-5.31, 6.38.

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§1.22 6. Result Is Less Stable on Appeal

If the motion for summary judgment is granted, the moving party may not be out of the woods. A grant of a summary judgment motion is reviewed de novo on appeal. *Merrill v Navegar, Inc.* (2001) 26 C4th 465, 476, 110 CR2d 370. In contrast, a trial victory likely will benefit from a more favorable standard of review on appeal, such as substantial evidence, and will be much less vulnerable to attack. *Faust v California Portland Cement Co.* (2007) 150 CA4th 864, 876, 58 CR3d 729 ("Examining evidence in light of summary judgment standards is far different from applying the substantial evidence test that often governs an appeal").

In addition, reversal on appeal usually leads to a distinctly inferior outcome: Not only must the moving party proceed to trial, but that trial has been delayed, perhaps for years, and the moving party has had to incur the expense of the appeal. The risks associated with reversal on appeal should make an attorney wary of bringing a summary judgment or adjudication motion based on a questionable showing or the hope of confusing the trial judge.

NOTE: Denial of a motion for summary judgment, and grant or denial of a motion for summary adjudication, may be challenged by petition for a peremptory writ (CCP §437c(m)(1)), which may also add to the costs of the case.

On challenging a summary judgment decision, see chap 12.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.23 III. ALTERNATIVES FOR TERMINATING LITIGATION OR NARROWING ISSUES

§1.23 III. ALTERNATIVES FOR TERMINATING LITIGATION OR NARROWING ISSUES

When considering making a summary judgment or summary adjudication motion, attorneys should always assess whether there are better procedures available for narrowing the issues or terminating the litigation.

NOTE: If a motion framed as a summary judgment motion is more appropriately treated as another motion, the court may do so on its own initiative, without requiring re-pleading. See, *e.g., Magna Dev. Co. v Reed* (1964) 228 CA2d 230, 234, 39 CR 284 (summary judgment motion treated as motion for judgment on pleadings).

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A. Alternative Procedures for Terminating Litigation or Narrowing Issues

1. Pretrial Alternatives

§1.24 a. Anti-SLAPP Motion

If the complaint or cross-complaint challenges the exercise of a party's rights of free speech or petition on a matter of public interest, the party may move to terminate the case at the outset under CCP §425.16, the anti-SLAPP statute. This motion gives the defendant the equivalent of a preemptive-strike summary malicious prosecution action without having to await a favorable resolution of the case on the merits.

Unlike a summary judgment motion, which is available in nearly every civil case, the availability of an anti-SLAPP motion is much more limited. When available, however, it is a powerful weapon with several distinct advantages over a summary judgment motion (and other pretrial motions):

- It may be brought immediately;
- It is not subject to the long lead time required for summary judgment motions;
- The moving party need not comply with the cumbersome separate statement requirement;
- Evidence is permitted;
- The opponent does not have a right to discovery such as that granted by CCP §437c(h); and
- If successful, the moving party has the right to recover its attorney fees (CCP §425.16(c)).

PRACTICE TIP: If the case is one of the limited category of cases eligible for an anti-SLAPP motion, and the motion has merit, you should generally make it. However, the denial of a defendant's anti-SLAPP motion may require the denial of a later summary judgment motion brought by the defendant, because the standard for determining the merits of an anti-SLAPP motion is similar to that for determining the merits of a motion for summary judgment, *i.e.,* both seek to determine whether a prima facie case has been presented by the plaintiff in opposing the motions. See *Bergman v Drum* (2005) 129 CA4th 11, 18, 28 CR3d 112.

On anti-SLAPP motion procedures, see Making and Opposing Special Motions to Strike Under the California Anti-SLAPP Statute (Cal CEB Action Guide February 2007).

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.25 b. Demurrer

§1.25 b. Demurrer

A demurrer challenges the legal sufficiency of a pleading on its face. Only the allegations of the pleading and matters of which the court properly may take judicial notice may be considered. A demurrer to the entire complaint, if successful, eliminates the plaintiff's or cross-complainant's case.

NOTE: Even when a complaint is technically demurrable, courts usually liberally grant leave to the pleading party to amend the pleading to cure the defect.

A party may also demur to a single cause of action (see CCP §430.50) or an affirmative defense (see CCP §430.20). The statute authorizing demurrers specifically provides that a defendant may demur to challenge the jurisdiction of the court (see CCP §430.10(a)), attack the capacity of a party to sue (see CCP §430.10(b)), stay or dismiss on the ground there is another action pending (see CCP §430.10(c)), and assert a defect or misjoinder of parties (see CCP §430.10(d)).

There are many differences between demurrers and summary judgment and adjudication motions. The timing is much shorter; demurrer must be made within **30 days** of filing the pleading challenged, whereas a summary judgment motion cannot be made until **60 days** after the complaint is filed.

Demurrers are more difficult to win, because the author of the pleading controls its contents and the court will accept the allegations of the pleading as true. Even when the demurrer succeeds, the court likely will allow the pleading party leave to amend. Unlike a summary judgment or adjudication motion, in which the parties submit evidence that the court must consider if admissible, on demurrer the court only considers allegations of the pleading and any judicially noticeable facts.

A major advantage of demurrer is the small expense compared with that on a summary judgment motion. A summary judgment resolution will require the costs of discovery, gathering and preparing evidence, briefing, and preparing a separate statement.

PRACTICE TIP: Many judges simply do not like to resolve cases on demurrer, and tend to prefer to grant summary judgment motions. This makes a demurrer a risky procedure when the case involves an issue of law: A judge disinclined to sustain a demurrer may well be more likely to rule adversely to the demurring party on a key legal issue, and that adverse legal ruling may persist throughout the action. Research the assigned judge's record on demurrers (if online results are unavailable, attend some law and motion sessions), and if the judge appears generally loath to granting demurrers, consider presenting key legal issues in the context of a more fully developed record via a summary judgment motion.

On demurrers, see California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).

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§1.26 c. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is essentially the same as a demurrer (see §1.25), except that it may be made any time before judgment, not just within the time allowed to respond to a pleading, and there is no requirement for filing a document setting out the grounds for the motion other than the notice of motion. By comparison, a motion for summary judgment is based on the issues raised by the pleadings and requires evidentiary affidavits to permit the court to decide whether a triable issue exists as to any material fact. See CCP §437c(b)(1), (c).

The motion for judgment on the pleadings is codified in CCP §438; however, the statutory motion can be made only when a demurrer was not made on the same grounds or when a demurrer on the same grounds was denied but a change was made in the applicable law after the demurrer was denied. CCP §438(g).

When summary judgment has been granted on the ground that the complaint fails to state a cause of action, appellate courts have treated such a judgment as if it had been made under a motion for judgment on the pleadings. See *Crouse v Brobeck, Phleger & Harrison* (1998) 67 CA4th 1509, 1532, 80 CR2d 94 (motion for summary judgment that argues pleadings do not support claim is evaluated as motion for judgment on pleadings); *Robinson v Hewlett-Packard Corp.* (1986) 183 CA3d 1108, 1131, 228 CR 591, quoting *C. L. Smith Co. v Roger Ducharme, Inc.* (1977) 65 CA3d 735, 745, 135 CR 483 ("[A] motion by a *defendant* under [CCP §437c] necessarily includes a test of the sufficiency of the complaint.... Motions for summary judgment in such situations have otherwise been allowed as being in legal effect motions for judgment on the pleadings" (italics in original)).

PRACTICE TIP: In *Magna Dev. Co. v Reed* (1964) 228 CA2d 230, 234, 39 CR 284, the appellate court affirmed "summary judgment" because essential allegations were absent from the complaint, thus treating it as a judgment on the pleadings. However, if the only basis of the motion is that the pleadings are insufficient, raise the defect by demurrer, motion to strike, or motion for judgment on the pleadings, not by motion for summary judgment.

NOTE: Motions for judgment on the pleadings are not only for defendants: A judgment on the pleadings will be entered on a plaintiff's motion when the complaint states a cause of action but the answer raises no valid defense by denial or by affirmative allegation. *Hardy v Admiral Oil Co.* (1961) 56 C2d 836, 840, 16 CR 894.

Apart from timing, a motion for judgment on the pleadings is the same as a demurrer; thus, the considerations in §1.25 apply equally.

PRACTICE TIP: If, after the pleadings are settled, judicially noticeable documents or facts arise that are dispositive of the case, an important cause of action, or a significant defense, consider making a motion for judgment on the pleadings rather than a summary judgment motion. The motion for judgment on the pleadings can be made on shorter notice, no separate statement is required, and the moving party need not put forth evidence. See CCP §438.

On judgment on the pleadings, see California Civil Procedure Before Trial, chap 27 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.27 d. Motion to Strike

§1.27 d. Motion to Strike

Any party, within the time allowed to respond to a pleading, may serve and file a notice of motion to strike the whole or any part of the pleading. CCP §435(b)(1).

NOTE: This time requirement does not apply to a motion to strike made as part of a motion under CCP §438(i)(1)(A), after the granting of a motion for judgment on the pleadings. CCP §435(b)(1), (e).

In response to a motion to strike filed under CCP §435, the court may strike out any (CCP §436)

- Irrelevant, false, or improper matter in the pleading; or
- Parts of the pleading not filed in conformity with California law, a court rule, or a court order.

NOTE: The court may rule on a motion to strike at any time during the case. CCP §436.

There is relatively little overlap between a summary judgment or adjudication motion and a motion to strike. If an "irrelevant, false or improper matter" appears on the face of the pleadings or as a result of judicially noticeable facts, then a motion to strike is the proper procedure. If evidence is required to prove the absence of an issue of material fact, and a cause of action, defense, issue of duty, or punitive damage claim may be determined as a matter of law, the summary judgment or adjudication motion is proper. *Vesely v Sager* (1971) 5 C3d 153, 167, 95 CR 623, superseded by statute on other grounds.

On motions to strike, see California Civil Procedure Before Trial, chap 24 (4th ed Cal CEB 2004).

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2. Alternatives During Trial

§1.28 a. Objection to Introduction of All Evidence

Either party may object to the introduction of all evidence at the time of trial on the ground that the other party's pleadings are fatally defective. *Clemens v American Warranty Corp.* (1987) 193 CA3d 444, 451, 238 CR 339. This objection is similar to a motion for judgment on the pleadings, in which the objecting party seeks to end the trial and obtain a favorable judgment on the pleadings without any evidence on the ground that if the allegations were proven, they still would not state a cause of action or defense. See 6 Witkin, California Procedure, *Proceedings Without Trial* §§199-200 (5th ed 2008). On judgments on the pleadings, see §1.26.

PRACTICE TIP: It is hard to fathom a circumstance in which a practitioner would make this motion. If the pleadings are so defective that the court should not hear evidence, then attack the case by demurrer or motion for judgment on the pleadings long before incurring the expense of discovery and trial preparation. Perhaps an attorney taking over a case for trial from a careless predecessor might seek to make such a motion. Even then, however, a motion for judgment on the pleadings would be a more appropriate motion because it has a statutory basis and results directly in a judgment.

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§1.29 b. Motions In Limine

A motion in limine is a request to the court to exclude evidence made before or at the outset of trial. *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1593, 71 CR3d 361 ("In limine motions are designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial"). A typical order in limine excludes the challenged evidence and orders counsel, parties, and witnesses not to refer to excluded matters during trial.

PRACTICE TIP: Traditionally, a party makes a motion in limine on assignment to the trial judge at the trial calendar call. In a single-assignment court, however, a party with a significant motion in limine should ask the court to set a briefing and hearing schedule for motions in limine before the trial date, particularly when grant of the motion will alter the outcome at trial or affect settlement.

Although most motions in limine do not resemble summary judgment or adjudication motions, and instead function much like an ordinary trial objection, a motion in limine can also eliminate claims, defenses, or an entire case. For example, when a motion in limine seeks to exclude testimony from a causation expert on the ground that the expert's opinion does not meet the *Kelly/Frye* test, or a motion in limine seeks to exclude evidence of lost profits of a fledgling business on the ground that the evidence is too speculative, a grant of that motion in limine might eliminate the case altogether.

In recent years, attorneys have attempted with some frequency to bring summary judgment motions in the guise of motions in limine. In response to this trend, appellate courts have emphasized the difference between motions in limine and summary judgment motions, and criticized the use of motions in limine instead of dispositive motions authorized by statue. *Amtower v Photon Dynamics, Inc.*, *supra* ("what in limine motions are *not* designed to do is to replace the dispositive motions prescribed by the Code of Civil Procedure"). See also *R&B Auto Ctr., Inc. v Farmers Group, Inc.* (2006) 140 CA4th 327, 371, 44 CR3d 426 (concurring opinion of Rylaarsdam, Acting P.J.) ("To have the sufficiency of the pleadings or the existence of triable issues of material fact decided in the guise of a motion in limine is a perversion of the process").

A motion in limine is much less cumbersome and expensive to make than a summary judgment motion, but if it fails, trial begins promptly, so the attorney must be prepared to try the case based on either outcome. Moreover, the trial judge will often have many pretrial matters to consider, so a motion in limine may not receive as much focused attention as a summary judgment motion. Many judges tend to deny motions in limine, preferring to hear the evidence first.

PRACTICE TIP: When the adversary's claim or case depends on admission of key evidence, and there is a strong ground for exclusion of that evidence, consider whether to attempt to dispose of the evidence, the claim, or the case via a motion in limine. If, however, resolution of the motion in limine depends on evidence that must be heard by the court, then a summary judgment motion is the appropriate device.

On motions in limine, see California Trial Objections, chap 2 (Cal CEB Annual).

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.30 c. Cottle Motion

§1.30 c. *Cottle* Motion

The court of appeal in *Cottle v Superior Court* (1992) 3 CA4th 1367, 5 CR2d 882, approved a trial court case management order requiring each individual plaintiff in a complex toxic tort case to make a prima facie showing of causation of liability before allowing the party to seek damages for physical injury at trial. This decision arises from the court's inherent power under CCP §187 to control its proceedings.

In the limited class of cases subject to a motion under *Cottle,* requiring the plaintiff to make a prima facie showing of causation may, as a practical matter, eliminate the plaintiff's case. In those circumstances, such a motion would be a swift, less expensive alternative to a summary judgment motion. Additionally, because the motion is limited to physical injury claims, it may not be possible to obtain summary adjudication when the plaintiff asserts other damage claims.

A *Cottle* motion is difficult to win. The trial court has the discretion to simply deny the motion without having to consider it and specify reasons for denial. The trial court may be reluctant to embrace the procedure because of the lack of a specific statutory basis. Additionally, because *Cottle* has been criticized and has not been expanded significantly beyond its individual circumstances (see, *e.g., In re Jacob E.* (2004) 121 CA4th 909, 924, 18 CR3d 15; *Hernandez v Superior Court* (2003) 112 CA4th 285, 300, 4 CR3d 883), it carries a significant risk of denial or, if granted, reversal on writ or appeal.

PRACTICE TIP: Although *Cottle* arose in the complex toxic tort context, in theory there is no reason why it would not apply in other types of complex cases. Defense counsel in complex cases should consider making a *Cottle* motion and arguing that the principles on which *Cottle* is founded are comparable, *i.e.,* the case is in a complex litigation court with active case management, the prospective expense of the case is high, and there are threshold issues that may eliminate the claims of some claimants, warranting a procedure for testing those threshold issues before trial of the entire case.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.31 d. Motion for Nonsuit

§1.31 d. Motion for Nonsuit

A motion for nonsuit has the effect of a demurrer to the evidence; it concedes the truth of the facts presented by the plaintiff, but contends that those facts are insufficient as a matter of law to establish a prima facie case. CCP §581c; *Conte v Girard Orthopaedic Surgeons Med. Group, Inc.* (2003) 107 CA4th 1260, 1266, 132 CR2d 855. A motion for nonsuit can be based on the plaintiff's failure to produce evidence at the time of trial to prove essential elements of his or her case. *Lombardo v Huysentruyt* (2001) 91 CA4th 656, 663, 110 CR2d 691. The plaintiff generally makes a motion for nonsuit after completion of the opening statement or after presentation of the plaintiff's evidence. CCP §581c(a). The motion may be made orally or in writing.

CAUTION: If the motion for nonsuit is made when the plaintiff's opening statement is completed, the court almost always will permit the plaintiff to augment or modify the opening statement to defeat the motion. See *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1594, 71 CR3d 361, quoting *Uccello v Laudenslayer* (1975) 44 CA3d 504, 509, 118 CR 741 (granting motion for nonsuit after opening statement is "disfavored practice"); *John Norton Farms, Inc. v Todagco* (1981) 124 CA3d 149, 162, 177 CR 215 (procedural anomaly in trial court's consideration of potential evidence in case in addition to plaintiff's opening statement and counsel's oral argument).

Although the standards for motions for nonsuit and motions for summary judgment differ, as a practical matter both call on the court to make a similar ruling, *i.e.,* as a matter of law, the plaintiff does not offer sufficient evidence for a reasonable jury to find for the plaintiff, or undisputed facts demonstrate a dispositive defense. See CCP §437c(p)(2). See also *Scheiding v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 81 CR2d 360. The principal distinctions between the motions arise from the procedural context and requirements for each motion. A summary judgment motion requires development of a detailed declaration and document record, a separate statement, and full briefing, whereas a nonsuit motion is much more flexible. Because the jury already has been impaneled and begun hearing the case when a nonsuit motion is made, the court is often disposed to deny a nonsuit motion in the belief that the jury is likely to reject the moving party's case, and with the knowledge that the court may always later direct a verdict or grant a judgment notwithstanding the verdict. See §1.32.

The nonsuit motion is often the right choice when the case budget is small enough that the expense and burden of a separate summary judgment motion is not warranted. In a larger, complex case, the benefit of avoiding a jury and trial preparation altogether argues for eliminating the case by motion for summary judgment.

PRACTICE TIP: Consider submitting a written memorandum of points and authorities if the court is not familiar with the controlling authorities, or if the legal issues in the case are complex. Because a jury is impaneled, however, the court may have little time to digest anything other than a short memorandum, so consider previewing the motion in more depth in a trial brief submitted at the outset of the trial.

On motions for nonsuit, see California Trial Practice: Civil Procedure During Trial §§18.7-18.34 (3d ed Cal CEB 1995).

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§1.32 e. Motion for Directed Verdict and Judgment Notwithstanding the Verdict (JNOV)

A motion for a directed verdict asks the trial judge to direct the jury to render a verdict in the plaintiff's or defendant's behalf on the ground that a verdict for the opposing party would be contrary to the evidence and would have to be set aside. CCP §630. A motion for a directed verdict is usually made after all the evidence has been presented. CCP §630(a). The court may direct a verdict (or partial verdict) when no evidence of "sufficient substantiality" supports a verdict for the opposing party, disregarding conflicting evidence, and giving the opposing party's evidence, and every legitimate inference drawn from it, all the weight to which it is entitled. See CCP §630(b); *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 395, 196 CR 117. See also 7 Witkin, California Procedure, *Trial* §420 (5th ed 2008).

The statutory motion for judgment notwithstanding the verdict (JNOV) authorizes a trial court to grant judgment in favor of a party against whom the jury has rendered a verdict whenever a motion for directed verdict should have been granted if that motion had been made. CCP §629; *Beavers v Allstate Ins. Co.* (1990) 225 CA3d 310, 327, 274 CR 766.

PRACTICE TIP: As a practical matter, view motions for directed verdict and JNOV motions as second and third opportunities to eliminate the adversary's case via motion in a jury case after a nonsuit motion has failed. These motions usually will not independently be part of the litigator's calculations on whether to seek a summary judgment motion or make a trial motion to dispose of the case; rather, they should be part of the package of trial motions available along with a motion for nonsuit. On nonsuit, see §1.31.

On directed verdicts, see California Trial Practice: Civil Procedure During Trial §§18.35-18.56 (3d ed Cal CEB 1995). On JNOV, see Civ Proc During Trial §§25.2-25.21.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.33 f. Motion for Judgment (Nonjury Trial)

§1.33 f. Motion for Judgment (Nonjury Trial)

After a party has completed presentation of evidence in a court (nonjury) trial, the adversary may move for judgment. CCP §631.8(a). See, *e.g., Brown v Boren* (1999) 74 CA4th 1303, 1310, 88 CR2d 758. In a motion for judgment, the court, as the trier of fact, weighs the evidence before deciding whether to render a judgment. CCP §631.8(a); *Greening v General Air-Conditioning Corp.* (1965) 233 CA2d 545, 550, 43 CR 662. If the motion is granted, and the losing party so requests, the court must issue a written statement of decision. CCP §631.8(a). See CCP §632.

PRACTICE TIP: The motion may be made orally, and written points and authorities are not required, but may be helpful if issues in the action are unique or complex. See California Trial Practice: Civil Procedure During Trial §§24.23-24.24 (3d ed Cal CEB 1995).

As with a motion for nonsuit in a jury case, the motion for judgment in a bench case differs from a summary judgment motion due to the timing and procedural requirements of each. Unlike a summary judgment motion, which seeks disposition of the case before trial, a motion for judgment may be brought only after the adversary's opening statement (when it usually will be denied or, if granted, will be accompanied by leave for the adversary to augment his or her opening statement to cure the defect in the case).

Perhaps the most important difference between a summary judgment motion and a motion for judgment, however, comes from the fact that the court may weigh the evidence as the trier of fact on a motion for judgment. This gives the court much more latitude in granting judgment to the moving party, and reduces the risk of an appeal overturning the judgment.

When granting motions for judgment, courts typically request proposed statements of decision from the parties. See CCP §631.8(a). Courts often adopt the statement prepared by the prevailing party. This gives the attorney for the prevailing party the opportunity to craft a statement of decision that includes all the evidence and grounds for the judgment, and thus reduces the risk of reversal on appeal.

PRACTICE TIP: Counsel who know that their case will not be tried to a jury should seriously consider bypassing a summary judgment motion altogether in favor of making a motion for judgment at trial at the conclusion of the adversary's evidence. Considerations for this decision include: the expense involved in compliance with summary judgment procedural requirements and with proceeding to trial before a motion for judgment can be made; the risk of surprise trial evidence defeating a motion for judgment; and the greater stability of a judgment rendered based on a motion for judgment, as contrasted with a judgment rendered on motion for summary judgment, which is reviewed de novo and will be reversed if the appellate court determines there was a material issue of fact to be tried.

On motions for judgment under CCP §631.8, see Civ Proc During Trial §§24.14-24.29.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.34 B. Chart: Comparison of Summary Judgment and Adjudication Motion to Alternative Dispositive Motions

§1.34 B. Chart: Comparison of Summary Judgment and Adjudication Motion to Alternative Dispositive Motions

Procedure	Description and Comparison
Summary Judgment (CCP §437c; Cal Rules of Ct 3.1350-3.1354)	Requests judgment on the ground that there is no material fact issue to be tried; must be supported by admissible evidence. See chap 2.
Summary Adjudication (CCP §437c(f); Cal Rules of Ct 3.1350-3.1354)	Requests a binding adjudication of a cause of action, defense, issue of duty, or punitive damages claim on the ground that as to that issue there is no material fact issue to be tried; must be supported by admissible evidence. See chap 2.
Anti-SLAPP Motion (CCP §425.16)	A preemptive motion to dismiss the case on the ground that it is a bad faith attempt to chill exercise of rights to speech or to petition government on an issue of public concern; evidence is allowed. See §1.24.
Demurrer (CCP §§430.10-432.10)	Seeks elimination of a pleading or cause of action in the pleading on the ground that the allegations of the pleading do not state a claim as a matter of law. May be based only on the allegations in the pleading and matters of which judicial notice may be taken; no evidence allowed. See §1.25.
Motion for Judgment on Pleadings (CCP §438)	Same as demurrer; only significant difference is timing: Demurrer is proper before the adversary's answer; motion for judgment on the pleadings is proper after answer. See §1.26.
Motion to Strike (CCP §435)	Requests that allegations in a pleading not in conformity with California law be stricken; may be based only on allegations in the pleading and matters of which judicial notice can be taken; no evidence is allowed. See §1.27.
Objection to Introduction of All Evidence (see *Clemens v American Warranty Corp.* (1987) 193 CA3d 444, 451, 238 CR 339)	Similar to motion for Judgment on Pleadings; objecting party seeks to end trial and obtain favorable judgment on pleadings without evidence on ground that, even if proved, allegations would not state cause of action or defense. See §1.28.
Motion In Limine (see *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1593, 71 CR3d 361)	Pretrial motion requesting an order precluding the admission of evidence; may be based on pleadings or limited evidentiary matters, such as discovery responses; the court may not weigh evidence. See §1.29.

Cottle Motion (see *Cottle v Superior Court* (1992) 3 CA4th 1367, 5 CR2d 882)	Motion requiring plaintiff to make prima facie showing of causation in personal injury cases; directed to trial court's discretion, which may deny motion without having to consider it or specify reasons for denial. See §1.30.
Motion for Nonsuit (CCP §581c)	After opening statement or presentation of plaintiff's evidence, motion concedes truth of facts presented, but contends those facts are insufficient to establish prima facie case as a matter of law. See §1.31.
Motion for Directed Verdict (CCP §630)	Usually made after all evidence is presented; court may direct verdict only when there is no substantial conflict in the evidence. See §1.32.
Motion for JNOV (CCP §629)	Made after the jury has returned its verdict; court may render JNOV whenever a motion for directed verdict should have been granted had such motion been made. See §1.32.
Motion for Judgment (CCP §631.8)	Made after party has completed presentation of evidence in a court (nonjury) trial; court weighs evidence as trier-of-fact and renders judgment; in motion for summary judgment, court does not weigh evidence or make factual determinations. See §1.33.

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IV. ASSESSING CASE FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION MOTION

§1.35 A. Consider Alternatives to Narrow Issues

Before deciding to file a summary judgment motion, the attorney should consider pretrial means of narrowing the issues, as set out in §§1.24-1.33.

As with other motions, attorneys should consider avoiding or reducing the expense and risk associated with a prospective summary judgment or summary adjudication motion and narrow the issues by other means. Possible alternate means to explore for narrowing issues include:

- Stipulations (but see *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 121, 94 CR3d 109 (stipulations may not be used as substitute for procedure mandated by CCP §437c));
- Requests for admission (CCP §§2033.010-2033.420);
- Severance of the issues in the case into separate phases;
- Mini-trial or arbitration of key issues;
- Mediation, which can also include the mediator's review of draft summary judgment papers and an advisory opinion on the likely outcome; and
- Dismissal of superfluous causes of action.

On downsides of summary judgment motions, see §§1.17-1.22.

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§1.36 B. Review Case for Disputed Matters

Review the pleadings and discovery documents to determine (1) what elements must be proved or negated on the motion, and (2) whether any facts *material* to those elements are in dispute and thus inappropriate for summary resolution. See chap 5 on identifying issues in contention and planning discovery. See chap 6 on preparing moving papers.

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§1.37 1. Pleadings

It is important to review all elements of the causes of action in the complaint (or cross-complaint) and review the answer to determine the facts or legal contentions that have been admitted or contested, and all defenses raised.

NOTE: On a motion for summary judgment, the pleadings determine the factual issues. *Danieley v Goldmine Ski Assocs.* (1990) 218 CA3d 111, 119, 266 CR 749 (court looks to actual charging allegations of complaint to determine issues in dispute). See also *Planned Parenthood, Inc. v City of Santa Maria* (1993) 16 CA4th 685, 690, 20 CR2d 391 (motion for summary judgment cannot be used to expand scope of complaint). After evaluating the pleadings, counsel should decide whether the pleadings should be amended. On amending complaints, see California Civil Procedure Before Trial, chap 16 (4th ed Cal CEB 2004).

PRACTICE TIP: The effect of amending pleadings while a summary judgment motion is pending depends on the amendment. If identical factual issues are set out in the original complaint and the amended complaint, the court may rule on the motion. If the plaintiff amends the complaint and alters the pertinent facts, however, the original complaint is superseded; thus, any ruling on the motion may be treated as void. See *Perry v Atkinson* (1987) 195 CA3d 14, 18, 240 CR 402.

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§1.38 2. Discovery

One of the most time-consuming tasks in preparing a summary judgment motion or opposition is reviewing deposition testimony and responses to discovery requests to extract all facts and proof that support or disprove an element of a cause of action or a defense. Not only must the evidence itself be identified, but foundation for document admission must also be assembled. On laying a foundation for documentary evidence, see §§5.58-5.78.

On reviewing discovery responses, see §§5.32-5.41.

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§1.39 3. Investigation

An attorney evaluating a summary judgment or summary adjudication motion must review all facts available outside discovery to assess what evidence will be available to support and oppose the motion via declaration.

On preparing declarations, see §§5.8-5.31.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.40 C. Distinguish Factual From Legal Disputes

§1.40 C. Distinguish Factual From Legal Disputes

Summary judgment and summary adjudication are only available when issues of law, not issues of material fact, are in dispute. See §1.6; chap 2.

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§1.41 1. Legal Issues

An issue of law is a dispute over a legal conclusion, such as the existence of a legal duty. See, *e.g., Denton v City of Fullerton* (1991) 233 CA3d 1636, 1639, 285 CR 297 (whether investigating officers had duty to warn plaintiff was issue of law). An issue of law arises when either

- One party exerts or relies on a conclusion of law that is disputed by the other party; or
- There are no triable issues of material fact.

See *Reid v State Farm Mut. Auto. Ins. Co.* (1985) 173 CA3d 557, 570, 218 CR 913, quoting *Terry v Atlantic Richfield Co.* (1977) 72 CA3d 962, 967, 140 CR 510 ("the issue of fact becomes one 'of law' and loses its 'triable' character if the undisputed facts leave no room for a reasonable difference of opinion").

EXAMPLE 1: When it was undisputed that the defendant sold a house without disclosing the existence of liens, the defendant was negligent per se, as a matter of law. *Little v Community Bank* (1991) 234 CA3d 355, 358, 286 CR 4.

EXAMPLE 2: When it was undisputed that an assistant surgeon had no control over the availability of a valve, he could not be legally responsible for its absence under the theory of res ipsa loquitur. *O'Connor v Bloomer* (1981) 116 CA3d 385, 391, 172 CR 128.

The court (rather than the jury) decides disputed issues of law. See CCP §§588, 591; Evid C §310. Because a summary judgment or summary adjudication motion is only proper when there is no genuine dispute of material fact, the motion crystallizes an issue of law for decision by the judge.

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2. Fact Issues

§1.42 a. Determine Whether Case Involves Genuine Factual Disputes

Through review of the case, counsel must determine whether there are factual disputes. A disputed issue of material fact arises when an allegation of material fact is made by one party and controverted by the other party, *e.g.,* the plaintiff claims that the defendant signed a written contract, but the defendant denies that the signature is his or hers. CCP §§588, 590. See §2.3.

To defeat the motion, the dispute over a material fact must be genuine, *i.e.,* the nonmoving party's factually unsupported denial is not sufficient to raise a genuine dispute. See *Cheviot Vista Homeowners Ass'n v State Farm Fire & Cas. Co.* (2006) 143 CA4th 1486, 1499, 50 CR3d 1 (attorney's declaration not founded on personal knowledge is insufficient to create genuine fact issue); *Jackson v Paramount Pictures Corp.* (1998) 68 CA4th 10, 34, 80 CR2d 1 (accepting testimony submitted by nonmoving party as true, trial court properly concluded it was insufficient to raise genuine dispute).

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§1.43 b. When Facts Are Disputed

If facts are disputed, counsel must determine whether the dispute involves material or nonmaterial facts. If the disputed facts are material, the court will not grant summary judgment. *Overland Plumbing, Inc. v Transamerica Ins. Co.* (1981) 119 CA3d 476, 481, 174 CR 1. If the disputed facts are not material, any factual conflict will not affect the outcome, and summary judgment should be granted. *Banks v Dominican College* (1995) 35 CA4th 1545, 1551, 42 CR2d 110, quoting *Saldana v Globe-Weis Sys. Co.* (1991) 233 CA3d 1505, 1518, 285 CR 385 ("The presence of a factual dispute will not defeat a motion for summary judgment unless the fact in issue is a material one").

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§1.44 (1) Material Issue of Fact

A factual issue is material when it

- Relates to a claim or defense raised by the summary judgment or summary adjudication motion; and
- Has a tendency or reason to change the outcome of the case.

See *Juge v County of Sacramento* (1993) 12 CA4th 59, 67, 15 CR2d 598 (materiality not synonymous with relevance); *Danieley v Goldmine Ski Assocs.* (1990) 218 CA3d 111, 126, 266 CR 749 (facts that are relevant, but "not of any ultimate significance" to resolution of element of cause of action or defense are not material).

EXAMPLE: When plaintiffs claimed that they had been fraudulently induced to join a church, a dispute over whether they had been subjected to "brainwashing" that prevented them from deciding *not* to join the church was a triable issue of *material* fact on the issue of justifiable reliance, and defendant's motion for summary judgment was denied. *Molko v Holy Spirit Ass'n* (1988) 46 C3d 1092, 1119, 252 CR 122, disapproved on other grounds in *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 853 n19, 107 CR2d 841.

A jury (or trial judge when there is no jury) determines disputed issues of material fact. CCP §592; *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 856, 107 CR2d 841.

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.45 (2) Nonmaterial Issue of Fact

§1.45 (2) Nonmaterial Issue of Fact

A factual issue is nonmaterial when it has no significance in determining the outcome of the case.

EXAMPLE: In an action to determine whether defendant ski-lift operator negligently failed to remove a tree from the edge of a slope, whether the ski patrol treated plaintiff negligently *after* the accident is an immaterial issue of fact. See *Danieley v Goldmine Ski Assocs.* (1990) 218 CA3d 111, 127, 266 CR 749.

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§1.46 c. When Facts Are Undisputed

If the facts are undisputed and the evidence is such that only one reasonable inference can be drawn, then summary judgment is proper. *Alvis v County of Ventura* (2009) 178 CA4th 536, 547, 100 CR3d 494; *Angelus Chevrolet v State* (1981) 115 CA3d 995, 1004, 171 CR 801. See, *e.g., Yuzon v Collins* (2004) 116 CA4th 149, 162, 10 CR3d 18 (no triable issue of fact in dog bite case when no evidence created inference that landlord had knowledge of dog's alleged vicious propensities). When undisputed facts leave no room for a reasonable difference of opinion, the issue of fact becomes one "of law" and loses its "triable" character. *Danieley v Goldmine Ski Assocs.* (1990) 218 CA3d 111, 118, 266 CR 749.

If, however, other reasonable inferences can be drawn, even if based only on circumstantial evidence, summary judgment or adjudication is *not* proper. *Aetna Cas. & Sur. Co. v Aceves* (1991) 233 CA3d 544, 557, 284 CR 477.

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§1.47 d. When Dispute Is Over Application of Law to Undisputed Facts

If no facts are in dispute and the action involves a dispute over legal conclusions, summary judgment may be proper. The following are examples of fact issues that became legal issues on summary judgment because there was no material fact in dispute:

- Nonexistence of a contract (*C. L. Smith Co. v Roger Ducharme, Inc.* (1977) 65 CA3d 735, 743, 135 CR 483);
- Contributory negligence of the plaintiff (*Pittman v Pedro Petroleum Corp.* (1974) 42 CA3d 859, 862, 117 CR 220);
- Causation, *e.g.,* defendants' activities were not a substantial factor in the plaintiff's injuries (*Hunter v Pacific Mechanical Corp.* (1995) 37 CA4th 1282, 1288, 44 CR2d 335, disapproved on other grounds in *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 854, 107 CR2d 841);
- Performance of a contract (*Wall Street Network, Ltd. v New York Times Co.* (2008) 164 CA4th 1171, 1181, 1178, 80 CR3d 6); and
- Absence of negligence (*Bushling v Fremont Med. Ctr.* (2004) 117 CA4th 493, 509, 11 CR3d 653).

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§1.48 D. Identify Matters That Can Be Disposed of Completely

If summary judgment does not have a strong probability of being granted, consider whether certain issues are appropriate for summary adjudication. See §§2.18-2.20. Seeking summary judgment when grounds do not exist will result in a loss of credibility with the court, and may hinder the opportunity to have key issues eliminated by a summary adjudication motion.

NOTE: The moving party may move for summary judgment with an alternative motion for summary adjudication. CCP §437c(f). See §2.29.

PRACTICE TIP: In determining whether any cause of action, affirmative defense, claim for punitive damages, or issue of duty warrants summary adjudication, counsel should seek adjudication *only* of matters that can be disposed of completely. See, *e.g.,* CCP §437c(f). Counsel should have evidence to support each matter, and never ask the court to make a factual determination.

Although some cases have held that matters cannot be summarily adjudicated unless they completely dispose of a cause of action or claim (see, *e.g., Regan Roofing Co. v Superior Court* (1994) 24 CA4th 425, 434, 29 CR2d 413, disapproved in part on other grounds in *Crawford v Weather Shield Mfg. Inc.* (2008) 44 C4th 541, 79 CR3d 721), others courts have allowed adjudication of a challenge to a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action (see *Lilienthal & Fowler v Superior Court* (1993) 12 CA4th 1848, 1854, 16 CR2d 458). In addition, at least one case has allowed adjudication of a question of duty as long as the ruling completely disposes of the issue of duty. See *Linden Partners v Wilshire Linden Assocs.* (1998) 62 CA4th 508, 519, 73 CR2d 708. See §2.23.

NOTE: One appellate decision has held that summary adjudication of a punitive damages claim may be granted only when the *entire* claim is eliminated. *Catalano v Superior Court* (2000) 82 CA4th 91, 97 CR2d 842.

PRACTICE TIP: In *Lilienthal & Fowler v Superior Court, supra,* the court held that the plaintiff's manner of pleading its claims is not determinative for ruling on a summary adjudication motion. The court of appeal construed language now found in CCP §437c(f)(1) to permit summary adjudication motions to challenge separate and distinct wrongful acts, although combined with other wrongful acts in the same cause of action. But see *Bagley v TRW, Inc.* (1999) 73 CA4th 1092, 1094 n2, 86 CR2d 909 (questioning *Lilienthal*).

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.49 E. Consider Other Tactical Maneuvers

§1.49 E. Consider Other Tactical Maneuvers

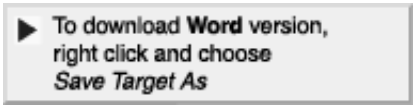
The moving party should consider other tactical moves before filing a summary judgment motion, such as:

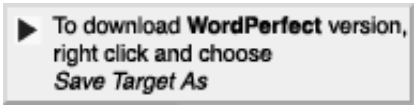
- **Serving Requests for Admission.** If admitted, the requests will significantly streamline the summary judgment motion, and if not admitted, the adversary may be exposed to cost of proof sanctions if the motion prevails.
- **Proposing a prevailing party attorney fee agreement.** Before filing a summary judgment or adjudication motion, consider proposing an agreement that the prevailing party recover its reasonable attorney fees from the losing party. Such proposals are rarely accepted, but the party making the proposal immediately gains leverage in mediation and negotiations over a party who was not bold enough to accept the proposal.
- **Seeking to informally resolve the motion.** Often the moving party should contact the party against whom it intends to move, describe the motion and supporting grounds informally, and invite the adversary to drop the claims that will be attacked by the motion. Although the adversary will almost never agree to do so, there is no downside in making the overture, and courts always appreciate informal attempts to avoid motions, even when futile. Indeed, some local rules require such a meet-and-confer effort as a prerequisite to filing the motion.
- **Proposing to submit a complex motion to a private neutral.** Submission of a complex motion to a private neutral will permit the moving party to take advantage of more flexible briefing schedules and limits, and streamlined evidentiary rules.
- **Holding a private trial of key issues.** A private trial of key issues is a means to avoid incurring the expense of filing a summary judgment motion.
- **Requesting severance of issues or staging of summary judgment or adjudication motion.**

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Source: Civil Litigation/California Summary Judgment/1 Strategic Overview/§1.50 V. CHECKLIST: INITIAL CASE REVIEW

§1.50 V. CHECKLIST: INITIAL CASE REVIEW





- 1. Plan case strategy, taking into account strengths and weaknesses of client's case and that of opposing party.
- 2. Evaluate the pleadings to determine whether they are susceptible to attack via:
- A. Summary judgment or summary adjudication; or
- B. Alternative procedures to narrow or terminate the litigation.
- 3. Plan discovery and regularly evaluate progress towards early case termination.
- 4. Evaluate causes of action, affirmative defenses, and issues in light of discovery to determine whether:
- A. Any issues of law exist that are susceptible to resolution via summary judgment or adjudication; or
- B. Any genuine issues of material fact are left undisputed.
- 5. Evaluate strategies for timing and scope of summary judgment or adjudication proceedings.
- 6. Request stipulations from opposing party as to pertinent facts or application of law to case.
- 7. If necessary, move for summary judgment or adjudication, or proceed by alternative procedures to narrow or terminate case.

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2

Availability of Relief

James Neudecker

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/§2.1 I. INTRODUCTION

§2.1 I. INTRODUCTION

Summary judgment "provide[s] courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841. Summary adjudication is available to completely dispose of one or more causes of action, affirmative defenses, punitive damage claims, or issues of legal duty. CCP §437c(f). Summary judgment and summary adjudication are generally available in any action or proceeding. CCP §437c(a).

This chapter discusses the availability of summary judgment or summary adjudication and the governing law. See §§2.2-2.12. It compares summary judgment and summary adjudication, and provides tips for deciding whether to seek one or the other, or both in the alternative. See §§2.13-2.29. Finally, the chapter compares federal law on summary judgment with California law. See §§2.30-2.32.

NOTE: This chapter generally refers to "summary judgment" as encompassing both summary judgment and summary adjudication, unless the terms are discussed distinctly. A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion, except as specified in CCP §437c. *Lunardi v Great-West Life Assur. Co.* (1995) 37 CA4th 807, 819, 44 CR2d 56.

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A. Availability of Summary Judgment

§2.2 1. When Summary Judgment Is Available

Summary judgment motions are generally available in any form of action by virtue of the language in CCP §437c(a) expressly stating their applicability in "any action or proceeding." *In re Mark K.* (1984) 159 CA3d 94, 102, 205 CR 393.

PRACTICE TIP: There may be strategic reasons for not moving for summary judgment or summary adjudication despite its availability. On the strategic considerations and alternatives for terminating litigation or narrowing issues, see chap 1.

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§2.3 a. Court Must Grant Motion if No Triable Issue of Material Fact Exists

A motion for summary judgment must be granted if all the papers submitted show that there is "no triable issue as to any material fact." CCP §437c(c); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. The decision is not discretionary; if no triable issue of material fact exists, the court must grant the motion. See *Habitat Trust for Wildlife, Inc. v City of Rancho Cucamonga* (2009) 175 CA4th 1306, 1342, 96 CR3d 813 (summary judgment not improper when review of evidence indicates no unresolved factual issues, only legal effect of undisputed facts).

There is a triable issue of material fact if, and only if, the admissible evidence allows a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. *Aguilar v Atlantic Richfield Co.*, *supra.* To determine whether the papers submitted show that there is no triable issue as to any material fact, the court must consider (CCP §437c(c))

- All evidence presented except that to which objections have been made and sustained (on objecting to evidence, see chap 9); and
- All inferences reasonably drawn from the evidence.

If the inferences drawn from the evidence are contradicted by other inferences, or by evidence that presents a triable issue as to any material fact, the motion for summary judgment must be denied. CCP §437c(c). When the evidence presented reveals no factual conflict, the court will decide the issues of law. *Aguilar v Atlantic Richfield Co.*, *supra*; *Continental Ins. Co. v Superior Court* (1985) 165 CA3d 1069, 1071, 212 CR 140.

On triable issues of fact, see §§1.42-1.45. On issues of law, see §1.41.

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/§2.4 b. Special Rules Apply to Unlawful Detainer and Forcible Entry Actions

§2.4 b. Special Rules Apply to Unlawful Detainer and Forcible Entry Actions

Summary judgment is expressly made available in unlawful detainer and forcible entry actions (CCP §1170.5), but the time frames in CCP §437c(a)-(b) are inapplicable. CCP §437c(q)-(r). In a forcible entry or unlawful detainer action (see CCP §§1159-1179a), notice of a motion for summary judgment must be given in compliance with CCP §§1013 and 1170.7 and Cal Rules of Ct 3.1351(a). There is also a special rule of court for summary judgment or summary adjudication proceedings involving possession of real property, including unlawful detainer actions. See Cal Rules of Ct 3.1351.

On summary judgment in unlawful detainer proceedings, see §§13.2-13.10. See also California Landlord-Tenant Practice §§11.31-11.39 (2d ed Cal CEB 1997).

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/§2.5 2. When Summary Judgment Is Unavailable

§2.5 2. When Summary Judgment Is Unavailable

Notwithstanding that CCP §437c(a) states that summary judgment applies in "any action or proceeding," it is unavailable in certain cases by virtue of either statute or case law. *Bagration v Superior Court* (2003) 110 CA4th 1677, 1688, 3 CR3d 292. See 6 Witkin, California Procedure, *Proceedings Without Trial* §206 (5th ed 2008).

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§2.6 a. Consumer Class Actions

Neither summary judgment nor summary adjudication can be ordered in consumer class actions under the Consumers Legal Remedies Act (CC §§1750-1784). CC §1781(c)(3). Section 1781(c)(3) provides its own procedure for determining whether an "action is without merit or there is no defense to the action." *Olsen v Breeze, Inc.* (1996) 48 CA4th 608, 624, 55 CR2d 818. This procedure is much more streamlined than that under CCP §437c, *e.g.,* the court may hold a hearing on a claim of no merit or no defense with just 10 days' notice to the other parties. The resulting dismissal has been held to have no "meaningful distinction" from a dismissal following summary judgment or summary adjudication. *Consumer Advocates v Echostar Satellite Corp.* (2003) 113 CA4th 1351, 1359, 8 CR3d 22.

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§2.7 b. Actions to Terminate Parental Rights

Summary judgment cannot be granted in actions to terminate parental rights under Fam C §7820, because the parent or child is entitled to have the matter decided at trial. See *In re Mark K.* (1984) 159 CA3d 94, 104, 205 CR 393 (summary judgment procedure is inappropriate to statutorily required time periods enacted with consideration for needs of parent, child, and public).

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§2.8 c. Election Contests

A motion for summary judgment is not considered an appropriate procedure in election contests because an election contest is given trial preference under CCP §35. See *Anderson v County of Santa Barbara* (1976) 56 CA3d 780, 783, 128 CR 707 (time limits for summary judgment motions and election contest statutes are so incompatible as to be irreconcilable).

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/§2.9 d. Medical Malpractice When Undertaking Required

§2.9 d. Medical Malpractice When Undertaking Required

When the plaintiff is required to file an undertaking as security for costs of the defense in a medical malpractice action, any defendant that moved for the undertaking is precluded from subsequently moving for summary judgment. CCP §1029.6(e).

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/§2.10 e. Proceedings Under Sexually Violent Predators Act

§2.10 e. Proceedings Under Sexually Violent Predators Act

The summary judgment statute is "inherently inconsistent" with the Sexually Violent Predators Act (Welf & I C §6600-6609.3). *Bagration v Superior Court* (2003) 110 CA4th 1677, 1688, 3 CR3d 292. Application of the mutual summary procedures in CCP §437c would violate the Act's due process protections by allowing an individual to be adjudicated a sexually violent predator without the benefit of the burden of proof beyond a reasonable doubt. Summary judgment also denies the individual the requirement of a unanimous verdict in the case of a jury trial. *Bagration v Superior Court, supra*.

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/ B. Governing Law/§2.11 1. Code of Civil Procedure §437c

B. Governing Law

§2.11 1. Code of Civil Procedure §437c

The procedures governing summary judgment and summary adjudication are entirely statutory, as specified in CCP §437c. Summary judgment is granted when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CCP §437c(c). Summary adjudication is governed by §437c(f), which provides that the court should grant the motion "only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." See also §1.2.

PRACTICE TIP: For the best summary of the law and procedure in making or opposing summary judgment or adjudication under §437c, see *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 107 CR2d 841.

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§2.12 2. Rules of Court

Specific rules of court pertaining to summary judgment and summary adjudication motions are found in Cal Rules of Ct 3.1350-3.1354. The rules state which documents must be filed and specify their format and length. Cal Rules of Ct 3.1350. The rules also discuss the handling of objections to proffered evidence. Cal Rules of Ct 3.1352-3.1354. There is a special rule for summary judgment or summary adjudication proceedings involving possession of real property (*e.g.*, unlawful detainer actions). See Cal Rules of Ct 3.1351, discussed in §§13.4, 13.7.

CAUTION: Individual courts may have "local rules" governing the filing of summary judgment and summary adjudication motions, but such rules, including fast track procedures, may not restrict the availability of the motions. *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7 (fast track rules must give way to statutory right to bring summary judgment motion); *Lokeijak v City of Irvine* (1998) 65 CA4th 341, 344, 76 CR2d 429 (courts may not apply local rule so as to prevent party from filing and having its summary judgment motion heard as provided in CCP §437c). See §6.5.

PRACTICE TIP: If a local rule seems to restrict the availability of a summary judgment motion, bring it to the attention of the opposing party and the court immediately. Often, the opposing party and/or the court will grant relief from the local rule without the need for a motion. If not, file a motion for relief as soon as possible. Almost certainly, the opposing party and the court will be more amenable to granting relief if the issue is brought to their attention early. A party seeking relief from a local rule after the fact faces a more problematic, and costly, road to relief.

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§2.13 II. SUMMARY JUDGMENT VERSUS SUMMARY ADJUDICATION

Generally, a summary adjudication motion is handled procedurally the same as a summary judgment motion. CCP §437c(f)(2); *Jones v P.S. Dev. Co.* (2008) 166 CA4th 707, 711 n3, 82 CR3d 882; *Toigo v Town of Ross* (1998) 70 CA4th 309, 324, 82 CR2d 649. A party may move for one or the other, or both in the alternative. On moving for summary judgment or summary adjudication, see chap 6.

The primary difference between the two motions is the effect on the action: Summary judgment resolves the entire action and results in the entry of an immediately appealable judgment (see §2.14), whereas the grant of summary adjudication on a claim, defense, or issue does not preclude trial on the remaining issues; it merely removes the need to prove or disprove at trial the claim, defense, or issue that was summarily adjudicated (see §§2.16-2.17).

On the differences in appellate court review of orders denying or granting summary judgment and summary adjudication, see chap 12.

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A. Summary Judgment

§2.14 1. Resolves Entire Action

Summary judgment resolves the entire action before trial in favor of the moving party when either of the following is true (*Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 843, 107 CR2d 841):

- The plaintiff's case has no merit, *i.e.,* the plaintiff cannot establish an element of the cause of action or the defendant has a complete defense (CCP §437c(p)(2)); or
- The plaintiff can establish every element of its case (including damage), the defendant has no valid defense, and there is no triable issue as to damages (CCP §437c(p)(1)).

A grant of summary judgment results in a final judgment that is immediately appealable. See §12.18.

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§2.15 2. Showing Required to Prevail

To prevail on a summary judgment motion, a moving party must show that there is no triable issue as to any material fact and that the moving party is "entitled to a judgment as a matter of law." CCP §437c(c); *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 843, 107 CR2d 841; *Charpentier v Von Geldern* (1987) 191 CA3d 101, 106, 236 CR 233.

On determining whether there are any triable issues as to any material fact, see §§2.3, 6.25-6.31.

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§2.16 B. Summary Adjudication

The moving party may seek summary adjudication by itself or in the alternative with summary judgment (see §2.29). CCP §437c(f). Nomenclature is important; §437c(f)(2) provides for "summary adjudication," not for "partial summary judgment." The term "partial summary judgment" is used in federal summary judgment law. See Fed R Civ Proc 56(a). On comparison of California and federal summary judgment law, see §§2.30-2.32.

CAUTION: For a court to grant summary adjudication, a party must expressly notice it in the motion. *Maryland Cas. Co. v Reeder* (1990) 221 CA3d 961, 974 n4, 270 CR 719 (because insurer did not identify coverage in its notice of motion as issues on which it was seeking summary adjudication, court of appeal lacked power to direct trial court to enter summary adjudication order in insurer's favor as to those issues).

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§2.17 1. Resolves Only Portions of Action

Summary adjudication is available to completely dispose of portions of the action, including any one or more of the following (CCP §437c(f)(1)):

- Individual cause of action;
- Individual affirmative defense;
- Claim for punitive damages; or
- Issue of legal duty.

Summary adjudication does not resolve the entire action; it simply eliminates the need for proof at trial on the issues summarily adjudicated. It does not result in a judgment and is not immediately appealable, although a party may petition the appellate court for a writ of mandate to review the determination. See §12.33. After summary adjudication, the case proceeds to trial on the remaining issues and causes of action.

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2. Showing Required to Prevail

§2.18 a. Individual Cause of Action

To prevail on a summary adjudication motion, a moving defendant must show that one or more causes of action are without merit, *i.e.,* one or more elements of a cause of action cannot be separately established, or an affirmative defense exists as to a cause of action. See CCP §437c(o)(1)-(2); *City of Emeryville v Superior Court* (1991) 2 CA4th 21, 25, 2 CR2d 826 ("no merit" includes when defendant has established complete defense to action or cause of action).

EXAMPLE: Summary adjudication was granted in favor of employer in an action by employee for injuries caused by workplace exposure to toxic mold because workers' compensation was the exclusive remedy for employee's claim. *Jensen v Amgen, Inc.* (2003) 105 CA4th 1322, 129 CR2d 899.

A moving plaintiff must show that each element of the cause of action has been proved, and thus "there is no defense." A moving plaintiff need not also disprove any of the defendant's affirmative defenses. See CCP §437c(p)(1); *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 853, 107 CR2d 841.

CAUTION: A party may not move for summary adjudication of causes of action if a previous motion for summary judgment or summary adjudication was denied unless that party establishes that the motion is based on newly discovered facts or circumstances or a change of law. CCP §437c(f)(2). See *Patterson v Sacramento City Unified Sch. Dist.* (2007) 155 CA4th 821, 827, 66 CR3d 337 (court found no procedural bar to consideration of defendant's second summary judgment motion because two motions involved different legal theories, and law changed after ruling on first motion). On renewal of a summary judgment or summary adjudication motion, see §§12.43-12.46.

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/§2.19 (1) When Separate Causes of Action Are Commingled

§2.19 (1) When Separate Causes of Action Are Commingled

When separate causes of action are commingled into one, a court may grant summary adjudication of the individual claims if they can be separately adjudicated. *Dominguez v Washington Mut. Bank* (2008) 168 CA4th 714, 727, 85 CR3d 705 (granting summary adjudication as to retaliation claim against individual employee, because such claims are only proper against employers), citing *Lilienthal & Fowler v Superior Court* (1993) 12 CA4th 1848, 1854, 16 CR2d 458 (court can summarily adjudicate one of two unrelated acts of legal malpractice alleged in single cause of action).

EXAMPLE 1: Employee's claims for sexual harassment and for retaliation for complaining about the harassment were separate causes of action. The court found triable issues of fact as to retaliation, but not as to the initial harassment, and ordered summary adjudication of the harassment claim only. *Mathieu v Norrell Corp.* (2004) 115 CA4th 1174, 1188, 10 CR3d 52.

EXAMPLE 2: Defendant obtained summary adjudication of a contract claim even though it was combined in a single cause of action with an antitrust claim. *Exxon Corp. v Superior Court* (1997) 51 CA4th 1672, 1688 n11, 60 CR2d 195.

A court will not, however, grant summary adjudication when the claims are so commingled that disposing of one will not completely dispose of the cause of action. See, *e.g., Hindin v Rust* (2004) 118 CA4th 1247, 1258, 13 CR3d 668 (summary adjudication improperly granted in malicious prosecution action because it did not completely dispose of malicious prosecution cause of action).

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§2.20 (2) When Declaratory Relief Claim Is Intertwined With Other Causes of Action

A declaratory relief claim may not be susceptible to resolution by summary adjudication when it arises from the same operative facts and is intertwined with other causes of action but does not relate to a separate and distinct wrongful act. Compare *Hood v Superior Court* (1995) 33 CA4th 319, 323, 39 CR2d 296 (summary adjudication of declaratory relief action did not adjudicate entirety of any cause of action and was prohibited by CCP §437c(f)(1)), with *Southern Cal. Edison Co. v Superior Court* (1995) 37 CA4th 839, 44 CR2d 227 (summary adjudication of cause of action for declaratory relief was not precluded merely because issues subject to declaratory relief were present in other causes of action).

PRACTICE TIP: Beware of attempts to use a declaratory relief claim to assert issues disputed in the underlying action. "The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action." *Hood,* 33 CA4th at 324. See 6 Witkin, California Procedure, *Proceedings Without Trial* §274 (5th ed 2008).

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§2.21 b. Individual Affirmative Defense

A plaintiff must establish that there is no merit to the affirmative defense(s) raised to the cause of action in question. See CCP §437c(f)(1)-(2); *City of Emeryville v Superior Court* (1991) 2 CA4th 21, 25, 2 CR2d 826. On the other side, the defendant must show that "there is a complete defense" to the cause of action. CCP §437c(p)(2); *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 849, 107 CR2d 841.

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/§2.22 c. Claim for Punitive Damages

§2.22 c. Claim for Punitive Damages

The defendant must establish that there is no merit to a claim for punitive damages as specified in CC §3294. The entire claim for punitive damages must be eliminated by summary adjudication, because piecemeal adjudication of factual allegations supporting a claim for punitive damages is prohibited by CCP §437c(f)(1). *Catalano v Superior Court* (2000) 82 CA4th 91, 92, 97 CR2d 842. See *DeCastro W. Chodorow & Burns, Inc. v Superior Court* (1996) 47 CA4th 410, 421, 54 CR2d 792 (reference to "one or more claims for damages" in the first part of §437c(f)(1) is "qualified by, and limited to, punitive damages").

NOTE: The court in *Catalano* expressly declined to decide whether summary adjudication must eliminate all claims for punitive damages in one action when there are separate and distinct claims for punitive damages that have nothing to do with one another within one complaint. 82 CA4th at 98 n5.

When making a motion for summary adjudication, a moving party's burdens of production and persuasion are shaped by the applicable burdens of proof at trial. See *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 851, 107 CR2d 841. On evidentiary burdens, see chap 4. When a defendant challenges the sufficiency of the plaintiff's evidence on a punitive damages claim, the court must apply the higher standard of "clear and convincing" evidence. *Basich v Allstate Ins. Co.* (2001) 87 CA4th 1112, 1121, 105 CR2d 153. See *Food Pro Int'l, Inc. v Farmers Ins. Exch.* (2008) 169 CA4th 976, 995, 89 CR3d 1 (summary adjudication of plaintiff's punitive damages claim was proper because plaintiff failed to present clear and convincing evidence of tortious conduct that would justify imposition of punitive damages).

On punitive damages, see California Tort Damages, chap 14 (2d ed Cal CEB 2002).

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/§2.23 d. Issue of Duty

§2.23 d. Issue of Duty

Determining the existence and scope of a defendant's duty of care is appropriate for resolution by summary adjudication. *Watts Indus., Ins. v Zurich Am. Ins. Co.* (2004) 121 CA4th 1029, 1038, 18 CR3d 61. The plaintiff must show that a defendant owed a duty to the plaintiff, and the defendant must establish that it did not owe a duty to the plaintiff. See *Regan Roofing Co. v Superior Court* (1994) 24 CA4th 425, 29 CR2d 413 (summary adjudication proper in both negligence and contract actions to resolve questions of duty), disapproved in part on other grounds in *Crawford v Weather Shield Mfg. Inc.* (2008) 44 C4th 541, 79 CR3d 721.

There is a split of authority on whether summary adjudication is available when an issue of duty does not dispose of an entire cause of action. Compare *Regan Roofing Co.,* 24 CA4th at 436 (issue of duty could not be summarily adjudicated if it did not completely dispose of claim or defense), with *Linden Partners v Wilshire Linden Assocs.* (1998) 62 CA4th 508, 520, 73 CR2d 708 (summary adjudication was proper as to any one of CCP §437c(f) categories (see §2.17) without reference to dispositive effect on any other category).

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§2.24 3. Effect of Grant of Summary Adjudication

At trial, any causes of action, defenses, claims, or issues on which a motion for summary adjudication has been granted are deemed to be established, and the action proceeds on other matters. CCP §437c(n)(1). When a motion for summary adjudication is granted, it does not bar any cause of action, affirmative defense, claim for damages, or issue of duty for which summary adjudication was not sought or was denied. CCP §437c(n)(2).

A party, a witness, or the court may not comment on the granting or denial of a motion for summary adjudication before a jury at trial. CCP §437c(n)(3); *Raghavan v Boeing Co*. (2005) 133 CA4th 1120, 1125, 35 CR3d 397. See 6 Witkin, California Procedure, *Proceedings Without Trial* §277 (5th ed 2008). In *Raghavan,* the appellate court held that the trial court could not instruct the jury that certain factual issues were established as a result of the summary adjudication motion. 133 CA4th at 1134. The *Raghavan* trial court erroneously instructed the jury that the summary adjudication of the defamation cause of action established certain facts as to the wrongful termination cause of action.

PRACTICE TIP: There may be ways to make a jury aware of the result of a summary adjudication motion without violating the rule against commenting on the granting or denial of the motion. For example, if the court granted a defendant's motion for summary adjudication of a plaintiff's request for punitive damages, the defendant may be able to tell the jury that "plaintiff is not asking for punitive damages here" (or something to that effect), as long as he or she doesn't reference the fact that the absence of a punitive damages request is the result of a successful summary adjudication motion. Similarly, it is probably permissible for a party to question a witness about evidence submitted in support of, or in opposition to, a summary adjudication motion (again, as long as the party doesn't comment on which side was successful). For example, if the court granted a defendant's motion for summary adjudication, at trial the defendant can probably question a plaintiff-affiliated witness about a declaration he or she submitted in opposition to the motion. A particularly attentive and thoughtful jury may realize that the cause of action to which the declaration relates is no longer in the case.

CAUTION: Counsel should be very cautious about this. The value of making the jury aware of the result of a motion for summary adjudication is questionable. Whatever minimal value there may be is likely outweighed by the risk of being admonished by the court—or worse, a potential mistrial—for running afoul of the rule.

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C. Tactical Considerations

1. Moving for Summary Judgment Only

§2.25 a. Benefits

The obvious benefit of moving for summary judgment is that if the moving party is successful, there is an immediate judgment and all the costs and delay of a trial have been avoided. There is also the benefit, win or lose, that a summary judgment motion forces the opposing party to make an evidentiary showing, providing useful information about its case. See §§1.8, 1.13.

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§2.26 b. Risks

Just as the moving party learns more about the opposition's case, the opposing party will also learn about the moving party's evidence on key issues. See §1.20. In addition, the moving party risks its witnesses being impeached at trial if their testimony varies from their declarations provided in support of the summary judgment motion. See §1.21.

Summary judgment motions can also be costly and take significant time to prepare. In addition, if a party's summary judgment motion is denied, the court's order may contain language that could be used against the moving party later. See §1.17.

PRACTICE TIP: If there is only a weak probability of winning a summary judgment motion, consider bringing a summary adjudication motion; seeking summary judgment when grounds do not exist may result in a loss of credibility with the court or the opposing party.

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2. Moving for Summary Adjudication Only

§2.27 a. Benefits

The obvious benefit of a summary adjudication motion is that it can completely dispose of a cause of action, defense, damage claim, or duty issue (see §2.16). This can save money and time as the case proceeds to trial. Summary adjudication can also hone the case down to the real dispute between the parties. See §1.48.

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Source: Civil Litigation/California Summary Judgment/2 Availability of Relief/§2.28 b. Risks

§2.28 b. Risks

It may actually be better not to challenge the opposing party's weaker claims for two reasons:

- It may give the trier of fact the impression that all of the opposition's claims are equally weak; and
- It may deprive the moving party of the opportunity to attack and destroy a weak claim at trial before the jury.

In addition, a successful summary adjudication motion may lay the foundation for a successful appeal by the opposition if the moving party obtains a judgment at trial.

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§2.29 3. Moving for Summary Judgment and Summary Adjudication in the Alternative

Motions for summary judgment and summary adjudication are frequently made in the alternative so that the court can determine whether there are triable issues of fact as to specific claims or defenses even if it denies summary judgment as to the entire action. See CCP §437c(f)(2). If made in the alternative, a summary adjudication motion may refer to and depend on the same evidence submitted in support of the summary judgment motion. Cal Rules of Ct 3.1350(b). In fact, a party must move for summary adjudication in the alternative for the court to consider adjudication of particular issues. See *Hawkins v Wilton* (2006) 144 CA4th 936, 949, 51 CR3d 1 (because defendant did not move in alternative for summary adjudication of specified issues, court would not address whether defendant may have prevailed on them). See §2.16.

PRACTICE TIP: It is generally advantageous to move for both summary judgment and summary adjudication in the alternative. The risks associated with each type of motion apply, however. See §§2.26, 2.28. If a party is confident that the court will grant a summary judgment motion, then consider not moving in the alternative if only because presenting issues separately may create the impression that some arguments are stronger than others, and that the moving party is hedging its motion by ensuring that the court will "at least" grant summary adjudication of those issues for which the moving party has "strong" arguments even if it denies summary adjudication of those issues for which the party has "weak" arguments.

CAUTION: A party may not move for summary adjudication based on issues that previously had been denied unless the party establishes that the motion is based on newly discovered facts or circumstances or a change of law. CCP §437c(f)(2). See §2.18.

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III. COMPARISON WITH FEDERAL LAW

§2.30 A. Federal Law on Summary Judgment

As a result of a series of cases known as the *Celotex* trilogy (*Celotex Corp. v Catrett* (1986) 477 US 317, 91 L Ed 2d 265, 106 S Ct 2548; *Anderson v Liberty Lobby, Inc.* (1986) 477 US 242, 91 L Ed 2d 202, 106 S Ct 2505; *Matsushita Elec. Indus. Co. v Zenith Radio Corp.* (1986) 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348), federal courts are granting more summary judgments under Fed R Civ P 56. In these three cases, the United States Supreme Court held that the party with the burden of proof as to an element of a claim at trial also has the burden of producing evidence sufficient to demonstrate a genuine issue for trial in opposing a motion for summary judgment. Evidence is sufficient to demonstrate a genuine issue if it could withstand a directed verdict motion. *Anderson,* 477 US at 250.

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§2.31 B. California Law Has Moved Closer to Federal Law on Summary Judgment

In California, the 1992 and 1993 legislative amendments to CCP §437c changed summary judgment law to move it closer to its federal counterpart as clarified in *Celotex, Anderson,* and *Matsushita* (see §2.30). See Senate Rules Committee Analysis of AB 498 (July 1, 1993). California law now provides that, once the moving defendant meets its burden of showing that the cause of action cannot be established or there is a complete defense to that cause of action, the burden shifts to the plaintiff to show that there is a triable issue of material fact as to the cause of action or defense to it. CCP §437c(p)(2).

The California Supreme Court has stated that summary judgment law in this state now conforms largely, but not completely, to its federal counterpart. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 848, 107 CR2d 841.

On evidentiary burdens and presumptions under California law, see chap 4.

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§2.32 C. Main Difference Between California and Federal Law on Summary Judgment

California summary judgment law diverges from federal law by continuing to require a moving defendant to meet its burden by presenting specific facts showing that no triable issue of material fact exists. CCP §437c(p)(2); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854, 107 CR2d 841 (moving defendant "must present evidence, and not simply point out through argument, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence"). See §4.30. Under the federal standard, a moving defendant may shift the burden of producing evidence to the nonmoving plaintiff merely by pointing out through argument the absence of evidence to support the plaintiff's claim. *Fairbank v Wunderman Cato Johnson* (9th Cir 2000) 212 F3d 528, 532. But see *Nissan Fire & Marine Ins. Co. v Fritz Cos.* (9th Cir 2000) 210 F3d 1099, 1105 (moving party without ultimate burden of persuasion at trial must "produce affirmative evidence negating an essential element of the nonmoving party's claim or defense").

PRACTICE TIP: The moving defendant must support the motion with evidence, including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. CCP §437c(b)(1). The defendant may also present evidence that the plaintiff lacks needed evidence through the plaintiff's own admissions to the effect that, following extensive discovery, he or she discovered nothing. On evidentiary support for the motion, see chap 5; §§6.36-6.51.

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3

Timing Requirements and Planning Strategies

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§3.1 I. INTRODUCTION

Issues of timing are among the most important issues in moving or responding to a summary judgment motion. The summary judgment statute sets out clear rules on timing; see §§3.2, 3.13-3.33. In most actions, developing a plan for whether and when to move, or how to respond to avoid a potential motion, may depend on a number of factors and considerations. See §§3.7-3.12. After the motion is filed, the opposing party may be able to secure a continuance of the hearing; see §§3.34-3.46 on when and how to obtain a continuance.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.2 A. Chart: Timing Provisions in CCP §437c

§3.2 A. Chart: Timing Provisions in CCP §437c

The following chart summarizes the timing requirements embodied in CCP §437c.

Task	Timing
Earliest date to move	(1) Any time after **60 days** have elapsed from the general appearance of party against whom the motion is directed; or (2) At an earlier time after that party's general appearance if the court orders, for good cause shown. CCP §437c(a). See §3.13.
Notice required for moving papers	(1) If personally served, **75 days**. CCP §437c(a). See §3.16. (2) If served by mail to an address within California, **80 days**. See §3.17. (3) If served by mail to an address outside California, but within the U.S., **85 days**. (4) If served by mail to an address outside of the U.S., **95 days**. (5) If served by fax, Express Mail, or another overnight delivery method, then **75 days plus 2 court days**. **NOTE:** These service deadlines cannot be shortened by the court without the parties' consent. See §3.18.
Latest date for hearing	(1) No later than **30 days** before the date trial is set, unless (2) The court orders otherwise for good cause shown. CCP §437c(a). See §3.21.
Opposition	Served and filed at least **14 days** before hearing date. CCP §437c(b)(2). See §3.30.
Reply	Served and filed at least **5 days** before hearing date. CCP §437c(b)(4). See §3.32.
Petition for writ after denial of motion	(1) If personally served with written notice of entry of order, no later than **20 days** after service; (2) If served by mail to an address within California, then **25 days**; (3) If served by mail to an address outside of California but within the U.S., then **30 days**; (4) If served by mail to an address outside of the U.S., then **40 days**; or (5) If served by fax, Express Mail, or another overnight delivery service, then **20 days plus 2 court days**. CCP §437c(m)(1). See §12.48. **NOTE:** A court may extend the time to petition

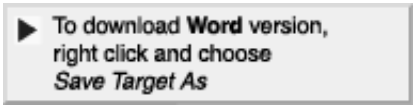
	for a writ once for good cause shown for up to **10 days**, but only if the extension request is made before the initial time to petition (*i.e.*, **20 days**) expires. CCP §437c(m)(1).

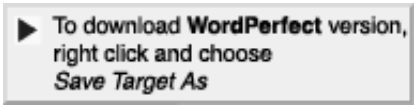
CAUTION: The period for trial provided by CCP §1170.5 (unlawful detainer actions) is not extended by CCP §437c. CCP §437c(q). See §13.6.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.3 B. Checklist: Moving Party's Preparation and Moving Papers

§3.3 B. Checklist: Moving Party's Preparation and Moving Papers





- 1. Decide whether to move for summary judgment or summary adjudication.
- A. Check availability and requirements for each. See chap 2.
- B. Consider risks and benefits for each. See §§1.8-1.22, 2.25-2.28.
- C. Consider alternatives for terminating litigation or narrowing issues. See §§1.23-1.34.
- D. Assess case for likelihood of success of each. See §§1.35-1.49.
- 2. Review timing. See §§3.13-3.33.
- A. Check the statutory requirements.
- B. Review strategic options and decide best time to move.
- 3. Research and understand evidentiary burdens in the case-in-chief and in the motion. See chap 4.
- A. Research the law in the case.
- B. Evaluate the burdens to meet for the motion.
- 4. Create a discovery plan. See chap 5.
- A. Evaluate the pleadings to determine the scope of the motion.
- B. Review discovery and other evidence already obtained, including:
- (1) Evidence from client and affiliated witnesses;
- (2) Evidence from opponent; and
- (3) Judicially noticed matters.
- C. Complete discovery (if necessary).
- 5. Marshal the evidence required to carry burdens for the motion. See chap 5.
- 6. Prepare the moving papers. See §§6.21-6.66.
- A. Review the procedural requirements of CCP §437c and the Rules of Court.
- B. Draft the moving papers, including:
- (1) Separate statement;
- (2) Supporting memorandum;
- (3) Supporting evidence;
- (4) Notice of motion; and
- (5) Proposed order granting the motion
- 7. Schedule hearing date. See §§6.67-6.69.
- 8. Serve and file the motion. See §§6.70-6.76.

Comment: The moving party controls when a motion is filed and whether the motion is for summary judgment or summary adjudication, or both. In preparing the motion, counsel for the moving party can control the scope and timing of the motion. On preparing and filing the moving papers, see chap 6.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.4 C. Checklist: Opposing Party's Preparation and Opposition

§3.4 C. Checklist: Opposing Party's Preparation and Opposition

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- 1. Anticipate a summary judgment or summary adjudication motion in the case. See chaps 1, 7; §§3.7-3.12.
- A. Draft pleadings to cover all anticipated causes of action or affirmative defenses that the facts and evidence indicate.
- B. Conduct discovery early to elicit evidence in support of your position and in contravention of opponent's position.
- 2. Review and calendar the date the opposition is due, the date the moving party's reply is due, and the date of the hearing. See §§3.30-3.32.
- A. Ask for a stipulation to continue the matter if needed.
- B. Move for a continuance if the other side will not stipulate to it if needed. See §§3.34-3.46.
- 3. Read and evaluate the motion for potential challenges. See §§7.3-7.12.
- A. Review moving papers for possible procedural challenges:
- (1) Is the motion timely? See §§3.13-3.15. If the motion is not timely, failure to object waives the challenge. See §7.3.
- (2) Does the notice of motion comply with CCP §1010 and Cal Rules of Ct 3.1350? See §§6.52-6.55, 7.4.
- (3) Does the moving party's separate statement comply with the requirements of Cal Rules Ct 3.1350? See §§6.22-6.35, 7.5.
- (4) Do all of the moving papers comply with the applicable statutes and court rules? See §7.6.
- B. Evaluate the moving party's evidence for evidentiary challenges. See §7.8, chap 9.
- C. Analyze the moving papers for substantive challenges (see §§7.9-7.11):
- (1) Did the moving party meet its burden of proof?
- (2) Are there reasonable conflicting inferences in the evidence that create a triable issue of material fact?
- (3) Has the moving party cited the correct law?
- (4) Does the motion seek to adjudicate less than an entire cause of action?
- 4. Research and understand your evidentiary burdens in the case-in-chief and in the motion. See chap 4.
- A. Research the law in the case.
- B. Evaluate the burdens to be met for the motion.
- 5. Evaluate the pleading. See §§7.13-7.17.
- A. Consider whether grounds for opposition are raised in the pleading.
- B. Determine whether to move to amend the pleading.
- 6. Marshal the evidence required to carry your burdens in opposing the motion. See chap 5.
- A. Review discovery and other evidence adduced to date.
- B. Complete discovery (if necessary).
- 7. Prepare opposition papers. See §§7.20-7.44.

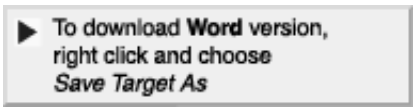
- A. Review the procedural requirements of CCP §437c and the Rules of Court.
- B. Draft the opposition papers, including:
- (1) Opposing separate statement;
- (2) Opposing memorandum;
- (3) Evidence in opposition;
- (4) Request for judicial notice;
- (5) Objections to supporting party's evidence;
- (6) Ex parte application to continue the hearing (if necessary);
- (7) Proposed order denying the motion; and
- (8) Motion for sanctions for bad faith submission of declarations.
- 8. Consider whether to file a cross-motion for summary judgment or summary adjudication. See §§7.46-7.48.
- 9. Serve and file the opposition papers. See §7.45.

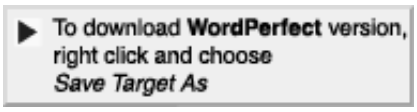
Comment: The opposing party responds to a motion filed by another party. In preparing the case, from the initial drafting of the pleadings to the discovery conducted for the case-in-chief, opposing counsel should anticipate a summary judgment or summary adjudication motion and work to avoid or lessen its impact in the case through careful planning and discovery. On preparing and filing the opposing papers, see chap 7.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.5 D. Checklist: Moving Party's Reply

§3.5 D. Checklist: Moving Party's Reply





- 1. Confirm date calendared for reply. See §3.32.
- 2. Read and evaluate the opposition papers for potential challenges. See §§8.6-8.13.
- A. Review the opposition papers for possible procedural challenges (see §§8.6-8.9):
- (1) Is the opposition timely? Court may grant motion if the opposition is not timely.
- (2) Does the opposition include an adequate separate statement of undisputed material facts? Court may grant motion if separate statement is inadequate.
- (3) Did the opposing party submit written objections in the proper format?
- B. Evaluate the opposing party's evidence for evidentiary challenges. See §§8.10-8.11, chap 9.
- C. Analyze the opposition papers for substantive challenges (see §§8.12-8.13):
- (1) Did the opposing party meet its burden of proof?
- (2) Has the opposing party cited the correct law?
- 3. Prepare reply papers. See §§8.16-8.22.
- 4. Serve and file reply papers. See §§8.2-8.4.

Comment: The moving party should use the reply to rebut the key points raised in the opposing papers, rather than reiterate the same points made in the moving or opposing papers. On preparing and filing the reply, see chap 8.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.6 E. Chart: Deadlines and Client Dates

§3.6 E. Chart: Deadlines and Client Dates

The following chart lists deadlines for all events and tasks associated with handling a motion for summary judgment and adjudication. It provides space for calculating specific deadlines for a particular case.

Event/Task	Date/Deadline	Client's Date/Deadline
Opposing party's general appearance	Unless court orders otherwise, earliest date motion can be brought (**60 days** after general appearance of party against whom motion is directed) (CCP §437c(a)).	
Trial date	Trial date fixes latest motion deadlines.	
Complete discovery and gathering of evidence needed for motion	Arrange deadlines in accordance with each discovery method; calendar the reviewing and signing of all declarations with declarants.	
Request and set hearing date	Well in advance of, but not later than **105 days** before trial date (depending on method of service and court's availability for hearing) (CCP §437c(a)).	
Hearing date	Not less than **30 days** before trial date (CCP §437c(a)).	
Serve motion on all parties	At least **75 days** before hearing; more if served by mail, fax, or overnight delivery (CCP §437c(a)).	
File motion, supporting papers, with court	At least **75 days** before hearing (CCP §437c(a)).	
Opposing party files and serves opposition	Not less than **14 days** before hearing date (CCP §437c(b)(2)) (service should be made to ensure next day delivery).	
Serve and file reply to opposition	Not less than **5 days** before noticed or continued hearing date (CCP §437c(b)(4)) (service should be made to ensure next day delivery).	
Arrange for court reporter if necessary	Check local practice; see Cal Rules of Ct 3.1352.	
Call or check	Check local practice	

online for tentative ruling, if available	(sometimes available the day before the hearing).	
Prepare order, if necessary	Check local practice; often due within **10 days** of ruling.	
Petition for writ of mandate, if necessary	Within **20 days** after service of written notice of entry of an order other than summary judgment (*e.g.*, denial of the motion), plus **5 days** if mailed to California address (CCP §437c(m)).	
Appeal grant of summary judgment, if necessary	File notice of appeal on or before the earliest of (1) **60 days** after service of a Notice of Entry of Judgment or file-stamped copy of judgment, showing date either was served; or (2) **180 days** after entry of judgment (Cal Rules of Ct 8.104(a)).	

PRACTICE TIP: Check local rules and practice before proceeding, *e.g.,* for contacting the court to reserve time for hearing before filing motion, for obtaining court records when requesting judicial notice, or for conforming to local requirements adopted under the Trial Court Delay Reduction Act (Govt C §§68600-68620). Note that local rules, *e.g.,* on motions, ex parte applications, and forms and format of court papers, may be preempted. See Cal Rules of Ct 3.20(a)-(b).

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II. PLANNING STRATEGIES

§3.7 A. When to Begin Planning

Counsel should begin thinking about summary judgment when first involved in the case. Preliminary analysis of the potential availability of a summary judgment or summary adjudication motion could affect the initial pleadings, as well as the order and conduct of early discovery efforts. It is especially important to have the timing requirements in mind before the matter is set for trial, so that at the time of the Case Management Conference or Trial Setting Conference counsel knows the earliest date on which trial can safely be set, taking into account not only the lengthy notice period, but also the amount of time still necessary to complete sufficient discovery before drafting the motion.

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B. Tactical Considerations

1. Early Motions

§3.8 a. Before All Parties Have Appeared

If a moving party makes the motion before all parties have appeared, it risks the court's delaying the motion. Opposing parties will then be able to structure their cases and other tactical steps after having considered the summary judgment motion. In addition, if a new party subsequently appears in the action and names the moving party in a cross-complaint after the motion is filed, the moving party might find itself still in the case, even if summary judgment is granted as to another party.

PRACTICE TIP: Carefully evaluate potential causes of action by anticipated parties when intending to file a motion before all parties have appeared.

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§3.9 b. Before Discovery Is Completed

The courts are usually reluctant to rule on early motions when discovery has not been completed and important evidence has not yet been gathered. See, *e.g., Nazar v Rodeffer* (1986) 184 CA3d 546, 556, 229 CR 209. When a motion for summary judgment or summary adjudication is filed soon after the opposing party's general appearance, the trial court will normally continue the hearing, when requested, to allow a reasonable time for discovery before deciding the motion.

If evidence is discovered after summary judgment has been granted, it may be used as grounds for setting aside the judgment. The party against whom judgment has been entered may file a motion for new trial under CCP §657 if the newly discovered evidence is material and could not, with reasonable diligence, have been discovered and produced earlier. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 858, 107 CR2d 841. See §§12.8-12.10. The trial court's ruling on a motion for new trial will be reviewed only for abuse of discretion. *Horowitz v Noble* (1978) 79 CA3d 120, 138, 144 CR 710.

NOTE: A trial court may reconsider its order denying a summary judgment motion to correct an error after giving the parties notice and an opportunity to litigate the issue. *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249.

In unusual situations, the motion may be brought successfully before completion of discovery, if the moving party has already pinned down the opposing party's contentions and has sufficient admissible evidence for a successful motion. Under these circumstances, bringing a motion for summary judgment before discovery is completed may

- Avoid further expensive and unnecessary discovery;
- Achieve a quick disposition of a case in which delay would prejudice the moving party;
- Dispose of the case before the opposing party has had time to fully prepare its case and learn facts that would strengthen it; and
- Force the opposing party to disclose evidence supporting its case.

Although a court may be inclined to grant a continuance under CCP §437c(h) (see, *e.g.,* San Francisco Ct R 8.2(B)), even if the opposing party has not been diligent in conduct of discovery (see *Bahl v Bank of America* (2001) 89 CA4th 389, 107 CR2d 270), the court is likely to set conditions and a schedule for completing discovery. In the event that the opposing party has delayed in pursuing discovery due to the expense or the weaknesses of its case, the imposition of a discovery schedule may cause it to reevaluate its interest in pursuing the case. On continuances, see §§3.34-3.46.

PRACTICE TIP: Some courts will not grant continuances if the opposing party has not been diligent in obtaining discovery. *Cooksey v Alexakis* (2004) 123 CA4th 246, 19 CR3d 810. Thus, the moving party may be able to resolve the action, or some portions of it, early if the opposing party does not act in a reasonably prompt manner to obtain the necessary evidence to oppose the motion.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.10 c. Sham Pleadings

§3.10 c. Sham Pleadings

If the pleadings are a sham and declarations can dispose of the case promptly, a motion for summary judgment should be made shortly after an answer is filed. See, *e.g., Charpentier v Von Geldern* (1987) 191 CA3d 101, 106, 236 CR 233. Resolving the case early saves the time and expense of prolonged litigation.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.11 2. When Evidence Is Developed on Dispositive Question

§3.11 2. When Evidence Is Developed on Dispositive Question

Counsel should consider moving for summary judgment, summary adjudication, or both, as soon as there is sufficient evidence on any dispositive question or as soon as it becomes clear that declarations could clearly show the pleadings to be a sham. For example, in a medical malpractice case, counsel may be able to focus on a statute of limitations defense without having to develop other issues, such as the standard of care, negligence, and damages.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.12 3. Completion of Discovery

§3.12 3. Completion of Discovery

Although it is often to the moving party's advantage to wait as long as possible before filing a motion for summary judgment, there are many exceptions to this tactic. For example, delay is not helpful if admissions or declarations against interest gained in discovery might provide proof of elements of the opposing party's case. See, *e.g., D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 21, 112 CR 786.

Delaying the motion until substantial discovery has been completed is often advisable because

- Discovery helps the moving party determine whether questions of fact exist;
- Admissions, answers to interrogatories, and other information gained in formal discovery or informal investigation may provide irrebuttable proof of elements of the opposing case;
- Discovery helps the moving party obtain foundation and authentication to admit evidence, *e.g.,* for documents;
- Discovery preserves evidence for later use if a witness becomes unavailable; and
- Information gained by discovery is usable at trial if the motion is denied.

On evidence obtained through discovery, see §§5.33-5.57.

NOTE: A motion for summary judgment can be made even after a motion for summary adjudication has been denied, but if the later motion is based on issues asserted (and unfavorably decided) in the earlier motion, the moving party must show newly discovered facts or circumstances or a change of law. CCP §437c(f)(2). See, *e.g., Schachter v Citigroup, Inc.* (2005) 126 CA4th 726, 23 CR3d 920 (court's inherent power to correct its own rulings does not excuse party from complying with requirements of CCP §437c(f)(2)). See §2.18.

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III. TIMING REQUIREMENTS

A. Moving Party

§3.13 1. Earliest Date to Move

Any party may move for summary judgment at any time after **60 days** have elapsed from the general appearance of the party against whom the motion is directed, or at an earlier time after that party's general appearance, if the court so orders for good cause shown, with or without notice. CCP §437c(a). As long as the hearing has been set for a date more than **60 days** after the defendant has appeared, the notice of motion may be served and filed within the **60-day** period. *McMahon v Superior Court* (2003) 106 CA4th 112, 115, 130 CR2d 407; *Sadlier v Superior Court (Schoenburg)* (1986) 184 CA3d 1050, 229 CR 374.

PRACTICE TIP: A defendant may bring a motion as early as **60 days** after the filing of the complaint, even before answering. Note, however, that the time to answer is not extended by bringing a summary judgment motion. CCP §437c(a). See *Conn v National Can Corp.* (1981) 124 CA3d 630, 636, 177 CR 445. A plaintiff may bring a motion before the defendant has answered as long as the defendant has made a general appearance in the case. On what constitutes a general appearance, see §3.15.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.14 a. Purpose of Waiting 60 days After General Appearance

§3.14 a. Purpose of Waiting 60 days After General Appearance

The purpose of the **60-day** waiting period at the beginning of the case is to give the opposing party reasonable time to gather evidence and to obtain discovery before having to appear at a motion that could terminate the action. There is an exception to this rule for unlawful detainer and forcible entry or detainer cases, in which a motion for summary judgment may be made at any time after the answer is filed on **5 days'** notice. CCP §1170.7. See §§13.4-13.6.

PRACTICE TIP: Make sure your opponent has a reasonable opportunity to conduct discovery before filing a summary judgment motion. Even if the motion is not premature, the court may still grant requests for additional discovery, giving your opponent the opportunity to prepare a better opposition. See, *e.g., Hunter v Pacific Mechanical Corp.* (1995) 37 CA4th 1282, 44 CR2d 335, disapproved on other grounds in *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 107 CR2d 841 (court continued motion to permit additional discovery after discovery had closed; plaintiff still unable to meet burden of establishing genuine factual dispute).

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.15 b. What Constitutes General Appearance

§3.15 b. What Constitutes General Appearance

Under CCP §1014, a defendant makes a general appearance when the answer, demurrer, motion to strike, or motion to transfer under CCP §396b is filed, or a defendant moves for reclassification under CCP §403.040 or gives the plaintiff written notice of appearance, or an attorney gives notice of appearance for the defendant, or when a general appearance is made in some other manner. See *Sadlier v Superior Court (Schoenburg)* (1986) 184 CA3d 1050, 229 CR 374 (defendant made general appearance by opposing ex parte application for attachment).

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2. Required Notice

§3.16 a. 75 Days' Notice for Personal Service

The notice of the motion and supporting papers must be served on all other parties to the action at least **75 days** before the time appointed for hearing, if service is made by personal delivery. CCP §437c(a). Without the parties' consent, the trial court has no authority to shorten the minimum notice period for the hearing of a summary judgment motion. *Robinson v Woods* (2008) 168 CA4th 1258, 86 CR3d 241; *McMahon v Superior Court* (2003) 106 CA4th 112, 115, 130 CR2d 407.

CAUTION: In forcible and unlawful detainer actions, a summary judgment motion requires only **5 days'** notice. See CCP §1170.7, discussed in §§13.4-13.6.

WARNING: The ordinary notice provisions of CCP §1005 and the extension provisions of CCP §1013 do not apply to summary judgment motions, except for the provisions of CCP §1005(c) relating to the method of service of opposition and reply papers. CCP §437c(b)(6).

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.17 b. Notice Extended for Service Other Than Personal Service

§3.17 b. Notice Extended for Service Other Than Personal Service

The notice period is extended if service is made by mail instead of personal service. An additional **5 days** is added to the notice period if the mailing address is within California; **10 days** if the mailing address is outside of California but within the United States; and **20 days** if the mailing address is outside of the United States. CCP §437c(a). If service is made by fax, express mail, or another overnight delivery service, then the notice period is extended by **2 court days**. CCP §437c(a).

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§3.18 c. Court May Not Shorten Notice Period Absent Parties' Consent

The trial court has no authority to shorten the minimum notice period on a summary judgment motion without the parties' consent. *Urshan v Musicians' Crédit Union* (2004) 120 CA4th 758, 763, 15 CR3d 839. The parties, however, may agree to waive the notice periods mandated by statute. *Credit Suisse First Boston Mortgage Capital, LLC v Danning, Gill, Diamond & Kollitz* (2009) 178 CA4th 1290, 1301, 101 CR3d 192.

EXAMPLE: In plaintiffs' action for negligence and insurance bad faith (and other causes of action), plaintiffs moved for trial preference based on age and health. After a hearing on that motion and various demurrers, the trial court issued an order granting trial preference, setting a trial date, and establishing deadlines for various pretrial matters, including summary judgment motions. In its order the court specified that the moving party need provide only **21 days'** notice for summary judgment motions. The appellate court analyzed the language of CCP §437c(a), noting that a court is specifically given discretion to shorten the time periods for the initial filing of the motion and the time for hearing the motion, but that no such discretion was included to shorten the notice period for a motion. The court held that in light of the express language of CCP §437c(a), a trial court does not have authority to shorten the minimum notice period for a summary judgment motion, absent the parties' consent. See *McMahon v Superior Court* (2003) 106 CA4th 112, 118, 130 CR2d 407.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.19 d. Motion for Joinder to Summary Judgment

§3.19 d. Motion for Joinder to Summary Judgment

A joinder motion must be served and filed in accordance with the time limits that apply to summary judgment motions. *Frazee v Seely* (2002) 95 CA4th 627, 636, 115 CR2d 780.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.20 e. If Service Is Delayed

§3.20 e. If Service Is Delayed

If the hearing date is set and service is going to be delayed for a few days, resulting in less than **75 days'** notice, the best option is to reschedule the hearing to a later date. If the hearing cannot be rescheduled because the new date would be less than **30 days** before trial, then counsel should consider the following options:

- Seek a stipulation from the other counsel for a brief continuance of the trial date to allow for the statutory notice period, and present the stipulation to the court, along with a proposed order (after checking with the court clerk to determine if the particular judge entertains continuance requests by stipulation);
- Bring an ex parte request for a brief continuance of the trial date to allow for the statutory notice period, if the judge does not entertain continuance requests by stipulation or if the other counsel will not agree.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.21 3. Latest Date to Hear Motion

§3.21 3. Latest Date to Hear Motion

Unless the court orders otherwise for good cause, motions for summary judgment cannot be heard later than **30 days** before the trial date. CCP §437c(a); *Robinson v Woods* (2008) 168 CA4th 1258, 1268, 86 CR3d 241.

PRACTICE TIP: Check local rules and, if required, contact the clerk of the court to ascertain local procedure for setting the hearing date. Many courts assign a law and motion hearing date, and some require counsel to contact the court to reserve a date before the motion is filed and served. See, *e.g.,* San Francisco Ct R 8.2(A)(2)(a). Some courts also limit the days of the week on which they will hear summary judgment motions, which might affect the scheduling of the hearing.

When drafting the moving papers, counsel should calculate the number of days available for both **75 days'** notice and the requirement that the hearing not take place within the **30-day** period before trial so that the motion for summary judgment may be timely filed. See CCP §437c(a).

PRACTICE TIP: In the event a trial date has already been set and no time is available to bring a motion for summary judgment—for example, you have just entered the action or evidence has just come to light that would support a motion for summary judgment—consider immediately requesting a continuance of the trial date sufficient to allow proper notice of the motion. Some courts will allow a continuance based on stipulation of the parties. If the court will grant a continuance based on stipulation or if the other side will not stipulate to a continuance of the trial date, then consider moving by ex parte application for a continuance sufficient to allow for proper notice of the motion. Be prepared to clearly demonstrate good cause for the continuance request, including an explanation of why the motion could not have been brought previously. See *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7 (fast track rules must give way to statutory right to bring motion). On obtaining a continuance, see §§3.34-3.46.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.22 a. Schedule Motion Before Deadline to Guarantee Hearing

§3.22 a. Schedule Motion Before Deadline to Guarantee Hearing

When scheduling the hearing date, counsel should keep in mind that, because of crowded calendars, law and motion hearing dates may not be available for several months; but a court cannot require a longer notice period than required by CCP §437c, *i.e.,* the court *cannot* refuse to hear a summary judgment motion filed within the time limits of CCP §437c, even if the court calendar makes it difficult to schedule the hearing before trial. *Sentry Ins. Co. v Superior Court* (1989) 207 CA3d 526, 529, 255 CR 13. Similarly, local rules requiring a longer notice period for "complex motions" than that provided by CCP §437c(a) are invalid. *Wells Fargo Bank v Superior Court* (1988) 206 CA3d 918, 922, 254 CR 68.

PRACTICE TIP: If the particular court requires that you reserve a date for the hearing, and the department clerk will not assign you a hearing date within the statutorily prescribed time, it may be necessary to bring an ex parte application to request that the judge place the matter on calendar within the time limitations or, alternatively, to continue the trial date for at least **30 days** after the assigned hearing date.

Counsel should check local rules for deadlines under the Trial Court Delay Reduction Act (Govt C §§68600-68620). The time limits in CCP §437c take precedence over "fast track" rules. See *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7 (state rules must give way when they conflict with statutes; Cal Rules of Ct 3.714 permits courts to exempt case from time disposition goals for exceptional circumstances, *e.g.,* when new party is brought into litigation more than 12 months after complaint was filed).

PRACTICE TIP: If practicing in a location in which the court requires counsel to reserve time on the court's calendar for a summary judgment motion (see, *e.g.,* San Bernardino Ct R 520 (contact clerk to request date for hearing before filing motion); Sacramento Ct R 3.20 (hearing date for summary judgment motion must be reserved in advance)), call the court well in advance of a proposed hearing date. Often the date for hearing on a summary judgment motion must be assigned by or cleared with the department clerk, which must be done before the **75-day** notice is given. In many courts with crowded calendars, the first available date for hearing a summary judgment motion is several months away. When calculating notice and service requirements, remember to take into account the scheduling requirements of the court or department in which the motion will be filed, especially if the department limits the days on which it will hear summary judgment motions. Make sure to reserve a date and promptly calendar the filing deadline based on that date.

JUDICIAL PERSPECTIVE: Make a motion well in advance of trial. If the motion is filed on time, but the opponent's request under CCP §437c(h) for a continuance to permit more discovery is granted, there may not be enough time to hear the motion within the deadline. In light of the obvious prejudice to the responding party if it has to deal with the motion shortly before trial, most courts will require good cause sufficient to overcome such prejudice before allowing a hearing to take place less than **30 days** before trial. A better practice is to bring the motion early enough to allow the judge time to deal with it fully, including providing time for more discovery under CCP §437c(h).

EXAMPLE: Absent court order, the absolute deadline for making a motion for summary judgment or summary adjudication is **105 days** (approximately **3½ months**) before trial, because the motion must be heard no less than **30 days** before trial, and moving party must provide at least **75 days'** notice if done by personal service. See CCP §437c(a). To accommodate the **75-day** notice period under CCP §437c, plus additional time for service by mail, the motion cannot be noticed later than **110 days** before the trial date if mailed in California. This number is derived from adding the days before the trial date (**30 days**), plus the statutory requirement for notice (**75 days**), plus the shortest additional time for service by mail (**5 days**). See CCP §437c(a).

PRACTICE TIP: Calendar the motion deadlines as soon as the court sets the trial date, even when no decision has been made on whether to move. Have the timing requirements in mind before the matter is set for trial so that at the time of the Case Management Conference or Trial Setting Conference you know the earliest date on which

trial can be safely set. For example, at the time of the conference, you may need another **60 days** to complete discovery and draft the motion. Even if the trial court is anxious to set the trial date earlier, argue that the client has a statutory right to bring a summary judgment motion and that sufficient time should be allowed for it to do so. See *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7 (state rules must give way to statute when they conflict).

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.23 b. Court's Authority to Hear Motion Less Than 30 Days Before Trial

§3.23 b. Court's Authority to Hear Motion Less Than 30 Days Before Trial

A court, for good cause, may allow the hearing to be set less than **30 days** before trial. See CCP §437c(a). To schedule a hearing less than **30 days** before trial, the moving party must have a court order permitting the motion to be heard on "shortened time."

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.24 (1) What Constitutes Good Cause

§3.24 (1) What Constitutes Good Cause

Although the statute does not specify what constitutes "good cause," some courts may permit a late motion for a reason such as newly discovered evidence if the attorney submits declarations showing why the evidence could not have been obtained earlier by the exercise of reasonable diligence. Even with trial imminent, given the proper showing, a court might be amenable to a late motion to eliminate the need for trial. However, summary judgment motions are time-consuming for the court, and there must be enough time for all papers to be considered.

NOTE: At least two appellate courts have held that if the trial date has been continued, a summary judgment motion can be set **30 days** before the new trial date. See *Sentry Ins. Co. v Superior Court* (1989) 207 CA3d 526, 529, 255 CR 13 (First District); *Green v Bristol Myers Co.* (1988) 206 CA3d 604, 609, 253 CR 745 (Second District).

On obtaining an Order Shortening Time to hear the motion within 30 days of trial, see §§3.23-3.27.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.25 (2) Declaration to Obtain Order Shortening Time

§3.25 (2) Declaration to Obtain Order Shortening Time

To obtain an Order Shortening Time, the moving party must prepare a declaration under penalty of perjury showing "good cause" under CCP §437c(a) to set the hearing date closer to trial. This should probably be done through an ex parte application.

JUDICIAL PERSPECTIVE: Most courts will require substantial good cause before allowing a hearing to take place less than **30 days** before trial, but in a single-assignment court the judge may be willing to hear the motion even within the **30-day** period to possibly obviate the need for a trial.

PRACTICE TIP: Avoid delay in petitioning the court for a later hearing date; petition as soon as it becomes clear that a later hearing will be required.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.26 (3) Contents of Application for Order Shortening Time

§3.26 (3) Contents of Application for Order Shortening Time

The ex parte application for an Order Shortening Time should explain why the motion could not have been heard earlier. If the delay in setting the hearing is because of belated discovery of evidence, the declaration should also include

- What evidence the motion is based on, and when and from whom it was obtained or discovered;
- Why each of these items of evidence could not have been obtained or discovered earlier by the exercise of reasonable diligence; and
- Why the items of evidence are essential to the matters to be determined in the motion.

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§3.27 (4) Contents of Proposed Order

In the proposed order that accompanies the petition, counsel should leave blank spaces for the new dates to file opposition and reply papers.

NOTE: If the motion was filed timely, but the opponent's request under CCP §437c(h) for a continuance to permit more discovery was granted, there may not be enough time to hear the motion within the deadline. Granting the CCP §437c(h) motion will not necessarily be considered good cause to hear the motion close to trial. See §3.24.

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§3.28 4. Motion Filed Within Time Limits Must Be Heard

A trial court may not refuse to hear a summary judgment motion filed within the time limits of CCP §437c, and local policies and rules may not be applied to prevent or to discourage the filing and hearing of the motion. *Lokeijak v City of Irvine* (1998) 65 CA4th 341, 76 CR2d 429.

EXAMPLE 1: In an action for defective and dilatory work brought by a water agency against a painting contractor, the contractor cross-complained against the paint manufacturer and distributor for equitable indemnity more than 14 months after the original action was filed. Trial was set for 3 months after the paint manufacturer answered. The paint manufacturer moved ex parte to speed up a motion to continue the trial 6 months (and push back discovery cut-off dates) to allow it sufficient time to conduct discovery and schedule a summary judgment motion. At the hearing to continue, the trial court continued the trial date only 4 months so that the case would meet the fast track rules' goal of case disposition within 2 years after filing, which was insufficient to bring a summary judgment motion. The appellate court held that a trial court may not rely on fast track rules to refuse to give a newly added party an adequate trial continuance to bring a summary judgment motion. See *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7.

EXAMPLE 2: In complex litigation filed by 25 corporate entities against 40 insurance companies involving 52 causes of action over 1800 property sites, the trial court held a series of status conferences to discuss how to schedule and manage dispositive motions after two insurance companies filed summary adjudication motions relating to one of the property sites. A series of corporate reorganizations on both sides before the action was filed resulted in numerous issues concerning the appropriate jurisdiction's law to be applied to the issue of coverage for the sites. The trial court issued, then adopted, a proposed Supplemental Case Management Order (SCMO) over the objections of the two insurers that filed the summary adjudication motions, but did not rule on the insurers' motions. The SCMO set up a procedure for resolving the choice of law issues involved in the dispositive motions that precluded the filing of motions under CCP §437c until after the choice of law issues were decided. After petition for writ of mandate, the appellate court held that the SCMO was invalid to the extent it precluded parties from filing motions under §437c in contravention of the timing requirements of that statute. The appellate court further held that the trial court had authority to defer hearing the motions filed under §437c until after resolution of the choice of law issues. In so holding, the appellate court reaffirmed that a trial court has inherent authority to supervise and manage litigation before it, including setting up a procedure for managing resolution of the complex choice of law issues that had to be decided before decision on the §437c motions. See *First State Ins. Co. v Superior Court (Jalisco Corp., Inc.)* (2000) 79 CA4th 324, 329, 94 CR2d 104.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.29 5. Prematurely Filed Motion

§3.29 5. Prematurely Filed Motion

Ordinarily, a motion is statutorily deemed "made" at the time of service and filing of the notice of motion; however, this provision may not be used to deprive a party of a hearing to which it is otherwise entitled. CCP §1005.5. Using CCP §1005.5, the appellate court in *Sadlier v Superior Court (Schoenburg)* (1986) 184 CA3d 1050, 229 CR 374, held that the trial court did not err in ruling that a prematurely filed summary adjudication motion could be deemed "made" orally in court at the time of the hearing so as not to deprive the party of a hearing to which it was "otherwise entitled." The appellate court found that the trial court did not err in permitting the prematurely filed motion, despite the clear language in CCP §437c(a) providing that a summary judgment motion could not be made sooner than **60 days** after the general appearance of the defendant.

WARNING: No other published cases have cited *Sadlier* for this proposition. It is likely an outlier decision and should probably not be used as support for a prematurely filed summary judgment or summary adjudication motion. The legislature clearly provided for service no sooner than **60 days** after the general appearance of a party against whom the motion is sought and did not amend that language in the statute despite other amendments.

The timing for filing a summary judgment motion in an unlawful detainer action is different. See §§13.4-13.6.

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B. Opposing Party

§3.30 1. Papers Must Be Served and Filed 14 Days Before Hearing

Any opposition to a motion for summary judgment must be served and filed at least **14 days** before the date of hearing unless for good cause the court orders otherwise. CCP §437c(b)(2). No extension of time is made for service by mail. CCP §437c(b)(2). See CCP §§1005, 1013(a).

NOTE: Code of Civil Procedure §1005, which requires opposing papers to be filed with the court at least **9 court days** before the hearing, is not controlling. See Cal Rules of Ct 3.1300(a) (unless "otherwise ordered or specifically provided by law"—here CCP §437c—all moving and supporting papers must be served and filed in accordance with CCP §1005).

CAUTION: The timing for filing opposition papers in response to motions for summary judgment is specifically governed by CCP §437c(b)(6). The extension of time for service by mailing contained in CCP §1013 does not apply.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.31 2. Service by Method Calculated to Ensure Next-Day Delivery

§3.31 2. Service by Method Calculated to Ensure Next-Day Delivery

The opposing party must use one of the methods of service for opposition papers provided by CCP §1005, *i.e.,* personal delivery, fax, express mail, or other means reasonably calculated to ensure delivery to other parties no later than the close of the next business day after the opposition is filed. CCP §437c(b)(2). Note that provisions in CCP §§1005 and 1013 for extending time for service by mail do not apply to the opposing party's response. CCP §437c(b)(6).

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.32 C. Reply

§3.32 C. Reply

The moving party must serve and file its reply brief, if any, at least **5 days** before the date set for the hearing. CCP §437c(b)(4). If the moving party files a reply brief, it must also be served to ensure next-day delivery to other counsel. CCP §437c(b)(6). See §§8.2-8.4.

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§3.33 D. Unavailability of Counsel

Counsel may not conduct litigation in bad faith or solely for the purpose of harassment. CCP §437c(j). A practice has grown up in some trial courts for litigants to file a "Notice of Unavailability of Counsel" under the guise of *Tenderloin Housing Clinic, Inc. v Sparks* (1992) 8 CA4th 299, 10 CR2d 371, a case in which the court awarded sanctions against a party for intentionally scheduling depositions and hearings in bad faith at a time when opposing counsel was unavailable. No appellate court has approved the filing of such a notice, and Courts of Appeal in both the Fourth and Sixth Appellate Districts have specifically disapproved the practice. In *Carl v Superior Court* (2007) 157 CA4th 73, 74, 68 CR3d 566, the court held that such a notice is a legal nullity, and has no effect on the timing of a motion for summary judgment and no effect on the conduct of the litigation. The court found the practice to be an impermissible infringement on the court's inherent powers to control its calendar. See also *Marriage of Falcone & Fyke* (2008) 164 CA4th 814, 824, 79 CR3d 588 (party's filing of purported notice of unavailability did not excuse untimely filing).

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IV. CONTINUANCE

A. When Continuance Is Available

§3.34 1. Essential Evidence Exists But Cannot Be Presented at Hearing

An opposing party may move for a continuance of the summary judgment hearing if it shows by declaration that evidence essential to the motion may exist, but cannot be presented in time for the hearing. CCP §437c(h). The statute mandates a continuance of the hearing when the opposing party makes a good faith showing by affidavit or declaration that additional time is needed to obtain facts essential to the opposition. *Cooksey v Alexakis* (2004) 123 CA4th 246, 253, 19 CR3d 810. See *Dee v Vintage Petroleum, Inc.* (2003) 106 CA4th 30, 34, 129 CR2d 923 (recently discovered evidence submitted with opposing counsel's declaration and request that court continue hearing or consider supplemental evidence justified continuance); *Bahl v Bank of America* (2001) 89 CA4th 389, 395, 107 CR2d 270 (continuance was "virtually mandated" on opposition's good faith showing in affidavit that essential facts were needed).

The opposing party who seeks a continuance when facts are not yet available must show (a) the facts to be obtained are essential to opposing the motion, (b) there is reason to believe such facts may exist, and (c) the reasons additional time is needed to obtain these facts. *Frazee v Seely* (2002) 95 CA4th 627, 633, 115 CR2d 780.

The court has inherent discretionary power to allow a party to amend the pleadings, to engage in further discovery, or to file supplemental declarations, and to grant continuances for those purposes. See CCP §437c(h). See also *Lerma v County of Orange* (2004) 120 CA4th 709, 717, 15 CR3d 609 (serious illness of attorney is good cause for granting continuance of summary judgment motion).

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.35 2. Timing of Request for Continuance

§3.35 2. Timing of Request for Continuance

The application to continue the motion to obtain necessary discovery must be made by ex parte motion at any time on or before the date the opposition response to the motion is due, *i.e.,* no later than **14 days** before the date set for hearing. CCP §437c(h). When a lack of diligence results in a party's having insufficient information to know whether facts essential to justify opposition may exist, and the party is unable to provide the requisite affidavit under CCP §437c(h), the trial court may deny the request for continuance of the motion. *Desaigoudar v Meyercord* (2003) 108 CA4th 173, 190, 133 CR2d 408. See also *Cooksey v Alexakis* (2004) 123 CA4th 246, 19 CR3d 810 (in determining whether to grant opposing party's motion for continuance for discovery under CCP §437c(h), trial court may consider whether that party has been diligent in completing discovery). On the required declaration, see §3.40.

EXAMPLE: In a products liability action, opposing counsel submitted her opposition to a summary judgment motion in a timely manner, but waited until the hearing to make an oral request for a continuance for additional time to obtain a declaration from an out-of-state expert on the issues in the case. The appellate court affirmed the trial court's denial of the continuance request, holding that opposing counsel's failure to request a continuance on or before filing her opposition made the request untimely. Counsel had also failed to submit the required declaration. *Ambrose v Michelin N. Am., Inc.* (2005) 134 CA4th 1350, 1353, 37 CR3d 1.

PRACTICE TIP: Make the request for a continuance as soon as possible. The court may not be inclined to grant the request if it appears that the opposing party has been dilatory in preparing its papers and evidence.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.36 B. Strategy Considerations on Whether to Request Continuance

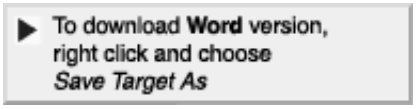
§3.36 B. Strategy Considerations on Whether to Request Continuance

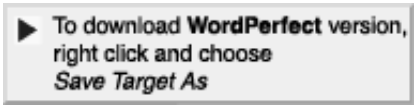
If a motion for summary judgment is received, opposing counsel should immediately evaluate whether additional evidence is needed to prepare the opposition. Because CCP §437c(a) requires a minimum of **75 days'** notice of the motion, opposing counsel has approximately **2 months** from receipt of the motion until the date opposition papers are due (opposition must be filed no later than **14 days** before hearing date). This period of time is sufficient to set depositions and serve written discovery if action is taken fairly promptly. If, after exercising diligence early in the notice period, it appears that there are additional essential facts that exist but which cannot yet be produced, opposing counsel should make a request for a continuance as soon as reasonably practical. There is rarely strategic advantage in seeking a continuance merely for the sake of delay itself.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.37 C. Checklist: Options for Requesting Continuance

§3.37 C. Checklist: Options for Requesting Continuance





If an opposing party determines that additional time is necessary to marshal evidence to oppose the motion, several options are available:

- **1. Make a request to counsel for the moving party to voluntarily continue the date for the hearing on the motion.** This is the simplest and most time-efficient method. Because they know courts will often grant continuances, counsel for moving parties will often agree to such requests, particularly if sufficient time remains before the trial date to properly set the hearing. If time does not remain to continue the hearing to a date at least **30 days** in advance of trial, courts will sometimes allow the parties to stipulate to a continuance of the trial date for time sufficient to properly reschedule the summary judgment hearing.
- **2. Make an ex parte motion for a continuance at any time on or before the date the opposition papers are due** (*i.e.,* at least **14 days** before the date set for hearing), as specifically authorized by CCP §437c(h). Such a request should demonstrate good cause—that facts exist which are essential to the opposition but cannot yet be presented. CCP §437c(h). If possible, show that the requesting party has been diligent in conducting discovery, and provide an estimate of the time necessary to obtain the sought-after facts. The ex parte motion should be made as soon as it is decided that more time will be needed—it is quite risky to wait until the date the opposition is due to make the motion, as the court may deny the request.
- **3. Include a request for continuance within the opposition papers themselves.** As with an ex parte motion, make the showing required under CCP §437c(h).

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D. Request for Continuance

§3.38 1. To Conduct Further Discovery

An opposing party who has not developed the facts needed to oppose the motion may move for a continuance on a good faith showing by affidavit or declaration that controverting evidence may exist, but for the reasons stated cannot yet be presented. CCP §437c(h). See *Yuzon v Collins* (2004) 116 CA4th 149, 167, 10 CR3d 18 (court did not err in denying continuance because declaration sought did not raise triable issue of fact). See also §7.19.

CAUTION: Assertions in the opposition papers about the need for additional discovery are not a substitute for affidavits or declarations; counsel must make a showing by affidavit or declaration. CCP §437c(h). See *American Continental Ins. Co. v C & Z Timber Co.* (1987) 195 CA3d 1271, 1280, 241 CR 466 (opposing party alleged in conclusory terms in its memorandum that "much discovery remains to be done in this matter," and failed to provide supporting affidavits or declarations detailing facts to establish existence of controverting evidence and why such evidence could not be presented at hearing).

The application to continue the motion to obtain necessary discovery may be made by ex parte motion on or before the date the opposition is due. CCP §437c(h).

On continuances generally, see California Civil Procedure Before Trial, chap 42 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.39 a. Required Showing for Continuance

§3.39 a. Required Showing for Continuance

An opposing party seeking a continuance when facts are not yet available must submit a declaration or affidavit showing (*Frazee v Seely* (2002) 95 CA4th 627, 633, 115 CR2d 780)

- The facts to be obtained are essential to the opposition;
- There is reason to believe such facts may exist; and
- Why additional time is needed to obtain these facts.

The party moving for the continuance must show that the facts essential to opposing the motion actually exist or may exist; it is not enough to declare that discovery is ongoing. *Roth v Rhodes* (1994) 25 CA4th 530, 548, 30 CR2d 706.

EXAMPLE: When an employee's attorney established that a deposition of a supervisor contained additional evidence applicable to the employee's claim under the FEHA, a trial court erred in failing to grant a continuance under CCP §437c(h) to consider the evidence. See *Dee v Vintage Petroleum, Inc.* (2003) 106 CA4th 30, 34, 129 CR2d 923.

NOTE: Some local court rules may affect continuances under CCP §437c(h). Even when not required by local rule, counsel should provide the court with an estimate of the time required and steps necessary to obtain the outstanding evidence in the opposing declaration to add credibility to the request.

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§3.40 b. Declaration in Support of Continuance

Assertions in the opposition papers about the need for additional discovery are not a substitute for affidavits or declarations; rather, a showing by declaration or affidavit is specifically required. CCP §437c(h). Courts are seldom receptive to vague and general affidavits or declarations that fail to track the statutory requirements. See *Lerma v County of Orange* (2004) 120 CA4th 709, 715, 15 CR3d 609 ("attorney's bald assertion that facts essential to justify opposition may have existed" but no clear statement concerning what those facts may have been is insufficient showing for continuance); *American Continental Ins. Co. v C & Z Timber Co.* (1987) 195 CA3d 1271, 1280, 241 CR 466 (conclusory statement that "much discovery remains to be done in this matter" made in opposing memorandum is insufficient; opposing party must show, either by affidavit or otherwise, that discovery is necessary to oppose motion).

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§3.41 2. Court Decision on Continuance Request

Once an opposing party makes this showing by declaration or affidavit, the court must deny summary judgment, grant a continuance, or "make any other order as may be just." CCP §437c(h). See *Lerma v County of Orange* (2004) 120 CA4th 709, 714, 15 CR3d 609 (despite failure to comply with §437c(h), it was just to grant opposing party continuance due to their attorney's serious illness). The court may deny a continuance on various grounds.

JUDICIAL PERSPECTIVE: The court is required to grant a continuance for further discovery on a showing of good cause. See CCP §437c(h). See also *Wachs v Curry* (1993) 13 CA4th 616, 16 CR2d 496.

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§3.42 a. Denial Based on Progress of Litigation

In deciding whether a continuance is appropriate, courts consider whether it is reasonable for the opposing party not to have procured outstanding evidence earlier. The progress of the litigation is an important factor in that determination. A continuance may be denied if there has been ample time to obtain the desired information previously, but the opposition has been dilatory. *Hoffman v Sports Car Club of Am.* (1986) 180 CA3d 119, 127, 225 CR 359 (2 years and 8 months).

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§3.43 b. Denial Based on Lack of Diligence

Although CCP §437c(h) does not expressly mention diligence, it does require a party seeking a continuance to declare why "facts essential to justify opposition cannot, for reasons stated, then be presented," and courts have long required such declarations to be made in good faith. See, *e.g., Yuzon v Collins* (2004) 116 CA4th 149, 167, 10 CR3d 18. "There must be a justifiable reason why the essential facts cannot be presented." *Cooksey v Alexakis* (2004) 123 CA4th 246, 257, 19 CR3d 810.

When a lack of diligence results in the opposing party having insufficient information to know whether facts essential to justify opposition may exist, thus being unable to provide the requisite affidavit under CCP §437c(h), the trial judge may deny the continuance. *Desaigoudar v Meyercord* (2003) 108 CA4th 173, 190, 133 CR2d 408. The court's discretion to deny a continuance is more limited, however, when the opposing party submits an affidavit demonstrating that facts essential to justify opposition may exist, but have not been presented to the court because the party has not been diligent in searching for the facts through discovery. In such instances, the policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency. See *Bahl v Bank of America* (2001) 89 CA4th 389, 397, 107 CR2d 270 (trial court improperly denied continuance to party opposing summary judgment motion in case that was 18 months old when continuance denied).

CAUTION: There is a split among appellate districts on whether or not diligence must be demonstrated by the party requesting a continuance. In *Cooksey v Alexakis* (2004) 123 CA4th 246, 257, 19 CR3d 810, the court stated that a request for a delay to obtain additional discovery "to oppose summary judgment requires some justification for why such discovery could not have been complete sooner." The court explained that "Courts of Appeal in the First, Second and Sixth Appellate Districts have held that there must be some showing of diligence by the party seeking a continuance in order to conduct additional discovery." 123 CA4th at 255. If the party requesting a continuance does not make a sufficient showing of diligence, the court may deny the request for continuance.

PRACTICE TIP: Check for local court rules that may affect a motion for a continuance under CCP §437c(h). Even when not required by local rule, it is good practice to provide the court with an estimate of the time required and steps necessary to obtain the outstanding evidence in the opposing declaration to add credibility to the request. Although §437c(h) does not require the party seeking a continuance of a summary judgment motion to provide the court with a time estimate, including this information in a declaration in support of the motion adds credibility to the request. On affidavits and declarations in support of a summary judgment motion, see §§5.8-5.31.

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§3.44 c. Denial Based on Relevance

A court may deny a continuance when the facts to be obtained are irrelevant to the litigation and thus not "essential to justify opposition" as specified in CCP §437c(h). *Coast-United Advertising, Inc. v City of Long Beach* (1975) 51 CA3d 766, 772, 124 CR 487.

EXAMPLE: The opposing party sought a continuance to obtain an expert declaration on the moving party's actual knowledge of his dog's vicious propensities. Although the subject matter of the evidence, *i.e.,* knowledge of the dog's dangerous propensity, was essential to the opposition to the summary judgment motion, the trial court correctly concluded that the expert declaration sought had no material relevance on that issue. See *Yuzon v Collins* (2004) 116 CA4th 149, 166, 10 CR3d 18.

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.45 E. When Continuance Is Granted and Moving Party Fails to Allow Discovery

§3.45 E. When Continuance Is Granted and Moving Party Fails to Allow Discovery

When a court grants a continuance to allow specified additional discovery, but the moving party unreasonably fails to allow the opposing party to conduct the discovery, the court must grant a continuance to permit the discovery to go forward or deny the summary judgment motion. CCP §437c(i).

NOTE: Section 437c(i) does not affect or limit the ability of any party to compel discovery under the Civil Discovery Act (CCP §§2016.010-2036.050).

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Source: Civil Litigation/California Summary Judgment/3 Timing Requirements and Planning Strategies/§3.46 F. When Request Is Denied

§3.46 F. When Request Is Denied

A court need not grant a continuance if the request does not demonstrate that facts sought are actually "essential" to determination of the motion, or if the requesting party does not provide an adequate explanation for why the facts could not have been presented earlier. CCP §437c(h).

EXAMPLE 1: In an action for overtime compensation, the trial court did not err in denying the employee's motion for a continuance under CCP §437c(h) to permit him to conduct further discovery because his counsel's supporting declaration did not explain why the information in the requested documents was essential to opposing the summary judgment motion or why additional time was needed. See *Combs v Skyriver Communications, Inc.* (2008) 159 CA4th 1242, 1269, 72 CR3d 171.

The court is not required to grant a continuance to allow a party to put its opposition papers into the proper format. *Lucas v George T. R. Murai Farms, Inc.* (1993) 15 CA4th 1578, 1586, 19 CR2d 436 (plaintiff waited 7 weeks after defendant's reply objecting to form of plaintiff's opposition before requesting continuance at oral argument).

EXAMPLE 2: The trial court did not abuse its discretion by declining to grant continuance to permit defendant to file a revised separate statement in response to plaintiff's summary judgment motion. See *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 88 CR3d 363.

A trial court's denial of a request for continuance is reviewable by the appellate court only on an abuse of discretion standard. *Cooksey v Alexakis* (2004) 123 CA4th 246, 253, 19 CR3d 810; *Desaigoudar v Meyercord* (2003) 108 CA4th 173, 190, 133 CR2d 408.

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4

Evidentiary Burdens and Presumptions

Michael C. Denison

I. INTRODUCTION §4.1
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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.1 I. INTRODUCTION

§4.1 I. INTRODUCTION

Depending on whether the moving party is the plaintiff or the defendant, the evidentiary burdens and presumptions vary greatly for summary judgment motions. This chapter explains the applicable burdens for either making or opposing a summary judgment motion and distinguishes them according to which party has the burden of proof at trial. It also clarifies when these burdens shift to the other party. The chapter is organized as follows:

- Applicable burdens and comparison of burdens in summary judgment motions and those required at trial (§§4.5-4.14);
- Evidentiary issues, including required evidence and use of factually devoid discovery responses (§§4.15-4.23);
- Evidence required from the moving party to obtain summary judgment depending on whether that party has the burden of proof at trial (§§4.24-4.33);
- Evidence required from the opposing party to defeat summary judgment depending on whether that party has the burden of proof at trial (§§4.34-4.46).

This chapter does not cover the specifics of how to prepare, file, or serve moving, opposing, or reply papers; those topics are discussed in chaps 6-8. Preparing for the motion in general and the methods of offering and the types of evidence are discussed in chap 5. Objecting to evidence in summary judgment motions is covered in chap 9.

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§4.2 A. Principal Authority: CCP §437c and *Aguilar*

The most cited case in California on the evidentiary burdens applicable to motions for summary judgment is *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841. As the California Supreme Court said in *Aguilar,* the purpose of the current summary judgment statute (CCP §437c) is to move summary judgment law in California closer to its federal counterpart by liberalizing the granting of summary judgment motions. 25 C4th at 848. Because that case was decided almost a decade ago, many court of appeal opinions published since then have clarified the evidentiary burden questions and provide examples of how courts have applied the *Aguilar* court's interpretations of CCP §437c.

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B. Summary of Required Burdens

§4.3 1. Moving Party

The California summary judgment statute (CCP §437c) as interpreted by *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 845, 107 CR2d 841, permits the moving party to either

- Prove its own case without having to negate the opposing party's case (CCP §437c(p)(1)-(2); 25 C4th at 854; see §§4.24-4.29, 4.31); or
- Demonstrate that the opposing party lacks evidence sufficient to prevail at trial (CCP §437c(p)(1)-(2); 25 C4th at 850; see §§4.30-4.32).

NOTE: On the second point, California and federal law differ. See §4.15.

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§4.4 2. Opposing Party

For the party opposing a summary judgment motion, California statutory law (CCP §437c) currently

- Permits the party to show that a triable issue of fact exists, after the moving party has met its initial burden of producing evidence (CCP §437c(p)(1)-(2); see §§4.34-4.37);
- Prohibits reliance on mere allegations or denials in pleadings to show that a triable issue of material fact exists (CCP §437c(p)(1)-(2); see §4.43);
- Requires specific facts to show that a triable issue of material fact exists for a cause of action, an affirmative defense, a claim for damages, or an issue of duty (see CCP §437c(b)(3), (p); §4.41);
- Does not require that the opposing party persuade the judge that its facts are conclusively established to defeat the motion; the opposing party need only raise a triable issue of material fact (see CCP §437c(c), (p); §§4.5, 4.8-4.9, 4.13); and
- Permits the party to prevail without presenting evidence, if the moving party has not satisfied its initial burden of production (CCP §437c(p)(2); see §4.36).

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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.5 II. APPLICABLE BURDENS IN SUMMARY JUDGMENT MOTIONS

§4.5 II. APPLICABLE BURDENS IN SUMMARY JUDGMENT MOTIONS

In addressing motions for summary judgment, three burdens come into play: These are the burdens of: (1) production (Evid C §110); (2) persuasion (*Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841); and (3) proof (Evid C §115; see §4.11).

Simply put, the moving party must

(1) produce sufficient evidence (burden of production; see §§4.6-4.8)

(2) to persuade the judge (burden of persuasion; see §4.9) that there is no triable issue as to any material fact on each element of the cause of action or defense that is the subject of the motion (see §§4.7, 4.9).

WARNING: The burden of proof applicable to trial (defined in Evid C §115) has a crucial role in summary judgment motions. 25 C4th at 851. Specifically, the trial standard for the burden of proof influences the burden of production and persuasion (see CCP §437c(p)) in summary judgment motions. See §§4.6, 4.10-4.13.

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§4.6 A. Burden of Production

The summary judgment procedure provides a system of shifting burdens of production (or producing evidence). The moving party bears an initial production burden, *i.e.,* to produce evidence sufficient to make a prima facie showing (see §4.7) of the nonexistence of any triable issue of material fact as to the elements of the claim or defense. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. See CCP §437c(o)-(p). The burden of production entails the timing of presentation of evidence, *i.e.,* that the moving party must present evidence first. 25 C4th at 850.

If the moving party carries this burden, the burden shifts, and the opposing party must produce sufficient evidence to make a prima facie showing of a triable issue of material fact. 25 C4th at 850. See §4.8. This is similar to the function of the burden of production at trial (see Jefferson's California Evidence Benchbook §§47.1-47.2, 47.15, 47.28-47.29 (4th ed CJA-CEB 2009)), except that in a summary judgment motion the judge does not ultimately weigh the facts or act as a fact finder, as a trier of fact does at trial in applying the required burden of proof (25 C4th at 856). When a triable issue is raised by the party opposing a summary judgment motion, the judge must deny the motion. See §4.13.

NOTE: Summary judgment may also be appropriate if all parties agree that there are no disputed facts and the sole question before the court is one of law. In that event, the importance of evidentiary burdens diminishes, and the trial court must hear and decide the disputed legal issues. See, *e.g., Blanco v Baxter Healthcare Corp.* (2008) 158 CA4th 1039, 70 CR3d 566 (federal law preemption defense decided on summary judgment motion); *Varni Bros. Corp. v Wine World, Inc.* (1995) 35 CA4th 880, 886, 41 CR2d 740. On how to proceed in that situation, see §2.3.

JUDICIAL PERSPECTIVE: When there are no disputed facts, the parties may seek leave of court to allow for trial based on stipulated facts, as an alternative to filing competing summary judgment motions. Such a motion is less taxing and need not comply with the procedural requirements of summary judgment motions. In addition, the parties are certain to obtain a quick resolution to the action. See §5.46.

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§4.7 1. Initial Burden; Prima Facie Showing

A prima facie showing in a summary judgment motion need not conclusively establish the position of the propounding party, but it must be sufficient to support its position. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. The supreme court in *Aguilar* compared this showing to that required to establish a rebuttable presumption under Evid C §602. See 25 C4th at 851.

The moving party bears an initial burden of production to make a prima facie showing that there are no triable issues of material fact. See CCP §437c(p). The prima facie case on a summary judgment motion is formulated differently depending on which side the moving party is on and who has the burden of proof at trial. See §4.10.

EXAMPLE: Under a state law claim for employment discrimination, the plaintiff moving for summary judgment establishes a prima facie case of retaliation by showing that (1) plaintiff engaged in protected activities, (2) the employer subsequently took adverse action against plaintiff, and (3) there was a causal connection between the protected activity and the adverse action. *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 286, 100 CR3d 296. See CCP §437c(p)(1). This is essentially identical to the burden of production required of a plaintiff at trial. See Jefferson's California Evidence Benchbook §§47.1-47.2, 47.28-47.29 (4th ed CJA-CEB 2009). See also §§4.25-4.28.

When the defendant is the moving party, however, a prima facie showing on a summary judgment motion need not establish an ultimate fact in the action. Rather, CCP §437c(p)(2) allows the defendant to meet its burden of showing that a cause of action is without merit by demonstrating through admissible evidence that the plaintiff cannot establish one or more elements of the subject cause of action. See §4.30. See also CCP §437c(o)(1) (when cause of action has no merit).

NOTE: When the burden shifts (see §4.8), the opposing party also has to make a prima facie case that there is a triable issue of fact.

Technically, until the moving party meets its initial burden, the opposing party is not obligated to come forward with conflicting evidence, or any evidence, although it may. CCP §437c(p); 25 C4th at 850. As a tactical matter, the opposing party will usually choose to do so. See §§4.34, 4.36.

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§4.8 2. Shifting Burden; Triable Issue of Fact

If the moving party demonstrates that there are no triable issues of material fact, the burden of producing evidence shifts, and the opposing party must introduce sufficient evidence to make a prima facie showing of a triable issue of material fact. CCP §437c(p). A triable issue is created if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. One way of creating a triable issue is for the opposing party to present evidence that directly controverts the moving party's evidence, but the court does not weigh the evidence as it does in a trial. See §§4.13-4.14. On permissible and impermissible ways to create a triable issue, see §§4.37-4.46.

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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.9 B. Burden of Persuasion

§4.9 B. Burden of Persuasion

The moving party always bears the burden of persuading the court to grant the motion, *i.e.,* of demonstrating that no triable issue of material fact exists and that it is entitled to judgment as a matter of law. This burden is properly characterized as one of persuasion, not proof, because the moving party's task is to persuade the trial court that there is no disputed material fact for a reasonable trier of fact to consider, not to offer proof as though the court were sitting as the trier of fact. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850 n11, 107 CR2d 841. The burden of persuasion always remains with the moving party. *Kahn v East Side Union High Sch. Dist.* (2003) 31 C4th 990, 1002, 4 CR3d 103. On the trial court's review of the evidence, see §4.13.

NOTE: The burden of persuasion never shifts to the opposing party (see *Padilla v Rodas* (2008) 160 CA4th 742, 746, 73 CR3d 114; *Rosenblum v Safeco Ins. Co.* (2005) 126 CA4th 847, 857, 24 CR3d 427) because the opposing party is only required to demonstrate a triable issue. See §§4.37-4.40.

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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.10 C. Burden of Proof

§4.10 C. Burden of Proof

The burden of proof applicable to trial (defined in Evid C §115) influences the burden of producing evidence and the burden of persuasion (see CCP §437c(p)) in summary judgment motions. See §4.6. How a party moving for or opposing summary judgment carries its burden of persuasion or production on a particular issue depends on which party would bear the burden of proof at trial. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 107 CR2d 841. See §§4.11-4.13.

NOTE: The required quantum of evidence may also be affected by whether the evidence is direct or circumstantial (see §§4.17-4.19).

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§4.11 1. How Trial Burden of Proof Standard Affects Motion

Moving parties frequently confuse the burden of proof at trial with the burdens imposed by CCP §437c. The burden of proof for the purpose of trial is defined in Evid C §115 as "the obligation of a party to establish by evidence a requisite degree of belief covering a fact in the mind of the trier of fact or the court." Under §115, the burden of proof may require a party to "raise a reasonable doubt concerning the existence or nonexistence of a fact" or "establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." It expressly states that "proof by a preponderance of the evidence" is the standard unless the law provides otherwise. On evidentiary burdens at trial, see Jefferson's California Evidence Benchbook, chap 47 (4th ed CJA-CEB 2009).

When making a motion for summary judgment or summary adjudication, the moving party must carry the initial burden of production. See §4.6. The standard for that burden is the same as the burden of proof that would be applied at trial. See CCP §437c(p); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. The difference between trial and summary judgment is that the court does not weigh conflicting evidence on a summary judgment motion as is done by the trier of fact at trial. See §4.13.

Thus, if the burden of proof at trial on an issue to be decided in a summary judgment motion is preponderance of the evidence, the moving party would need to produce sufficient evidence by which a trier of fact could find for the moving party on that standard. See §4.12. Similarly, if the burden of proof at trial were to be clear and convincing proof, the moving party would have to produce sufficient evidence by which a trier of fact could find for the moving party at that standard.

The burden of proof standards in civil cases can vary; they are not all governed by the preponderance standard. For an extensive list, see Jefferson's Evidence Benchbook §§47.21-47.27.

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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.12 2. Effect of Trial Standard of Proof on Prima Facie Case

§4.12 2. Effect of Trial Standard of Proof on Prima Facie Case

If a plaintiff moves for summary judgment in a case governed by the preponderance of the evidence standard of proof, it must make a prima facie case that would require a reasonable trier of fact to find each underlying material fact more likely than not. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 107 CR2d 841. See, *e.g., Principal Life Ins. Co. v Peterson* (2007) 156 CA4th 676, 687, 67 CR3d 584 (in probate action contesting distribution of life insurance proceeds, plaintiff administrator of estate satisfied preponderance standard by submitting authenticated copy of criminal conviction for first degree murder of which trial court took judicial notice).

If a defendant moves for summary judgment in a case governed by the preponderance of the evidence standard, it must either (*Kahn v East Side Union High Sch. Dist.* (2003) 31 C4th 990, 1003, 4 CR3d 103)

- Make a prima facie showing that would preclude a reasonable trier of fact from finding that it was more likely than not that a material fact of the claim were true; or
- Show that an element of the claim cannot be established, by presenting evidence that the plaintiff does not have and cannot reasonably obtain the necessary evidence to prove it.

EXAMPLE: In *Paduano v American Honda Motor Co.* (2009) 169 CA4th 1453, 1467, 88 CR3d 90, defendant demonstrated in its motion for summary adjudication that plaintiff's breach of warranty claim on a vehicle purchase was not supported by the evidence in that the written warranty did not expressly include or exclude "mileage related defects," and the "EPA mileage estimate" did not by itself constitute a warranty. In response, plaintiff failed to present any evidence suggesting that the low gas mileage was the result of a mechanical defect. The court concluded that plaintiff did not establish a triable issue of material fact on the warranty with regard to gas mileage.

A defendant moving for summary judgment on an affirmative defense would have to make a prima facie showing like a moving plaintiff described above. See, *e.g., Jessen v Mentor Corp.* (2008) 158 CA4th 1480, 1484, 71 CR3d 714, discussed in §4.29. Similarly, a plaintiff moving for summary judgment on an affirmative defense would have to make a prima facie showing like a moving defendant described above. See, *e.g., Continental Ins. Co. v Columbus Line, Inc.* (2003) 107 CA4th 1190, 133 CR2d 199, discussed in §4.33.

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§4.13 3. How Trial Court Reviews Evidence

Summary judgment is not affected by the burden of proof at trial in the sense of a party's obligation to establish the requisite degree of belief in the fact finder (see Evid C §115), for the judge has no power to weigh evidence or one inference against another (CCP §437c(c); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 856, 107 CR2d 841; *Kids' Universe v In2Labs* (2002) 95 CA4th 870, 879, 116 CR2d 158). See §§2.3, 4.46. Rather, the court must determine what any evidence "could show or imply" to the reasonable trier of fact. In doing so, it does not decide any finding on its own, but simply decides what finding such a trier of fact could make for itself. 95 CA4th at 879. When the moving and opposing papers in a summary judgment motion show one or more triable issues of material fact, the court must deny the motion. *Aguilar,* 25 C4th at 856. See CCP §437c(c), (g). See also §4.37.

On the decision and order rendered after hearing, see chap 11.

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§4.14 D. Effect of Presumptions

Some presumptions shift the burden of producing evidence or the burden of proof from the plaintiff to the defendant. See Jefferson's California Evidence Benchbook §§48.18-48.42 (4th ed CJA-CEB 2009). On summary judgment, a moving defendant who is subject to a presumption may have to carry the initial burden of making a prima facie showing as would a party with the burden of proof at trial.

EXAMPLE: In *Hagen v Hickenbottom* (1995) 41 CA4th 168, 187, 48 CR2d 197, plaintiff alleged that defendant unduly influenced testator to write a will favorable to defendant. Defendant moved for summary judgment, but failed to address the foundational facts that activated a presumption of undue influence. The presumption affects the burden of proof at trial. Because of the presumption, defendant, in moving for summary judgment, had the initial burden of production. Thus, to prevail, defendant needed to show with evidence that it was more likely than not that she did not exercise undue influence. If there had been no presumption of undue influence, defendant would not have had to include that issue in its initial burden of production, *i.e.,* the defendant could merely have shown that it was more likely than not that plaintiff could not prove the elements of his case.

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III. EVIDENTIARY ISSUES RELATING TO SUMMARY JUDGMENT BURDENS

§4.15 A. Evidence Is Required

Some federal cases permit a defendant who is the moving party to point out through argument that the plaintiff has no evidence to support its case. See §2.32. California law, however, requires a defendant moving for summary judgment to present evidence (*e.g.,* plaintiff's discovery responses), and not simply assert that the plaintiff does not possess, and cannot reasonably obtain, the evidence needed to meet its trial burden. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 855, 107 CR2d 841. See also *Rio Linda Unified Sch. Dist. v Superior Court* (1997) 52 CA4th 732, 739, 60 CR2d 710 (demonstrating a negative is akin to appellant's burden in proving that there is no substantial evidence to support judgment).

PRACTICE TIP: The best way to show with admissible evidence that the opposing party does not have evidence to support its case is with broad requests for admission going to the other party's claims or defenses (*e.g.,* "admit defendant was not negligent with respect to the subject incident"), followed up with an interrogatory asking for all facts, witnesses, and evidence in support of any answer other than an unqualified admission. Such broad discovery almost necessarily embodies "contention" questions calling for legal conclusions. It is thus not a good idea to base your motion for summary judgment on such broad questions asked at a deposition, because such "basis of contention" questions are not allowed. A deposition may, however, establish crucial factual matters, such as, *e.g.,* that the plaintiff saw no foreign substance on the ground in a slip and fall case. On the use of discovery to support or oppose a summary judgment motion, see §5.38.

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§4.16 1. Evidence Must Be Admissible

The papers submitted by parties moving for and opposing summary judgment must contain admissible evidence. CCP §437c(c)-(d). Thus, for plaintiff moving parties, each element of a cause of action must be established by evidence that is both competent (Evid C §§700-704, 1401) and admissible (Evid C §§350-351). *Leyva v Superior Court* (1985) 164 CA3d 462, 469, 210 CR 545. It follows that the same is true for defendants for each element of an affirmative defense. See §5.3.

Similarly, a defendant moving for summary judgment must submit competent, admissible evidence showing that the plaintiff cannot establish the elements of its claims. A plaintiff moving for summary adjudication of an affirmative defense must make a similar showing on the elements of the defense. On preparing motion papers and on the competence and admissibility of evidence, see chaps 5-9.

An issue related to admissibility under the Evidence Code that arises in summary judgment motions in particular is whether the trial court has the power to consider submitted evidence if a party has not complied with the formal requirements of preparing and submitting summary judgment moving and opposing papers.

EXAMPLE 1: Properly authenticated evidence, such as documents attached to a declaration or produced in response to discovery requests, and which otherwise meet admissibility requirements under the Evidence Code, may or may not be considered by the court if the evidence is not accurately referenced in the separate statement of material facts required by CCP §437c(b). Compare *United Community Church v Garcin* (1991) 231 CA3d 327, 335, 282 CR 368 (applying separate statement requirement strictly), with *King v United Parcel Serv., Inc.* (2007) 152 CA4th 426, 437, 60 CR3d 359, and *San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 316, 125 CR2d 499 (both cases noting that trial court has discretionary power to consider evidence not referenced in separate statement and ascertain whether court-filed papers satisfy due process standards).

JUDICIAL PERSPECTIVE: As a practical matter, a court is more likely to consider evidence outside of the separate statement in denying a motion for summary judgment, because granting the motion is a drastic remedy and the opposition papers are more liberally construed than the moving papers.

Another issue is the admissibility of facts that were previously undisclosed in discovery proceedings before the summary judgment motion was filed.

EXAMPLE 2: Plaintiff sued his employer for injuries sustained when he fell from a ladder while working on a construction project. On appeal from summary judgment in defendant's favor, defendant argued that the removal of the fall protection system should be disregarded because plaintiff did not mention that conduct in his discovery responses. The appellate court held that courts may admit and consider in a summary judgment proceeding any evidence that was previously undisclosed in discovery, as long as the party seeking to introduce the evidence did not engage in discovery abuse or violate an order to disclose it. *Browne v Turner Constr. Co.* (2005) 127 CA4th 1334, 1349, 26 CR3d 433.

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§4.17 2. Weight of Direct Versus Circumstantial Evidence

There is no inherent distinction in terms of probative value between direct and circumstantial evidence. Both are acceptable as means of proof and neither is entitled inherently to greater weight than the other. See *Hulett v Farmers Ins. Exch.* (1992) 10 CA4th 1051, 1060, 12 CR2d 902 (inferences from circumstantial evidence may defeat motion). See also Jefferson's California Evidence Benchbook §19.15 (4th ed CJA-CEB 2009).

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§4.18 3. When Direct Evidence Is Sufficient

Direct evidence is defined as evidence that directly proves a fact, without the aid of an inference or presumption, and which in itself, if true, conclusively establishes that fact. Evid C §410. It follows that the use of direct evidence exclusively is always sufficient to create a prima facie case. On the distinction between direct and circumstantial evidence, see Jefferson's California Evidence Benchbook §§19.12-19.18 (4th ed CJA-CEB 2009).

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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.19 4. When Circumstantial Evidence Is Sufficient

§4.19 4. When Circumstantial Evidence Is Sufficient

Circumstantial evidence is not defined in the Evidence Code. Instead, Evid C §600 defines "inference," which is the basis of the concept of circumstantial evidence. Inference is "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts … established in the action." Evid C §600. Circumstantial evidence requires the aid of inference to prove a point. Whether circumstantial evidence is sufficient to create a prima facie case depends on the strength of the inferences drawn from that evidence.

EXAMPLE: In *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 273, 100 CR3d 296, an employment discrimination action, a strong inference that there was no discriminatory intent arose because the same person who promoted the plaintiff fired him (*i.e.*, the same-actor inference). A court must take that inference into account on summary judgment; in response, plaintiff must correspondingly present stronger evidence of bias to prevail over that inference.

NOTE: This is identical to the rule on a motion for directed verdict. The opponent of a motion for directed verdict must produce "evidence of sufficient substantiality" to defeat a motion for directed verdict. Kallay, *Managing the Burdens Imposed on Motions For Summary Judgment in California: The 1992 and 1993 Amendments to CCP 437c,* 41 Santa Clara L Rev 39 (2000).

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§4.20 5. Credibility; Facts Presented Only by Single Witness

If a party is otherwise entitled to a summary judgment under CCP §437c, summary judgment may not be denied on grounds of the credibility of a witness who offers a declaration of facts known by the witness. CCP §437c(e). Judgment may be denied in the discretion of the court if the only proof of a material fact offered in support of summary judgment is a declaration made by an individual who was the sole witness to that fact. CCP §437c(e). See §§5.12, 11.15.

Similarly, if a material fact is an individual's state of mind or lack thereof, and the moving party attempts to establish that fact solely by that individual's declaration, the court has discretion to deny the motion. CCP §437c(e). See *Viner v Sweet* (2004) 117 CA4th 1218, 1230, 12 CR3d 533 (explaining summary judgment statute in context of reviewing denial of motion for judgment notwithstanding verdict). See §§5.11, 11.14.

Denial of summary judgment under CCP §437c(e) does not mean that a triable issue of fact exists, but only that the moving party lacks evidence sufficiently credible to prevail on its summary judgment motion. See *Merrill v Navegar, Inc.* (2001) 26 C4th 465, 476, 110 CR2d 370. Although disbelieving affirmative evidence of a witness's state of mind permits a trial court to deny a moving defendant's summary judgment motion (because it is the equivalent of "no evidence"), this principle is applied differently at trial. Disbelief of affirmative evidence at trial requires entry of judgment against the party with the burden of proof on that issue. *Viner,* 117 CA4th at 1231.

On use of hearsay evidence and inferences regarding a party's state of mind at trial, see Jefferson's California Evidence Benchbook §§1.34-1.47 (4th ed CJA-CEB 2009).

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§4.21 B. Factually Devoid Discovery Responses

"Factually devoid" and "factually vague" responses to discovery may be used to show the absence of evidence to support a party's case (see *Andrews v Foster Wheeler LLC* (2006) 138 CA4th 96, 101, 41 CR3d 229; *Union Bank v Superior Court* (1995) 31 CA4th 573, 589, 37 CR2d 653), but the court will look closely at the discovery responses to make sure that they are complete, *e.g.,* the defendants propounded, and the plaintiffs responded to, sufficiently comprehensive interrogatories (*Scheiding v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 83, 81 CR2d 360). The court may also consider the culpability or good faith of the moving party during discovery. See *Teselle v McLoughlin* (2009) 173 CA4th 156, 176, 92 CR3d 696 (summary judgment denied because defendant failed to cooperate on discovery demand by plaintiff for production of documents that would have assisted plaintiff in defeating motion).

Courts are willing to grant summary judgment based on factually devoid responses if the moving party makes an affirmative showing that the opposing party cannot prove its case by any means. See *Weber v John Crane, Inc.* (2006) 143 CA4th 1433, 1439, 50 CR3d 71.

CAUTION: The court's language in *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841, that the defendant must show that the plaintiff does not possess and cannot reasonably obtain needed evidence would seem to suggest that the defendant must overcome a two-pronged challenge before the burden shifts to the plaintiff. This language seems to obviate CCP §437c(h), which provides a means for the plaintiff to put before the court evidence that certain facts exist but cannot be presented.

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§4.22 1. When Factually Devoid Responses Shift Burden

Courts will grant summary judgment based on the moving party's showing of the opposing party's factually devoid discovery responses if the moving party makes an affirmative showing that the opposing party cannot prove its case and the opposing party does not submit evidence that is sufficient to create a triable issue of material fact. See, *e.g., Andrews v Foster Wheeler LLC* (2006) 138 CA4th 96, 107, 41 CR3d 229. The courts have approved summary judgment based on factually devoid responses in cases in which

- Defendant conducted comprehensive discovery and plaintiff's factually devoid responses indicated that plaintiff could not prove causation. See *Andrews,* 138 CA4th 105. Compare *Weber v John Crane, Inc.* (2006) 143 CA4th 1433, 1439, 50 CR3d 71, with *Andrews*.

EXAMPLE: When defendant propounded special interrogatories for specific facts concerning plaintiff's exposure to defendant's asbestos, plaintiff provided a list of documents and names of persons whom he believed had knowledge of the facts concerning his exposure to defendant's asbestos, but did not state what specific facts were contained in those documents or known by those persons. After extensive discovery, plaintiff asserted he had no additional information. Does this showing create a prima facie case, sufficient to shift the burden of production to the plaintiff and, if uncontroverted, support a judgment in defendant's favor? *Yes* (see 138 CA4th at 107).

- Opposing party had, or could have had, personal knowledge of the facts, and the discovery responses were still factually devoid. See *Andrews,* 138 C4th at 104 (defendant's motion for summary judgment granted based on plaintiffs' discovery responses; either plaintiffs knew some additional material facts and chose not to disclose them or they had no idea what additional facts were available). See also *McGonnell v Kaiser Gypsum Co.* (2002) 98 CA4th 1098, 1104, 120 CR2d 23 (plaintiff was best person to identify products to which he was exposed; deposition excerpt not identifying products was sufficient to shift burden).

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§4.23 2. When Factually Devoid Responses Do Not Shift Burden

The courts have rejected summary judgment based on the moving party's attempt to show that the opposing party's case lacked merit by introducing factually devoid discovery responses in cases in which

- Plaintiff did not or could not have had personal knowledge of facts alleged in papers, *e.g.,* defendants' allegedly conspiratorial conversations (*Villa v McFerren* (1995) 35 CA4th 733, 747, 41 CR2d 719), or defendant's allegedly undue influence exerted over decedent (*Hagen v Hickenbottom* (1995) 41 CA4th 168, 187, 48 CR2d 197);
- Plaintiff's discovery response stated that defendants had partnership books and records, and that plaintiff requested but was not given access to them (*Teselle v McLoughlin* (2009) 173 CA4th 156, 176, 92 CR3d 696);
- Plaintiff's counsel instructed plaintiff not to answer a deposition question and plaintiff refused to answer (*Gaggero v Yura* (2003) 108 CA4th 884, 892, 134 CR2d 313 (refusal to answer is not equivalent to factually devoid response));
- Defendant's interrogatories were not designed to elicit all of plaintiff's evidence (*Weber v John Crane, Inc.* (2006) 143 CA4th 1433, 1441, 50 CR3d 71).

EXAMPLE: In an asbestos-related personal injury action, plaintiff responded to defendant's single question in deposition by stating that he was unable to recall whether he worked around defendant's products. Does this showing create a prima facie case, sufficient to shift the burden of production to plaintiff? *No.* The court held that this showing by defendant did not allow an inference that plaintiff did not possess or could not obtain evidence that he was exposed to defendant's product; that plaintiff was unable to recall whether he worked around defendant's products over 40 years ago suggests only that plaintiff will not be able to prove its case with plaintiff's deposition testimony. 143 CA4th at 1439.

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IV. MOVING PARTY'S CASE

A. Moving Party With Burden of Proof at Trial

§4.24 1. Plaintiff's or Cross-Complainant's Burden as Moving Party

Code of Civil Procedure §437c(p)(1) provides that a plaintiff or cross-complainant has met its burden "of showing that there is no defense to a cause of action if that party has *proved each element* of the cause of action entitling the party to judgment on that cause of action" (emphasis added). When this burden is met, the burden of production shifts to the defendant.

NOTE: A plaintiff or cross-complainant moving for summary adjudication bears the same burden as a party moving for summary judgment. See *United Community Church v Garcin* (1991) 231 CA3d 327, 338, 282 CR 368 (motion for summary judgment proceeds in all respects as motion for summary adjudication).

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§4.25 a. Prove All Elements

If the moving party is a plaintiff or cross-complainant, it bears the burden of persuasion by competent admissible evidence that "each element of" the "cause of action" in question has been "proved." CCP §437c(p)(1); *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 850, 107 CR2d 841; *Troyk v Farmers Group, Inc.* (2009) 171 CA4th 1305, 1321, 90 CR3d 589. Therefore, the plaintiff must put forward a prima facie case that meets the burden of production for each element of a cause of action on which it seeks judgment. To establish a prima facie case in most instances, the plaintiff will submit declarations of its own witnesses, properly authenticated documentary evidence, deposition testimony from opposing and independent witnesses, and discovery responses from opposing parties. See CCP §437c(b)(1). It may also submit matters of which the court must or may take judicial notice. CCP §437c(b)(1); *Principal Life Ins. Co. v Peterson* (2007) 156 CA4th 676, 695, 67 CR3d 584 (criminal conviction for first degree murder is prima facie evidence of felonious and intentional killing in summary judgment motion brought in related civil action). On judicial notice, see §§5.48-5.57.

NOTE: In contrast, a defendant moving for summary judgment must "show" by the applicable standard of proof that the plaintiff cannot establish the elements of its case. CCP §437c(p)(2). See §4.30. The difference in the language between subsections 437c(p)(1) and 437c(p)(2) may indicate merely that a moving plaintiff will always have to prove the elements of its cause of action, whereas a moving defendant may only have to show that plaintiff cannot prove one element. Stated another way, a moving plaintiff will always have to present evidence sufficient to meet the burden of proof, whereas a moving defendant only has to do so if its motion is based on an affirmative defense on which it would have the burden of proof at trial. It also may be a distinction without a difference, because "show" has been held to be synonymous with "establish" or "prove." See *People v Resolute Ins. Co.* (1975) 46 CA3d 249, 256, 120 CR 17.

On the requirement of competent, admissible evidence, see §4.16; on establishing a prima facie case, see §§4.7, 4.12. On preparing evidence such as discovery responses and declarations for submission in support or opposition to a summary judgment motion, see chap 5.

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§4.26 b. Not Required to Disprove Affirmative Defenses

Code of Civil Procedure §437c(p)(1) specifically provides that a moving plaintiff is not required to both prove its own case and disprove some element of every applicable affirmative defense, as was required before the 1992 amendment of the statute. It is enough that the moving plaintiff prove each essential element of its own causes of action. *Troyk v Farmers Group, Inc.* (2009) 171 CA4th 1305, 1321, 90 CR3d 589.

EXAMPLE: In moving for summary judgment on its payment bond claim, plaintiff subcontractor met its initial burden of producing evidence establishing the elements of its claim for recovery on the bond. Plaintiff was not also required to disprove defendant bonding company's affirmative defenses of release and estoppel. See *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 564, 88 CR3d 363.

To narrow issues for trial, a plaintiff may move for summary adjudication on an affirmative defense; on how the plaintiff proceeds in that event, see §4.33.

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§4.27 c. Not Required to Prevail on Every Theory Pleaded

A plaintiff who has pleaded several causes of action based on the same set of facts need sustain the burden of proof on only one of the legal theories to prevail on a summary judgment motion, but the judgment will be limited by the remedies that apply to that theory. *Conn v National Can Corp.* (1981) 124 CA3d 630, 639, 177 CR 445. On the contrasting defendants' burden, see §4.30.

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§4.28 d. Must Carry Initial Burden Even if Motion Unopposed

Even unopposed or inadequately opposed summary judgment and summary adjudication motions can be denied for failure of the moving party to carry the initial burden. *Certain Underwriters at Lloyds of London v Superior Court* (1997) 56 CA4th 952, 955, 65 CR2d 821 (plaintiff's motion for summary judgment denied despite defendant's failure to submit evidence of plaintiff's inability to establish coverage). Although a trial court may, in its discretion, grant summary judgment if the opposing party fails to file a proper separate statement (see CCP §437c(b)(3)), the statute does not authorize granting the motion without first determining that the moving party has met its initial burden of production. *Teselle v McLoughlin* (2009) 173 CA4th 156, 169, 92 CR3d 696; *Thatcher v Lucky Stores, Inc.* (2000) 79 CA4th 1081, 1084, 94 CR2d 575. See also *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 366, 94 CR3d 424 (court's determination of whether moving party has carried its burden on summary judgment motion occurs before court's evaluation of opposing party's papers).

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§4.29 2. Defendant's Burden as Moving Party Seeking to Establish Defense

Code of Civil Procedure §437c(p)(2) allows a defendant to meet its burden of showing that a cause of action is without merit by showing that there is a complete defense to it. When a defendant moves for summary judgment on the basis of an affirmative defense, for example, the defendant has the initial burden of production, *i.e.*, it must make a prima facie showing by establishing all the factual elements of the defense, as it would at a trial. After that is done, the burden shifts to the plaintiff opposing the motion to present evidence sufficient to show at least one triable issue of material fact regarding the defense. See *Jessen v Mentor Corp.* (2008) 158 CA4th 1480, 1484, 71 CR3d 714.

EXAMPLE 1: In *Jessen,* a medical malpractice action, defendant asserted that plaintiff's causes of action were preempted by federal law, an affirmative defense. To establish preemption in its motion for summary judgment, defendant was required to prove that a surgically implanted prosthesis was designed, manufactured, and labeled according to specifications approved by the federal government. Defendant submitted declarations that included all necessary information about compliance with federal specifications. Plaintiff countered with evidence that defendant did not comply, but objections to that evidence were sustained by the trial court, and those rulings were not challenged on appeal. The court of appeal ruled that plaintiff's evidence in any event failed to raise a triable issue of material fact, because plaintiff only attempted to show that defendant failed to comply with a labeling requirement imposed more than 8 months after he had his surgery. Because plaintiff failed to offer any evidence that defendant failed to comply with the labeling requirement in effect when the surgery was performed, summary judgment was properly granted. 158 CA4th at 1492.

Another way for a defendant to meet its initial burden of establishing a defense to a cause of action is to demonstrate that the plaintiff's own pleadings allege sufficient facts to support the defense. In that event, the defendant's burden of production is relatively simple.

EXAMPLE 2: In *24 Hour Fitness v Superior Court* (1998) 66 CA4th 1199, 1211, 78 CR2d 533, plaintiff sued a health club for sexual harassment. Defendants alleged the affirmative defense that plaintiff's claims were subject to an arbitration agreement. In moving for summary judgment, the individual defendants relied on allegations in plaintiff's complaint that they acted in the course and scope of their employment to come within the scope of the arbitration clause. The court held that the allegations in plaintiff's complaint satisfied defendants' initial burden of showing the existence of a complete defense to a cause of action. The court noted that for the purpose of a summary judgment motion, however, an allegation in a complaint will not be binding if plaintiff offers countervailing evidence in opposition to the motion.

On other issues on which a defendant has the burden of proof at trial, such as the doctrine of exhaustion of judicial remedies (see *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 355, 94 CR3d 424), the defendant as moving party bears the initial burden of establishing a prima facie case on each required element.

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B. Moving Party Without Burden of Proof at Trial

1. Defendant's or Cross-Defendant's Burden

§4.30 a. Prove That Elements of Cause of Action Cannot Be Established

If the moving party is a defendant or cross-defendant, it bears the burden of persuasion by competent admissible evidence that one or more elements of the cause of action in question cannot be established. CCP §437c(p)(2); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841.

Courts recognize two ways for a defendant to meet this burden on a summary judgment motion:

(1) The first, called "positive refutation," consists of the defendant's presenting evidence that, without conflicting evidence from the plaintiff, precludes a reasonable trier of fact from finding a fact necessary to the cause of action. See *Browne v Turner Constr. Co.* (2005) 127 CA4th 1334, 1339, 26 CR3d 433. Simply put, the defendant introduces evidence controverting the actual events in the plaintiff's pleadings and establishes a version of those events that is incompatible with the plaintiff's. 127 CA4th at 1339.

(2) In the second, the moving defendant may demonstrate by competent evidence (typically the product of discovery) that the plaintiff lacks the evidence to prove a fact necessary to the plaintiff's claim. In this method, called "evidentiary negation," the defendant need not affirmatively establish anything factual; it need only show "that there is insufficient evidence of what occurred, or insufficient evidence favorable to the plaintiff, to establish a necessary element of the cause of action." 127 CA4th at 1340. A defendant cannot do this by mere argument; it must introduce admissible evidence. See §4.31.

If a complaint pleads several causes of action, a defendant seeking summary judgment has the burden of demonstrating on each cause of action that there are no material facts requiring a trial. When a defendant's moving papers fail to address every cause of action, the defendant cannot obtain a summary judgment. *Teselle v McLoughlin* (2009) 173 CA4th 156, 163, 92 CR3d 696. A defendant's motion for summary adjudication, however, may eliminate one or more causes of action or claims. CCP §437c(f).

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§4.31 b. Not Required to Negate Element of Plaintiff's Claims

Like federal law, California law since the 1992 and 1993 amendments to CCP §437c no longer requires a defendant moving for summary judgment to conclusively negate an element in the plaintiff's cause of action, although that is one way for a defendant to obtain summary judgment (see §4.30) and was the principal method before the statutory amendments. After the amendments, a defendant may satisfy the requirement under CCP §437c(p)(2) (to show that the plaintiff cannot establish one or more elements of the plaintiff's cause of action) by demonstrating that the plaintiff does not possess, and cannot reasonably obtain, the required evidence to prevail at trial on its claim. *Jones v P.S. Dev. Co.* (2008) 166 CA4th 707, 710, 82 CR3d 882 (trial court properly granted summary judgment for contractor based on "completed and accepted" doctrine, which shields contractor from liability for negligence in its work after work has been completed and accepted, because there were no triable issues regarding completion and acceptance of defendants' work on machine that caused plaintiff's injury). However, a defendant moving for summary judgment on that basis must present evidence (usually by showing a lack of factual information in discovery responses), not merely argue or assert that the plaintiff does not possess and cannot reasonably obtain the required evidence. See *Smith v Wells Fargo Bank* (2005) 135 CA4th 1463, 1473, 38 CR3d 653 (applying summary judgment standards in pretrial motion to dismiss meritless complaint under Consumers Legal Remedies Act (CC §1781(c)); see §2.6). On divergence from federal law, see §§2.32, 4.15.

PRACTICE TIP: All the defendant needs to show is that the plaintiff has no evidence to show element "X" of the cause of action. Although the defendant is free to do so, he or she is not required to show "not X." If the defendant does choose to produce evidence sufficient to make a prima facie showing of "not X," however, the defendant has satisfied its burden and will prevail on its motion, unless the plaintiff produces contrary evidence creating a triable issue of fact. *Aguilar v Atlantic Richfield Co*. (2001) 25 C4th 826, 853, 107 CR2d 841.

CAUTION: The *Aguilar* court's language that the defendant must show that the plaintiff does not possess and "cannot reasonably obtain" needed evidence would seem to suggest that the defendant must overcome a two-pronged challenge before the burden shifts to the plaintiff. This would seem to obviate CCP §437c(h), which provides a means for the plaintiff to put before the court evidence that certain facts exist but cannot be presented. For an explanation of this apparent contradiction, see §4.21.

On the requirement of competent, admissible evidence, see §4.16; on the prima facie case, see §4.7.

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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.32 c. Failure to Shift Burden

§4.32 c. Failure to Shift Burden

A defendant moving for summary judgment must carry its burden of production by presenting evidence in a "separate statement" setting forth all material facts contended to be undisputed and referring to supporting evidence. See CCP §437c(b)(1). Any assessment of whether the defendant has carried its burden—and therefore caused a shift—occurs before the court evaluates the opposing party's papers. See *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 366, 94 CR3d 424. If the defendant fails to carry its burden, the opposing party is not obligated to provide a "separate statement" of the material facts in dispute (*Teselle v McLoughlin* (2009) 173 CA4th 156, 169, 92 CR3d 696) and the motion must be denied (173 CA4th at 171). In the following cases, the moving party defendant failed to carry its burden of production.

EXAMPLE 1: Grandparents petitioned for visitation rights. The father, who opposed the petition, moved for summary judgment. The father did not submit evidence on the issue of whether the children would suffer harm from the absence of grandparent visitation, which (the court accepted for sake of argument) was a required element of the grandparent's case. At the hearing, the father contended that his motion should be granted because the grandparents did not raise a triable issue of fact on the issue of harm. The court disagreed. Before that issue could be reached, the father was required to make a prima facie showing that the grandparents could not establish their case of harm by the appropriate standard of proof. He did not. *Fenn v Sherriff* (2003) 109 CA4th 1466, 1 CR3d 185.

EXAMPLE 2: Nard, through his guardian, sought damages for loss of consortium, due to the death of his father. Nard is mentally disabled due to head trauma and does not understand that his father is dead. Defendant moved for summary adjudication, arguing that Nard's belief that his father is alive was prima facie evidence that Nard suffered no damages because of his father's death. The motion for summary adjudication was denied because defendant did not produce any evidence regarding the extent of Nard's injuries or the manner by which those injuries rendered him unable to suffer from the loss of his father. There was nothing in the record to suggest that Nard's guardian would not be able to demonstrate that Nard suffered from the loss of his father's love and companionship, despite lack of knowledge of his father's death. The court held that defendant did not meet his burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. *Knowles v Superior Court (Labo)* (2004) 118 CA4th 1290, 1301, 13 CR3d 700.

EXAMPLE 3: The moving party's separate statement did not address all material allegations of the complaint in a trust administration action alleging multiple causes of action, and, therefore, did not shift the burden of production. See *Teselle,* 173 CA4th at 160.

EXAMPLE 4: In an asbestos-related personal injury action, defendant moved for summary judgment based on plaintiff's answers to form interrogatories, which did not ask questions aimed at defendant's presence or absence from job sites. This discovery was not comparable to "state all facts" interrogatories. Therefore, it could not be inferred from plaintiff's response that he had no other facts to support his case against defendant. *Scheiding v Dinwiddie Constr. Co.* (1999) 69 CA4th 64, 83, 81 CR2d 360.

EXAMPLE 5: Defendant moved for summary judgment, alleging that plaintiff had no evidence that defendant misappropriated money from a trust fund. Plaintiff's discovery responses, however, stated that she had requested certain books and records from defendant that had not been provided. The court opined that defendant had not shown that plaintiff could not obtain evidence to support her case. *Teselle,* 173 CA4th at 176.

EXAMPLE 6: Plaintiff sued the owner of an apartment complex, alleging that the owner was negligent in hiring the resident manager after notice of his dangerous propensities, such as a manslaughter conviction, carrying guns, using methamphetamine, and threatening tenants while working for the owner. Defendant's motion for summary judgment merely contained an unsworn statement of counsel, without citation to evidence or to lack of plaintiff's evidence (*e.g.,* factually devoid discovery responses), that the resident manager was not an employee. Bald

assertions by counsel did not shift any burden to plaintiff. *Hawkins v Wilton* (2006) 144 CA4th 936, 947, 51 CR3d 1.

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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.33 2. Moving Plaintiff Seeking to Eliminate Affirmative Defense

§4.33 2. Moving Plaintiff Seeking to Eliminate Affirmative Defense

Although it is not required to disprove any affirmative defense in order to prevail on a summary judgment motion (see §4.26), a plaintiff may choose to narrow issues for trial by moving for summary adjudication on one or more affirmative defenses. If the plaintiff files a motion for summary adjudication under CCP §437c(f)(1) seeking only to eliminate one or more affirmative defenses on which the defendant bears the burden of proof at trial, the motion must "proceed in all respects as a motion for summary judgment." CCP §437c(f)(2). This means that, like the defendant moving for summary judgment on a cause of action in the complaint (see §4.30), the plaintiff bears the burden of persuasion by competent admissible evidence that one or more elements of the defense in question cannot be established. See CCP §437c(p)(2); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841.

Summary adjudication of an affirmative defense is proper only if it "completely disposes" of that defense. *North Coast Women's Care Med. Group v Superior Court* (2008) 44 C4th 1145, 1160, 81 CR3d 708.

EXAMPLE 1: In *North Coast Women's Care Med. Group,* in an action against her physicians for violating the Unruh Civil Rights Act (CC §51), plaintiff asserted that defendants unlawfully discriminated against her on the basis of sexual orientation by refusing to administer artificial insemination. Plaintiff moved for summary adjudication on defendants' affirmative defense that their constitutional rights to free speech and free exercise of religion exempted them from complying with the Act. The supreme court upheld the trial court's grant of summary adjudication, essentially rejecting the defense as a matter of law.

As in a summary judgment motion (see §4.32), the party moving for summary adjudication on an affirmative defense must meet its burden of production before the burden shifts to the opposing party. The failure to meet that initial burden justifies denial of the motion. See *Continental Ins. Co. v Columbus Line, Inc.* (2003) 107 CA4th 1190, 133 CR2d 199.

EXAMPLE 2: In *Continental Ins. Co.,* although plaintiff presented evidence that defendant's bill of lading did not comply with federal case law requiring incorporation of express statutory language, plaintiff did not present any evidence indicating that the shipper was denied a fair opportunity to negotiate more favorable terms, which was also a requirement. Neither did plaintiff present evidence that defendant would be unable to document that the shipper was denied a fair opportunity to negotiate; hence, the burden of production never shifted to defendant to produce any evidence on its defense. 107 CA4th at 1200.

It is very difficult to obtain summary adjudication of a defense involving a party's intent. See CCP §437c(e), discussed in §4.20.

EXAMPLE 3: In *Drouet v Superior Court* (2003) 31 C4th 583, 3 CR3d 205, a landlord filed an unlawful detainer action following the landlord's exercise of its right to withdraw a rental unit from the market under the Ellis Act (Govt C §§7060-7060.7). The tenants asserted the affirmative defense of retaliatory eviction under CC §1942.5 to controvert the landlord's good faith, and the landlord moved for summary adjudication of that defense. The supreme court remanded the case to the trial court to consider factually whether the landlord had made a showing of good faith intent to withdraw the unit. If the landlord succeeded, then the trial court could grant the motion for summary adjudication only if the tenants did not adequately controvert that intent in their opposing papers. See 31 C4th at 600.

WARNING: The opinion in *Drouet* discussed both the burden of proof at trial and the burdens in pretrial summary adjudication motions, because the court was considering a case of first impression on applying the retaliatory eviction statute to Ellis Act evictions. The case must be carefully read in the light of CCP §437c; sometimes the opinion does not clearly distinguish between the trial burden of proof and the burdens on parties opposing each other in summary adjudication. See 31 C4th at 595-596, 599-600.

A motion for summary adjudication of an equitable defense can be more difficult to win than such a motion on a legal defense. See *Kendall-Jackson Winery, Ltd. v Superior Court* (1999) 76 CA4th 970, 90 CR2d 743.

EXAMPLE 4: When a defendant asserts the affirmative defense of unclean hands in a malicious prosecution action, plaintiff's misconduct in the underlying transaction (or in the subject litigation) that directly affects the equitable relations between the litigants is relevant to that defense and must be weighed by the trier of fact. See 76 CA4th at 974. In *Kendall-Jackson Winery,* the court of appeal issued a writ of mandate directing the trial court to deny plaintiff's motion for summary adjudication on the defense. The court noted that the defense "is not a legal or technical defense to be used as a shield against a particular element of a cause of action." Rather, the trier of fact may rely on any evidence of a plaintiff's unclean hands as "an equitable rationale for refusing a plaintiff relief" when "principles of fairness dictate that the plaintiff should not recover," despite the merits of the complaint. 76 CA4th at 985.

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V. OPPOSING PARTY'S CASE

A. When Moving Party Meets Its Burden

§4.34 1. If Opposing Party Is Defendant

If the moving plaintiff has met its initial production burden (see §4.24), then the defendant must either show the existence of a triable issue of fact (see §4.37) or establish the existence of an affirmative defense (see §4.29). CCP §437c(p)(1).

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§4.35 2. If Opposing Party Is Plaintiff

If the moving defendant has met its initial production burden (see §4.32), then the plaintiff must raise a triable issue of fact by establishing each element of his or her case or showing a conflict in the evidence. See CCP §437c(p)(2). Conversely, a plaintiff opposing a motion for summary judgment bears no burden to produce evidence unless and until the defendant presents evidence either affirmatively negating at least one element (proving its absence in fact), or affirmatively showing that the plaintiff does not possess and cannot obtain evidence to prove its case. See *Y.K.A. Indus., Inc. v Redevelopment Agency* (2009) 174 CA4th 339, 352, 94 CR3d 424.

EXAMPLE: In opposing a motion for summary judgment, plaintiff failed to establish a triable issue of material fact on one cause of action in *Paduano v American Honda Motor Co.* (2009) 169 CA4th 1453, 88 CR3d 90, but succeeded in raising a triable issue on another. In its motion, defendant demonstrated that the breach of warranty claim on a vehicle purchase was not supported by the evidence in that the written warranty did not expressly include or exclude "mileage related defects" and the "EPA mileage estimate" was not a warranty. 169 CA4th at 1467. In response, plaintiff failed to present any evidence suggesting that the low gas mileage was the result of a mechanical defect covered by the warranty. However, on the false advertising claim, the court concluded that from plaintiff's evidence a fact finder could determine that other statements defendant made in its brochure were misrepresentations or misleading to the public. 169 CA4th at 1470.

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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.36 B. When Moving Party Does Not Meet Its Burden

§4.36 B. When Moving Party Does Not Meet Its Burden

The moving party's papers must be sufficient on their own to entitle that party to summary judgment. When the moving party does not meet its initial burden of producing evidence (see §§4.24-4.33), the court must deny the motion. See CCP §437c(g); *Teselle v McLoughlin* (2009) 173 CA4th 156, 171, 92 CR3d 696. If it appears that the moving party has not met its initial burden, the opposing party may choose either (1) not to file any opposition, or (2) to file a response addressing the merits of the motion. The opposing party is not required to file affidavits and declarations to defeat the motion unless the moving party has provided facts sufficient to establish every element necessary to sustain a judgment. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 849, 107 CR2d 841; *Hagen v Hickenbottom* (1995) 41 CA4th 168, 187, 48 CR2d 197. Not presenting evidence in opposition to the motion, however, is risky from a tactical viewpoint. See §4.7.

PRACTICE TIP: Although the opposing party in this situation is not obligated to file opposing declarations or a separate statement of material facts (see 173 CA4th at 170), the failure to submit opposing evidence presents the risk that the moving party's declarations, if adequate to meet the initial burden, will be treated as true (see, *e.g., Niederer v Ferreira* (1987) 189 CA3d 1485, 1498, 234 CR 779). When counteraffidavits or declarations are not filed, the court must accept as true for purposes of the summary judgment motion those facts in the moving party's affidavits or declarations. Thus, it is risky for opposing party's counsel not to file counteraffidavits and to rely only on the insufficiency of the moving party's evidence. The court may not agree that the moving party failed to meet the burden of production and may order summary judgment without having had the opportunity to consider opposing evidence.

NOTE: The courts have carved out a narrow exception to this rule when the identity of a party is at issue. In a products liability case, one court concluded that, even when the moving party's evidence is insufficient, if summary judgment raises the question of the manufacturer's identity, the plaintiff opposing the motion must offer evidence showing a "good-faith belief that the party is the actual manufacturer of the product involved." *Versa Technols., Inc. v Superior Court* (1978) 78 CA3d 237, 240, 142 CR 570.

Prudent counsel will respond as follows:

- Base its opposition solely on the inadequacy of the moving party's showing in support of the motion (*Beech Aircraft Corp. v Superior Court* (1976) 61 CA3d 501, 520, 132 CR 541); or
- File an opposition to the substance of the motion (*i.e.,* demonstrate triable issues of material fact), in addition to attacking the adequacy of the moving party's showing.

Experienced counsel for an opposing party will usually follow the second course because the moving party's counsel may attempt to salvage an inadequate motion by submitting in its reply papers previously omitted evidence. Some trial court judges allow that and will consider all evidence on the record regardless of whether it was submitted in the moving or reply papers. Others will not consider evidence in reply papers if it should have been included in the moving papers. See, *e.g., San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 315, 125 CR2d 499 (although trial court had discretion to consider evidence not referenced in moving party's separate statement and to grant summary judgment despite inadequate separate statement, trial court could not consider evidence filed by moving party after opponent had responded to issues raised in separate statement; such action would violate opponent's due process rights). See also *Laabs v City of Victorville* (2008) 163 CA4th 1242, 1266, 78 CR3d 372 (citing *San Diego Watercrafts,* court held that neither trial court nor appellate court could properly consider evidence submitted by defendant county because it was not included as part of supporting evidence on defendant city's summary judgment motion).

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§4.37 C. Showing Triable Issue of Fact

When the moving party has met its burden of production, the opposing party then has the substantive burden of presenting sufficient admissible evidence to demonstrate that there is at least one triable issue of material fact on at least one of the elements necessary for judgment for the moving party. CCP §437c(p); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841; *Kids' Universe v In2Labs* (2002) 95 CA4th 870, 877, 116 CR2d 158. When the moving and opposing papers in a summary judgment motion show the existence of one or more triable issues of material fact, the court must deny the motion. *Aguilar,* 25 C4th at 857. See CCP §437c(c), (g). See also §4.13. For a case in which the opposing plaintiff failed to establish a triable issue of material fact on one cause of action, but succeeded in raising a triable issue on another, see *Paduano v American Honda Motor Co.* (2009) 169 CA4th 1453, 88 CR3d 90, discussed in §4.35.

PRACTICE TIP: It is crucial to prepare a clear and complete opposing separate statement of material facts so that the court can easily locate the specific evidence offered to show the disputed facts. Particularly when the opposing evidence creates numerous triable issues of material fact, the trial court needs the guidance of the separate statement to fully assess the disputed facts. See, *e.g., Parkview Villas Ass'n v State Farm Fire & Cas. Co.* (2005) 133 CA4th 1197, 35 CR3d 411.

In *Parkview Villas,* the court of appeal reversed a grant of summary judgment and held that in the absence of extraordinary circumstances, "a trial court faced with an opposing party's defective separate statement plainly indicating which proposed material facts are disputed and including at least general references to the evidence supporting its position does not have the discretion to enter a judgment against that party solely as a result of that party's failure to explain the nature of the dispute and to provide sufficiently specific citations to the evidence supporting its position." 133 CA4th at 1214-1215. Instead, the court explained, "if the trial court is not prepared to address the merits of the motion in light of the deficient separate statement," it should "give the opposing party an opportunity to file a proper separate statement rather than entering judgment against that party based on its procedural error." 133 CA4th at 1211. Compare *Parkview Villas* with *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 88 CR3d 363, cited in §4.40.

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§4.38 1. Examples of Party Establishing Triable Issues

In the following reported cases, the opposing party in a summary judgment motion succeeded in demonstrating triable issues of material fact:

- In a personal injury suit arising from high school sport activities, the supreme court concluded that the totality of the circumstances precluded the grant of the defendants' motion for summary judgment, which had asserted that the plaintiff's claim was barred by the doctrine of primary assumption of risk. Specifically, the court referred to numerous conflicting evidentiary facts creating triable issues of fact, including whether the defendant coach failed to train the plaintiff on the technique of shallow-water diving and his alleged threat to remove her from the swim meet if she refused to perform the dive. *Kahn v East Side Union High Sch. Dist.* (2003) 31 C4th 990, 996, 4 CR3d 103.
- The plaintiff alleged that he was terminated from employment because of discrimination and retaliation. The defendant contended that it terminated the plaintiff for cause following an investigation. The plaintiff raised a triable issue of fact in opposition to the defendant's motion based on the following evidence: Although the defendant conducted an investigation of a complaint against the plaintiff, it chose a biased investigator who refused to interview witnesses who had exculpatory information. *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 277, 100 CR3d 296.
- The plaintiff alleged that he was terminated from employment in violation of statutes that prohibit retaliation for conduct protected on the job. On summary judgment, the employer attempted to show that it acted not in response to the worker's complaints but for legitimate, nonretaliatory reasons. Conflicting evidence presented by the plaintiff suggested that the employer may have been liable for retaliatory discharge because the supervisor who initiated the disciplinary proceedings acted with retaliatory intent, even if the ultimate decision to discharge the plaintiff was made by a manager with no knowledge that the worker engaged in protected activities. *Reeves v Safeway Stores, Inc.* (2004) 121 CA4th 95, 100, 16 CR3d 717.

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§4.39 2. Examples of Party Not Establishing Triable Issues

In the following reported cases, the opposing party in a summary judgment motion did not demonstrate triable issues of material fact:

- In an employment discrimination action, after the defendant presented evidence that its decision not to renew the plaintiff's contract was based on legitimate, nondiscriminatory factors, the plaintiff failed to show that the defendant's dissatisfaction with the plaintiff's performance was pretextual, that there was no evidence of race-based animus or discriminatory hiring practices, and that there was no evidence to suggest that anyone at the defendant television company was dissatisfied with the plaintiff on account of his race. See *Hicks v KNTV Television, Inc.* (2008) 160 CA4th 994, 1012, 73 CR3d 240.
- The defendant surety company produced no evidence demonstrating any triable issue of material fact in opposing a subcontractor's summary judgment motion on its complaint for recovery on a payment bond; the defendant only unsuccessfully challenged some of the disputed facts submitted by the plaintiff in support of its motion for summary adjudication on the defendant's affirmative defenses. *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 577, 88 CR3d 363.
- The plaintiff failed to raise a triable issue of fact that the defendant made a fraudulent misrepresentation based on the following evidence: money in the investment fund had disappeared, the losses were serious, many persons thought the defendant was liable, and there were unanswered questions concerning why the money was missing. *Union Bank v Superior Court* (1995) 31 CA4th 573, 593, 37 CR2d 653.

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Source: Civil Litigation/California Summary Judgment/4 Evidentiary Burdens and Presumptions/§4.40 D. Methods of Showing Disputed Facts

§4.40 D. Methods of Showing Disputed Facts

To show that triable issues exist, the opposing party must

- Produce admissible evidence that genuinely contradicts evidence produced by the moving party (see §4.41); or
- Show that admissible evidence gives rise to other reasonable contradictory inferences that raise a genuine issue of material fact.

See CCP §437c(c); *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 766, 107 CR2d 617; *Unjian v Berman* (1989) 208 CA3d 881, 884, 256 CR 478.

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1. Permissible Methods of Creating Triable Issue

§4.41 a. Presenting Specific Conflicting Facts

One way to raise a triable issue of material fact is for the opposing party to present specific facts that conflict with the evidence of the moving party or show that the moving party's evidence is reasonably susceptible to an inference supporting the opposing party's case. See CCP §437c(c), (p). See *Chaknova v Wilbur-Ellis Co.* (1999) 69 CA4th 962, 81 CR2d 871.

EXAMPLE: Defendant, the moving party, shifted the burden to raise a triable issue of fact to plaintiff concerning plaintiff's exposure to defendant's product. Plaintiff responded by referring to discovery responses from which it might be inferred that some of defendant's products might have been present at certain places where he worked. The court held that plaintiff did not raise a triable issue of fact because he provided no evidence of specific facts with respect to the time, location, and actual circumstances of exposure. 69 CA4th at 977.

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§4.42 b. Producing Essential Material Facts

If the defendant moving party's evidence demonstrates an absence of evidence establishing an essential element of the plaintiff's case, and the plaintiff's evidence in opposition to the motion does not show that a triable fact exists with respect to the essential element, no amount of factual conflicts on other aspects of the case will affect the result and the motion should be granted. *Armato v Baden* (1999) 71 CA4th 885, 893, 84 CR2d 294. See CCP §437c(p)(2). Similarly, if a defendant opposing a summary judgment motion produces no evidence creating any triable issue of material fact on the complaint, the motion will be granted. *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 577, 88 CR3d 363.

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2. Impermissible Methods of Creating Triable Issue

§4.43 a. Using Own Pleadings

The opposing party cannot rely solely on its own pleadings, even if verified, to oppose a motion for summary judgment or summary adjudication. See CCP §437c(p). A party may rely on the pleadings of the other party to create a triable issue of fact because statements in the opposing pleadings may be treated as admissions. *24 Hour Fitness v Superior Court* (1998) 66 CA4th 1199, 1210, 78 CR2d 533 (allegations in plaintiff's complaint satisfied defendants' initial burden of showing existence of complete defense to cause of action). See §5.43.

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§4.44 b. Offering Speculation

A triable issue of material fact (see §4.37) can only be created by a conflict in the evidence. It is not created by speculation, conjecture, imagination, or guesswork. See *Chaknova v Wilbur-Ellis Co.* (1999) 69 CA4th 962, 977, 81 CR2d 871 (plaintiff's speculation that some of defendant's products might have been present where he worked did not create triable issue of fact). Nor is it established by "cryptic, broadly phrased, and conclusory assertions" or "mere possibilities." See *Lyons v Security Pac. Nat'l Bank* (1995) 40 CA4th 1001, 1014, 48 CR2d 174.

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§4.45 c. Promising to Prove Facts at Later Date

Assertions and allegations unsupported by evidence do not raise disputed facts. Thus, if plaintiff's entire opposition rests on assertions that it will be able to prove its beliefs at trial, the motion must be granted. See *Lyons v Security Pac. Nat'l Bank* (1995) 40 CA4th 1001, 48 CR2d 174.

EXAMPLE: In *Lyons,* with the trial court's permission, plaintiff presented its opposition to defendant's summary judgment motion orally at the hearing on the motion. Plaintiff offered no testamentary evidence, separate statement, declarations, or other supporting documentary evidence to dispute or contradict defendant's factual showing. Plaintiff's attorney merely argued the case as if he were making an opening or a closing statement at trial; the court held that this did not create triable issues of material fact.

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§4.46 E. Construing Evidence and Factual Inferences

On a summary judgment motion, the moving party's declarations are strictly construed; the opposing party's declarations are liberally construed. *Podolsky v First Healthcare Corp.* (1996) 50 CA4th 632, 642, 58 CR2d 89; *Armstrong v Optical Radiation Corp.* (1996) 50 CA4th 580, 585 n2, 57 CR2d 763. See §5.8. The facts alleged in the opposing party's declarations, and reasonable inferences drawn from them, must be accepted as true for purposes of deciding the motion. *Armstrong v Optical Radiation Corp., supra*. Such inferences, however, cannot be speculative (see §4.44) and must meet the "more likely than not" burden of proof the opposing party bears at trial. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 107 CR2d 841; *Smith v Wells Fargo Bank* (2005) 135 CA4th 1463, 1489, 38 CR3d 653.

EXAMPLE: In *Smith,* an action for unfair competition and false advertising, the court of appeal concluded that a trier of fact could infer from the undisputed facts that the existence of all of the elements of plaintiff's causes of action was more likely than their nonexistence. Specifically, a trier of fact could infer that it was more likely that defendant's disclosures regarding its transaction overdraft policy change were not clear, conspicuous, and meaningful and were likely to mislead members of the public. A trier of fact could reasonably infer that defendant did not adequately disclose the change in fees (or the conditions under which fees would be imposed) or the effective date of the policy change. Accordingly, the trial court erred in granting defendant's motions for summary adjudication. 135 CA4th at 1489.

On inferences in summary judgment motions, see §§2.3, 4.19.

On appeal, the reviewing court must apply the same standards to the summary judgment motion as the trial court. The court of appeal independently determines as a matter of law the construction and effect of the facts presented, focusing on identifying disputed issues, but not resolving issues of fact. *Calemine v Samuelson* (2009) 171 CA4th 153, 161, 89 CR3d 495. "The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." *Acosta v Glenfed Dev. Corp.* (2005) 128 CA4th 1278, 1292, 28 CR3d 92. On appellate review of a decision on a motion for summary judgment, see chap 12.

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5

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§5.1 I. INTRODUCTION

Obtaining evidence in support of or in opposition to a summary judgment motion requires investigation, discovery, and fact gathering. See §5.2. Counsel must consider all evidence obtainable from its client and affiliated witnesses, as well as evidence obtained from the opponent, primarily in response to discovery requests.

A moving defendant must "present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." *Andrews v Foster Wheeler LLC* (2006) 138 CA4th 96, 101, 41 CR3d 229, quoting *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854, 107 CR2d 841. In response, the opposing party must produce evidence showing some triable issue of material fact (CCP §437c(b)(3)) by producing substantial responsive evidence. *Uhrich v State Farm Fire & Cas. Co.* (2003) 109 CA4th 598, 616, 135 CR2d 131. On the parties' respective burdens, see chap 4.

The rules of evidence apply to all evidence proffered to the court. All evidence must be admissible (see §§5.3-5.6) and have a proper foundation, *i.e.,* documents must be original or have foundational proof for the admission of secondary evidence (see §§5.58-5.78). Declarations must be from personal knowledge and not contain objectionable hearsay. See §§5.8-5.31. Evidence that is judicially noticed must meet the requirements of that statute. See §§5.48-5.57.

This chapter concludes with checklists for preparation of declarations. See §§5.79-5.81.

NOTE: Unless otherwise stated, this chapter refers to "summary judgment" as encompassing both summary judgment and summary adjudication. On the similarities and differences between summary judgment and summary adjudication, see §§2.13-2.29.

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§5.2 II. GATHERING EVIDENCE TO SUPPORT OR OPPOSE SUMMARY JUDGMENT MOTION

Before moving for summary judgment, the moving party should review all discovery and other evidence to determine what is needed to support the motion. The moving party should then gather all the evidence needed to support the motion just as it would for trial. See §§6.11-6.14. Similarly, to defeat a summary judgment motion, the opposing party should gather all evidence showing at least one triable issue of material fact. See CCP §437c(b)(3). See §§7.8, 7.30-7.36.

The moving party's evidentiary submissions are strictly construed, whereas evidence submitted in opposition to a summary judgment motion are given a liberal construction. *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 768, 107 CR2d 617; *Truong v Glasser* (2009) 181 CA4th 102, 109, 103 CR3d 811. See §4.46. Despite this liberality, the same evidentiary standards apply to both the moving and opposing parties. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 107 CR2d 841. See §§5.3-5.7, 7.30.

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§5.3 A. Evidence Must Be Admissible

A party must submit admissible evidence to support and oppose a motion for summary judgment. CCP §437c(b). See §4.16. Using inadmissible evidence can be fatal to the motion. See *Martin v Johnson* (1979) 88 CA3d 595, 151 CR 816 (trial court granted defendant's summary judgment motion after striking all plaintiff's exhibits and inadmissible portions of plaintiff's declaration in opposition to motion). On evidence admissibility, see Jefferson's California Evidence Benchbook, chap 1 (4th ed CJA-CEB 2009).

PRACTICE TIP: To meet the standards of admissibility, the evidence's proponent must either obtain originals of necessary documents or secure foundational proof for the admission of secondary evidence. See Evid C §1521 (secondary evidence admissible as proof of content in most cases). On the secondary evidence rule, see §§5.62-5.70.

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§5.4 1. No Ultimate Facts

To be admissible, evidence must state evidentiary facts, as opposed to conclusory or "ultimate" facts. *Brown v Ransweiler* (2009) 171 CA4th 516, 529, 89 CR3d 801; *Tuchscher Dev. Enters., Inc. v San Diego Unified Port Dist.* (2003) 106 CA4th 1219, 1240, 132 CR2d 57.

EXAMPLE: In *Jack v Wood* (1968) 258 CA2d 639, 65 CR 856, plaintiff sued three defendants for damages caused as a result of a slip and fall in an office building. Two defendants settled with plaintiff, and the remaining defendant, a janitor hired by the first two defendants, filed a motion for summary judgment based on plaintiff's execution of settlement releases that released from all liability the first two defendants and their "agents, servants, … and all others." After examining the declaration submitted by the remaining defendant, the court found that it contained conclusory statements rather than a detailed statement of specific facts. 258 CA2d at 645.

PRACTICE TIP: Although there is sometimes a fine distinction between admissible facts and inadmissible conclusions, you can avoid problems by stating underlying facts with specificity whenever possible.

In general, pleadings contain "ultimate facts," whereas "evidentiary facts" are found in answers to interrogatories, responses to requests for admission, depositions, other discovery, and affidavits and declarations made on personal knowledge. See CCP §437c(b)(1). Admissions made in another party's pleadings (either by affirmative allegation or by failure to deny an allegation) are admissible evidence that can be used to support the motion. On admissions in pleadings, see §§5.43-5.45.

For examples illustrating improper use of legal conclusions or ultimate facts, see 6 Witkin, California Procedure, *Proceedings Without Trial* §227 (5th ed 2008).

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/ 2. Sources of Evidence/ §5.5 a. Permissible Sources

2. Sources of Evidence

§5.5 a. Permissible Sources

The moving and opposing parties may use the following methods to present evidence in support of or in opposition to a summary judgment motion:

- Affidavits or declarations (see §§5.8-5.31);
- Evidence derived from discovery procedures, *e.g.,* depositions, answers to interrogatories, requests for admissions, documents produced in response to a demand for inspection, or reports of physical or mental examinations (see §§5.33-5.41);
- Admissions or stipulations in the pleadings (see §§5.42-5.47); and
- Matters subject to judicial notice (see §§5.48-5.57).

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.6 b. Impermissible Sources

§5.6 b. Impermissible Sources

A party may not rely on the following methods to prove any fact needed to support or oppose a summary judgment motion:

- Party's own interrogatory responses (CCP §2030.410; *Great Am. Ins. Cos. v Gordon Trucking, Inc.* (2008) 165 CA4th 445, 450, 81 CR3d 65);
- Party's own pleadings (CCP §437c(p); *Slobojan v Western Travelers Life Ins. Co.* (1969) 70 C2d 432, 437, 74 CR 895);
- Inconsistent theories or facts pleaded by an opposing party (see *Conn v National Can Corp.* (1981) 124 CA3d 630, 639, 177 CR 445 (success of action depends on plaintiff being able to carry burden of proof on at least one of theories asserted));
- Admissions made by a party other than the party opposing or moving for summary judgment (see Evid C §1220);
- Oral testimony at the hearing (*Spencer v Hibernia Bank* (1960) 186 CA2d 702, 717, 9 CR 867);
- Unauthenticated documents (see Evid C §1401);
- Opposing party's clearly mistaken discovery response (*Mason v Marriage & Family Ctr.* (1991) 228 CA3d 537, 545, 279 CR 51); and
- Discovery responses from parties other than the party against whom the motion is directed (CCP §§2030.410 (interrogatories), 2033.410 (admissions)).

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§5.7 B. Evidence Must Be Directed to Issues Raised by Pleadings

A motion for summary judgment is limited to issues raised by the pleadings. A party cannot raise an issue for the first time in its opposition to a summary judgment motion. *Laabs v City of Victorville* (2008) 163 CA4th 1242, 1253, 78 CR3d 372; *Ferrari v Grand Canyon Dories* (1995) 32 CA4th 248, 252, 38 CR2d 65. Thus, "to create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings." *Distefano v Forester* (2001) 85 CA4th 1249, 1264, 102 CR2d 813.

PRACTICE TIP: If the opposing party's evidence would show some factual assertion, legal theory, defense, or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. *Laabs v City of Victorville* (2008) 163 CA4th 1242, 1253, 78 CR3d 372, citing *Distefano v Forester, supra*. See §§6.10, 7.13. The opposing party must amend the pleadings if its opposition is based on an unpleaded claim or defense. *Oakland Raiders v National Football League* (2005) 131 CA4th 621, 648, 32 CR3d 266; *Keniston v American Nat'l Ins. Co.* (1973) 31 CA3d 803, 812, 107 CR 583. See §§7.14-7.17.

NOTE: The moving party may move for summary judgment even if there are defects on the face of the moving party's pleadings that make it vulnerable to a demurrer or a motion for judgment on the pleadings, if the supporting affidavits or declarations are factually within the general scope of the causes of actions or defenses set out in the pleadings. See *Varco-Pruden, Inc. v Hampshire Constr. Co.* (1975) 50 CA3d 654, 656, 123 CR 606 (pleading situation in case was unusual in that "parties entirely ignored the theories expressed in the pleadings and the summary judgment was considered and granted on a theory not pleaded"); *Ramos v City of Santa Clara* (1973) 35 CA3d 93, 96, 110 CR 485 (court permitted defendant to move for summary judgment despite fact that defenses were not raised first in its answer).

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III. DECLARATIONS AND AFFIDAVITS

§5.8 A. Used As Support for or in Opposition to Motion

Most summary judgment motions are largely based on witness testimony contained in affidavits or declarations made under penalty of perjury. Likewise, the primary means by which the opposing party establishes that material facts are in dispute is by testimony in affidavits and declarations. The declarations of the moving party are strictly construed, whereas those of the opposing party are liberally construed. *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 711, 128 CR2d 529. See §5.2.

PRACTICE TIP: Interviews are frequently necessary to learn who can identify documents and substantiate facts, and thus execute the appropriate declarations. Be careful to ensure that declarations are from personal knowledge (see §§5.18-5.22) and do not contain objectionable hearsay (see §§5.71-5.75).

For a sample declaration in support of a motion for summary judgment, see §14.10. On objections to declarations, see chap 9.

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§5.9 1. Differences Between Declarations and Affidavits

Declarations are made and signed under penalty of perjury (CCP §2015.5), whereas affidavits are written declarations made under oath and attested to, ordinarily by a notary public (CCP §2003). A declaration in the form prescribed by CCP §2015.5 is as valid and effective in support of a motion as an affidavit.

PRACTICE TIP: Litigants almost always use declarations rather than affidavits (as permitted by CCP §2015.5) because affidavits must be notarized, and declarations need not be. Therefore, the discussion in this chapter refers to declarations rather than to affidavits even if the authorities refer to affidavits.

Whichever form is used, it is important that it conform strictly to content and execution requirements. See §§5.13-5.23.

On declarations and affidavits, see California Civil Procedure Before Trial §§12.43-12.53 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.10 2. When to Use Declaration or Affidavit

§5.10 2. When to Use Declaration or Affidavit

Declarations and affidavits, *i.e.,* written statements made under penalty of perjury or under oath (CCP §§2015.5, 2003), are used to present facts to the judge from

- A witness (including a party) to an event;
- An expert witness;
- A custodian of records; or
- Any witness who can prove or disprove a fact needed to support the motion.

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3. Potential Limitations on Use of Declaration or Affidavit

§5.11 a. When State of Mind Is at Issue

The moving party should avoid presenting a declaration or affidavit on an individual's state of mind (or lack thereof) when that fact is sought to be established only by the individual's affirmation of it. See CCP §437c(e). A court is not required to accept an undisputed declaration by an individual concerning his or her state of mind; rather, such matter is committed to the court's discretion. *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 417, 94 CR3d 288; *Violette v Shoup* (1993) 16 CA4th 611, 621, 20 CR2d 358. See §11.14.

JUDICIAL PERSPECTIVE: Although the declaration could be disregarded, its submission cannot hurt. If a party corroborates the declaration with submission of other credible circumstantial evidence, a court may exercise its discretion and accept the declaration.

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§5.12 b. When Declarant Is Sole Witness

The moving party should avoid presenting a declaration or affidavit of a declarant who is the sole witness to a material fact, because the court may deny summary judgment when this is the only proof of an uncontroverted material fact. See CCP §437c(e). A court is not required to accept an undisputed declaration by an individual who is the sole witness to a material fact; rather, such matter is committed to the court's discretion. *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 417, 94 CR3d 288. See §§4.20, 11.13.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.13 4. Format of Declarations and Affidavits

§5.13 4. Format of Declarations and Affidavits

The caption of the declaration or affidavit must state the name of the person making the statement and identify the motion it supports or opposes. Cal Rules of Ct 3.1115. Immediately below the case number, it should specify the (Cal Rules of Ct 3.1110(b))

- Hearing date;
- Time;
- Location:
- Judge, if set;
- Nature or title of any attached document other than an exhibit;
- Date action was filed; and
- Trial date, if set.

The body of a declaration is a series of statements by the witness, usually set out in separately numbered paragraphs.

CAUTION: Strict compliance with the rules set out for declarations and affidavits is required, as courts will often disregard them if they lack the required formalities or are improperly executed. See, *e.g., Kulshrestha v First Union Commercial Corp.* (2004) 33 C4th 601, 610, 15 CR3d 793 (out-of-state declaration that materially deviates from CCP §2015.5 and does not state it was made under laws of State of California cannot be used as evidence); *Baron v Mare* (1975) 47 CA3d 304, 308, 120 CR 675 (formalities of declaration "lacking": declaration was undated and did not indicate where it was executed, and declarant declared only that all facts stated were within his personal knowledge, not that they were true, as required); *Palm Springs Alpine Estates, Inc. v Superior Court* (1967) 255 CA2d 883, 888, 63 CR 618. See also §5.31 on common defects in declarations and affidavits.

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§5.14 a. Declaration Subscription Requirement

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A declaration must assert the truth of the matters it sets forth. Following the witness's statement, a declaration should be set out in substantially the form provided in CCP §2015.5.

If signed inside California, the declaration should provide:

"I declare under penalty of perjury that the foregoing is true and correct":

_____ _____

(Date and Place) **(Signature)**

If signed outside California, the declaration should provide:

"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct":

_____ _____

(Date) **(Signature)**

Declarations must state the date of execution. CCP §2015.5; *People v United Bonding Ins. Co.* (1969) 272 CA2d 441, 444, 77 CR 310. They must also be signed with the witness's own hand. *Stockinger v Feather River Community College* (2003) 111 CA4th 1014, 1026, 4 CR3d 385 (transcript of telephone conversation with various witnesses submitted without signatures, despite fact that witnesses said that their statements were true and correct under penalty of perjury, did not comply with §2015.5, and transcripts were inadmissible as evidence under CCP §437c).

For a sample declaration, see §14.10.

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§5.15 b. Affidavit Oath Requirement

An affidavit must recite the fact that either (see CCP §2003)

- It was made under oath; or
- The affiant was sworn.

The affidavit must be sworn to before a notary public or other official. Failure to show that the witness has been sworn renders it invalid. *Common Wealth Ins. Sys., Inc. v Kersten* (1974) 40 CA3d 1014, 115 CR 653.

NOTE: Although it is customary for the affiant to sign an affidavit, an affidavit with a proper jurat is sufficient without the affiant's signature unless a particular statute or rule requires a signed affidavit. *City of Petaluma v White* (1907) 152 C 190, 195, 92 P 177; *Dodge v Free* (1973) 32 CA3d 436, 443, 108 CR 311. A jurat is a certificate stating when, where, and before whom the affidavit was sworn or affirmed. See CCP §§2093-2094. A statement without a jurat is not sufficient to serve as an affidavit. *People v United Bonding Ins. Co.* (1969) 272 CA2d 441, 443, 77 CR 310.

On out-of-state and foreign affidavits, see CCP §§2013-2015.

On affidavits, see California Civil Procedure Before Trial §12.53 (4th ed Cal CEB 2004).

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§5.16 5. Substantive Requirements for Declarations and Affidavits

Because the pleadings define the scope of the issues on a summary judgment motion (see §5.7), counsel must direct any declarations and affidavits to the issues raised by the pleadings. *Keniston v American Nat'l Ins. Co.* (1973) 31 CA3d 803, 812, 107 CR 583.

A declaration or affidavit must assert the truth of the matters it sets out. CCP §2015.5; *Baron v Mare* (1975) 47 CA3d 304, 308, 120 CR 675. In addition, it must

- Be presented in good faith (see CCP §437c(j); §5.17);
- Be based on personal knowledge of the declarant (CCP §437c(d)) (see §§5.18-5.22);
- Show affirmatively the declarant's competence to testify as to matters stated (CCP §437c(d)) (see §5.23); and
- Set out admissible evidence (CCP §437c(d)) (see §5.3).

JUDGE'S PERSPECTIVE: Because declarations are subject to the same objections and scrutiny as testimony at trial, they should be carefully drafted.

PRACTICE TIP: Do not include argument in declarations or affidavits; simply present the facts that will establish a fact or authenticate a document without characterizing them or arguing their importance.

On general requirements for declarations and affidavits, see 6 Witkin, California Procedure, *Proceedings Without Trial* §224 (5th ed 2008).

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§5.17 a. Must Be Presented in Good Faith

All declarations must be presented in good faith, or are subject to sanctions on notice and an opportunity to be heard. CCP §437c(j) (court must impose sanctions in amount of reasonable expenses incurred by other party if affidavits are presented in bad faith or solely for purposes of delay).

On sanctions for bad faith affidavits, see §11.40.

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§5.18 b. Must Be Based on Personal Knowledge

An affidavit or declaration must be made by any person based on personal knowledge. CCP §437c(d). Thus, unless the declarant is an expert (see §§5.25-5.30), the declaration must include specific information showing that the declarant has personal knowledge of the facts supporting the motion.

Personal knowledge cannot be established solely by declaring that "the following statement is based on personal knowledge," when there is no factual basis for such knowledge (see CCP §437c(d); *Bowden v Robinson* (1977) 67 CA3d 705, 719, 136 CR 871), or alleging facts "to the best of my knowledge," which implies something less than personal knowledge. *Bowden v Robinson, supra*. See §5.20. Rather, personal knowledge is shown by stating with particularity the circumstances that demonstrate such knowledge, *e.g.,* the declarant's presence during a conversation or receipt of a document. See Evid C §702; Jefferson's California Evidence Benchbook §§25.9-25.11, 27.13-27.15 (4th ed CJA-CEB 2009).

EXAMPLE 1: A court found that the exhibits submitted with the summary judgment motion were inadmissible because the only attempt to authenticate them was counsel's declaration of familiarity with the subject matter and issues. Counsel did not provide any evidence concerning how the documents were prepared or on what sources they were based, or any evidence that they were trustworthy. *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 719, 128 CR2d 529.

EXAMPLE 2: The declaration provided on the notice's mailing did not meet the requirement of personal knowledge because it was conclusory and did not state that the declarant had actually observed the notice's mailing, by whom or where it was mailed, or that it was deposited in a properly addressed, sealed, and postage-paid envelope in the United States mail. *Rincon v Burbank Unified Sch. Dist.* (1986) 178 CA3d 949, 955, 224 CR 88.

PRACTICE TIP: When drafting declarations many attorneys routinely include a statement such as "I have personal knowledge of the facts stated herein." The court is unlikely to consider such a conclusory statement, without more, as sufficient to show personal knowledge. See *Snider v Snider* (1962) 200 CA2d 741, 754, 19 CR 709 (when facts stated in affidavit do not demonstrate personal knowledge, assertion of personal knowledge and competency to testify "should be ignored"). See also *Osmond v EWAP, Inc.* (1984) 153 CA3d 842, 200 CR 674 (failure to include conclusory statement of competence was not fatal when facts included in declaration were within declarant's personal knowledge). Always include specific facts showing personal knowledge.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.19 (1) Speculative Evidence Is Insufficient

§5.19 (1) Speculative Evidence Is Insufficient

Personal knowledge evidence cannot be based on speculation, imagination, guesswork, or mere possibilities. *Doe v Salesian Soc'y* (2008) 159 CA4th 474, 481, 71 CR3d 565, citing *Yuzon v Collins* (2004) 116 CA4th 149, 166, 10 CR3d 18. The court cannot fill in gaps in the evidence by speculation. In *Yuzon v Collins,* the court found that it was "purely speculative" to infer from evidence of the landlord's request that the tenant's dog be confined during an insurance inspection that the landlord knew of the dog's vicious propensities.

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§5.20 (2) "To the Best of My Knowledge" May Be Insufficient

Declarations made "to the best of my knowledge," or "to the best of my knowledge and recollection," or stating "I am familiar with the following facts," without supporting facts, are generally insufficient to show personal knowledge and may instead be treated as allegations on information and belief. See *Bowden v Robinson* (1977) 67 CA3d 705, 719, 136 CR 871 (court rejected declaration of corporate officer asserting that "to the best of my knowledge" certain individuals were never elected as corporate officers, because question of what corporate officers were elected would be easily verifiable from corporate records). But see *Katelaris v County of Orange* (2001) 92 CA4th 1211, 1215, 112 CR2d 556 (acknowledging that phrase "to the best of my knowledge" introduces uncertainty that can be "lethal" to declaration, court found no such uncertainty in statement that declarant followed normal business practice for collecting and processing mail).

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§5.21 (3) Counsel's Personal Declaration Is Generally Insufficient

Counsel's attempt to support or oppose a summary judgment motion with his or her own personal declaration is generally insufficient. Counsel rarely has sufficient personal knowledge of the facts to establish the absence or presence of a triable issue of fact. See, *e.g., Cheviot Vista Homeowners Ass'n v State Farm Fire & Cas. Co.* (2006) 143 CA4th 1486, 1497, 50 CR3d 1 (counsel's unsupported testimony and statements made in his declaration are insufficient to create triable issue of material fact; counsel's passing reference to $1 million cost-of-repair estimate is not basis to defeat summary judgment); *Lincoln Fountain Villas Homeowners Ass'n v State Farm Fire & Cas. Ins. Co.* (2006) 136 CA4th 999, 1008, 39 CR3d 345 (counsel's declaration on cost estimate given by consultants without more was insufficient); *Cullincini v Deming* (1975) 53 CA3d 908, 914, 126 CR 427 (counsel's declaration inadequate). But see *Wall Street Network, Ltd. v New York Times Co.* (2008) 164 CA4th 1171, 1181, 80 CR3d 6 (counsel's declaration established her personal knowledge of litigation and rendered her competent to testify that certain documents were obtained through discovery).

In addition, declarations by counsel will often be excluded as hearsay. See *DiCola v White Bros. Performance Prods., Inc.* (2008) 158 CA4th 666, 679, 69 CR3d 888, a products liability action, in which defendants moved for summary judgment, submitting declarations that they did not manufacture or distribute the motorcycle stand at issue. In opposition, plaintiff's attorney submitted her declaration referencing a package label and an instruction sheet indicating that defendants were manufacturer and designer of the stand. The appellate court held that the trial court properly sustained defendants' hearsay objections and granted summary judgment. On hearsay, see §§5.71-5.75.

Counsel potentially becomes a witness in the case by submitting a declaration, which is permissible (see Cal Rules of Prof Cond 5-210), but not recommended. See California Civil Procedure Before Trial §2.52 (4th ed Cal CEB 2004).

PRACTICE TIP: It may be useful to submit counsel's declaration for a limited, procedural purpose, such as authenticating copies of pleadings or exhibits on which a party wishes to rely. Whenever possible, however, avoid executing a declaration that can be controverted by the other side; instead locate an appropriate witness with personal knowledge of the facts. See §5.34.

JUDGE'S PERSPECTIVE: An attorney must satisfy the same personal knowledge and competency requirements as any other declarant. For example, an attorney may be competent to testify to events occurring during the course of litigation, *e.g.,* "Mr. Smith appeared for deposition on July 24, 2007." But an attorney is not competent to testify to the contents of another witness's testimony or to matters solely within the client's personal knowledge, and cannot offer a legal opinion of the case.

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§5.22 (4) Expert Opinion Is Sufficient Alternative

Properly qualified experts may submit declarations based on expert opinion rather than on personal knowledge. See Evid C §§720, 801.

On requirements of expert declarations, see §§5.26-5.30.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.23 c. Competence

§5.23 c. Competence

A declaration in support of or in opposition to a summary judgment motion must affirmatively show that the declarant is competent to testify as a witness about the matters stated. CCP §437c(d). A competent declarant is a person qualified to be a witness who either has personal knowledge of the subject of the declaration (Evid C §702) or is qualified by training or experience to express an expert opinion on the subject of the declaration (Evid C §§720, 801) (on expert declarations, see §§5.26-5.30). See, *e.g., Miley v Harper* (1967) 248 CA2d 463, 469, 56 CR 536 (competent portions of defendant's papers did not show that he was entitled to summary judgment).

PRACTICE TIP: Ensure that all declarations recite facts showing that the declarant is competent to testify about the matters stated, *e.g.,* the declarant witnessed the accident at issue, or is a qualified expert on the mechanism that caused the accident at issue.

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6. Types of Opinion Evidence

§5.24 a. Lay Opinion

A nonexpert witness, *i.e.,* a lay witness, may properly state an opinion if the declaration includes foundational facts showing that the opinion is both rationally based on the witness's perception and helpful in understanding other facts in the document. Evid C §800.

To provide evidentiary support, a lay opinion must clearly state

- Sufficient reasons and explanations for the opinion;
- The factors considered; and
- The reasoning employed.

EXAMPLE 1: In a taxpayer suit seeking to compel the State Gambling Control Commission to collect money due from Indian tribes, the Commission supported its summary judgment motion with a declaration by an official stating that the tribes' payments to the state were not delinquent. This was insufficient to establish that no delinquency existed, in light of another statement in the official's declaration indicating that the Commission had audited only one tribe. *Cates v California Gambling Control Comm'n* (2007) 154 CA4th 1302, 1309, 65 CR3d 513.

EXAMPLE 2: A lay witness can give an opinion based on comparison of a shoe and a shoe print, even though the witness is not an expert in shoe print comparison. *People v Lucero* (1998) 64 CA4th 1107, 1110, 75 CR2d 806.

For examples of subjects considered appropriate for opinion testimony by lay witnesses, see California Expert Witness Guide §2.7 (2d ed Cal CEB 1991). On opinion testimony from lay witnesses generally, see Jefferson's California Evidence Benchbook §§30.1-30.15 (4th ed CJA-CEB 2009). On attacking lay opinions, see §9.20.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.25 b. Expert Opinion

§5.25 b. Expert Opinion

Expert witnesses may give opinions that are (Evid C §801)

- Related to a subject sufficiently beyond common experience that an expert opinion would assist the trier of fact; and
- Based on matter (including special knowledge, skill, experience, training, and education) that may be relied on by an expert in forming an opinion on the subject.

EXAMPLE 1: In a breach of contract action between a concert promoter and a singer, expert testimony on customs in the entertainment industry, and the music concert business in particular, was admissible because "these customs and practices are sufficiently beyond common experience." See *PM Group, Inc. v Stewart* (2007) 154 CA4th 55, 63, 64 CR3d 227.

EXAMPLE 2: In a medical malpractice action, the medical professional's conduct is often not within the common knowledge of a lay person, making expert testimony required. See *Bushling v Fremont Med. Ctr.* (2004) 117 CA4th 493, 509, 11 CR3d 653.

EXAMPLE 3: Expert testimony on ball speed and reaction time in a case in which plaintiff was struck by a line drive off the bat of another player was found to be properly admitted. *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 718, 128 CR2d 529.

For other examples of topics that have been considered appropriate for expert testimony, see California Expert Witness Guide §2.2 (2d ed Cal CEB 1991).

PRACTICE TIP: If the issue involved in the motion requires the testimony of an expert, counsel opposing the motion should submit expert testimony. See *Mann v Cracchiolo* (1985) 38 C3d 18, 210 CR 762. The testimony must come from the expert; trial counsel's declaration on what the expert's testimony will provide is insufficient to create a triable issue of material fact and will leave the motion unopposed. *Lincoln Fountain Villas Homeowners Ass'n v State Farm Fire & Cas. Ins. Co.* (2006) 136 CA4th 999, 1009, 39 CR3d 345. Counsel should also consider whether to depose the moving party's experts to better oppose the motion. If there is a need to depose experts, request a continuance under CCP §437c(h). See *Frazee v Seely* (2002) 95 CA4th 627, 115 CR2d 780 (noting that continuance should be granted when such expert depositions would be essential to opposing motion). On requesting a continuance, see §§3.34-3.46.

On objecting to expert testimony submitted in a declaration, see §9.19. On experts and the summary judgment process, see California Expert Witness Guide, chap 16 (2d ed Cal CEB 1991). On opinion testimony from expert witnesses, see Jefferson's California Evidence Benchbook §§30.16-30.58 (4th ed CJA-CEB 2009).

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(1) Requirements for Expert Declaration

§5.26 (a) State Expert's Qualifications

An expert declaration offered in support of or in opposition to a summary judgment motion must make the same showing on qualifications and expertise that would be required if the expert were testifying in person at trial. See *Towns v Davidson* (2007) 147 CA4th 461, 472, 54 CR3d 568. The declaration should state with particularity the facts that make the expert competent to render the opinion contained in the declaration. The expert should first state what type of expert he or she is, and give enough information about his or her background to qualify as an expert in that field. Courts are generally fairly lenient in allowing experts to testify somewhat far afield in this context. See, *e.g., Mann v Cracchiolo* (1985) 38 C3d 18, 38, 210 CR 762 (medical expert may be qualified to testify on standard of care for medical field outside his or her own specialty).

PRACTICE TIP: In a case involving fungal damage to a structure, the trial court's reaction to an expert's qualifications as submitted in a declaration provides useful questions to consider when preparing an expert's declaration: "What training, if any, must one have to be licensed? What record must a licensee demonstrate to maintain his license? What sort of specific work has [the declarant] performed during his 30 years' experience in the pest control industry? What are field investigations? How often has he encountered poria or mold or wet or dry rot? What cases has he reviewed? What has he read? With whom has he had discussions and on what subjects?" *Jordan v Allstate Ins. Co.* (2004) 116 CA4th 1206, 1217 n7, 11 CR3d 169.

On expert qualifications, see Evid C §720. On attacking an expert's qualifications, see §9.18.

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§5.27 (b) Include Factual Basis for Opinion

The expert should set out the facts of the case on which his or her opinion is based, state his or her opinions, and enumerate any additional bases for those opinions. See, *e.g., Johnson v Superior Court* (2006) 143 CA4th 297, 307, 49 CR3d 52 (defendant failed to establish that doctor's care was within standard of care because his expert did not provide basis for determining safe amount of radiation); *Kelley v Trunk* (1998) 66 CA4th 519, 523, 78 CR2d 122 (expert declaration that failed to make any foundational showing that expert's opinion rested on matters of type on which experts reasonably rely was inadmissible). But see *Hanson v Grode* (1999) 76 CA4th 601, 608 n6, 90 CR2d 396 (criticizing *Kelley v Trunk, supra,* for suggesting that "an expert's declaration must set forth in excruciating detail the factual basis for the opinions stated therein").

PRACTICE TIP: The court in *Powell v Kleinman* (2007) 151 CA4th 112, 125, 59 CR3d 618, reconciled *Hanson* and *Kelley* by reasoning that an expert declaration made in *support* of a defendant's summary judgment motion must be detailed and with foundation to carry the burden of production in showing the nonexistence of any genuine issue of fact, but an expert declaration made in *opposition* to a motion need not be detailed because it is entitled to all favorable inferences. Remember this distinction between moving and opposing declarations when preparing expert declarations.

JUDICIAL PERSPECTIVE: Arguing for favorable inferences for a declaration based on its submission by the opposition is a last resort argument. When drafting opposition declarations, try to insert as much detail as possible. If that turns out to be inadequate, then, as a last resort, argue to the court that the opposition declarations are entitled to all favorable inferences.

Counsel should keep in mind that for the expert declaration to be considered, the matter on which the expert relies must be properly before the court. See *Garibay v Hemmat* (2008) 161 CA4th 735, 741, 74 CR3d 715 (in medical malpractice action, defendant's expert medical witness declaration was based on plaintiff's medical records, which defendant failed to offer into evidence; trial court properly rejected declaration for lack of foundation and authentication). On laying a foundation for evidence, see §§5.58-5.78. On objecting to evidence for hearsay and insufficient foundation, see chap 9.

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§5.28 (c) Must Not Be Based on Speculation or Conjecture

The court may dismiss an expert declaration if the expert's stated opinion is speculative or lacks sufficient certainty. *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 718, 128 CR2d 529. See *McGonnell v Kaiser Gypsum Co.* (2002) 98 CA4th 1098, 1106, 120 CR2d 23 ("court is not bound by expert opinion that is speculative or conjectural"); *Kelley v Trunk* (1998) 66 CA4th 519, 524, 78 CR2d 122 (expert opinion is "worth no more than the reasons upon which it rests"; expert opinion unsupported by reasons or explanations does not establish absence of material fact for purposes of summary judgment).

EXAMPLE: In a car accident case, plaintiff alleged that defendant caused the accident by failing to properly service the brakes of the car that collided with his. Plaintiff's expert's opined that the accident must have been caused by defendant's failure to properly close the "bleeder" screws after servicing, which allowed the brake fluid to leak out and led to the brake failure. The court found this opinion to be based on "speculation and conjecture" because the expert did not address the fact that the person who inspected the car shortly after the accident testified that those screws were properly closed and there were no signs of leaking from them. *Nardizzi v Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 CA4th 1409, 39 CR3d 530.

On attacking speculative evidence, see §9.21.

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§5.29 (d) Must Not Be Merely Conclusory

As with all evidence in support of or opposition to a summary judgment motion (see §5.4), expert opinion must not be merely a conclusory assertion. See, *e.g., Parker v Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 184, 89 CR 737 (expert stated only "conclusory assertions" that employment offered is "not different from or inferior to" that under different employment contract).

EXAMPLE: In a suit arising from a collision of two downhill skiers, the declaration of plaintiff's expert witness, a skiing safety consultant, stated that the undisputed facts showed that the collision was caused by defendant's recklessness. The trial court properly struck the declaration because the expert reached a legal conclusion on the ultimate legal issues of inherent risk and duty. *Towns v Davidson* (2007) 147 CA4th 461, 54 CR3d 568.

Other examples of inadmissible conclusions are statements such as "these are business records," "the defendant has no defense," and "the action is a sham." Each of these can be transformed into admissible evidence if supported by foundational facts or exhibits attached to the declaration. On laying a foundation for evidence, see §§5.58-5.78.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.30 (2) Examples of Inadmissible and Inadequate Expert Declarations

§5.30 (2) Examples of Inadmissible and Inadequate Expert Declarations

The following cases are examples of situations in which a court found an expert declaration to be inadmissible or inadequate in some way.

EXAMPLE 1: In a suit by a bystander who was injured by police officers who were attempting to apprehend a murder suspect, the officers moved for summary judgment. In opposition, plaintiff's expert, a retired police officer, submitted a declaration stating that, in his opinion, the officers' force was excessive and unreasonable under the circumstances. The appellate court affirmed judgment for defendants, noting that the declaration "reaches a conclusion as to the ultimate issues in dispute, … *without providing any reasoned explanation as to why* the underlying facts lead to his ultimate conclusion." *Brown v Ransweiler* (2009) 171 CA4th 516, 530, 89 CR3d 801 (emphasis added).

EXAMPLE 2: In a medical malpractice suit by a patient who developed shoulder pain following abdominal surgery, plaintiff's expert declarations in opposition to defendants' summary judgment motion stated that plaintiff's shoulder injury occurred "more probably than not" from plaintiff being dropped or his arm being improperly positioned or stretched during surgery. The trial court granted defendants' motion and the court of appeal affirmed, explaining that plaintiff's difficulty is that the experts "assume the cause from the fact of the injury.… '[A]n expert's opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist' has no evidentiary value." *Bushling v Fremont Med. Ctr.* (2004) 117 CA4th 493, 510, 11 CR3d 653 (internal citation omitted).

EXAMPLE 3: Plaintiff sued his doctors, alleging that they had used excessive radiation in treating his cancer. The doctors moved for summary judgment, submitting an expert declaration stating that plaintiff's treatment plan was within the standard of care, and the trial court granted the motion. The court of appeal vacated the judgment, concluding that defendants' declaration was overly conclusory and neglected to provide necessary explanations or evidentiary support: The declaration did "not relate [the expert's] conclusion to the number of [radioactive] seeds implanted in the plaintiff, nor the radiation dose given the plaintiff, nor the relation of the dose to the prostate volume, nor any standard by which to measure the appropriate dose. Rather, it contains two conclusory statements that occupy five sentences of the declaration." *Johnson v Superior Court* (2006) 143 CA4th 297, 307, 49 CR3d 52.

NOTE: *Johnson* provides more than one useful lesson in how not to present an expert declaration. In opposing the motion, the plaintiff submitted a declaration that was inadequate in several respects: It failed to state where it was signed; purported to be merely under penalty of perjury rather than under penalty of perjury under the laws of the state of California; failed to give adequate information about the expert's education and experience; and claimed, but failed, to include a curriculum vitae. The plaintiff later submitted an amended declaration, but filed it only 2 days before the hearing. The trial court refused to consider the plaintiff's inadequate declaration or the late-filed amendment, granted the defendants' motion, and denied reconsideration. On appeal, the court stated that it did not need to reach the question of the adequacy of the plaintiff's opposition or the trial court's refusal to consider the amended declaration, because the moving defendants' declaration was insufficient to show they acted within the standard of care.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.31 B. Checklist: Common Defects in Affidavits and Declarations

§5.31 B. Checklist: Common Defects in Affidavits and Declarations

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A summary judgment motion can be lost because of defects in the affidavits and declarations, the most common of which are included in the following checklist:

- 1. Failure to comply with requirements of CCP §2015.5 for declarations under penalty of perjury, including (see §5.14):
- A. Omission of signatures;
- B. Omission of date and/or place of execution;
- C. Failure to assert the truth of the matter stated;
- 2. Failure to recite in an affidavit that it was made under oath or that the witness was sworn (CCP §2003; see §5.15);
- 3. Failure to have the affidavit or declaration (CCP §437c(d); see §§5.16-5.23):
- A. Be made by someone with personal knowledge,
- B. Set out admissible evidence, and
- C. Show that the affiant is competent to testify to the matter.

For a checklist listing all required contents for declarations (or affidavits) used to authenticate evidence, see §§5.79-5.81.

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§5.32 IV. EVIDENCE OBTAINED THROUGH DISCOVERY

A moving party and opposing party may use all methods of discovery to support or oppose a summary judgment motion, as long as the discovered matter is not hearsay or otherwise objectionable under the rules of evidence. On hearsay, see §§5.71-5.75. Discovery methods that are easily adaptable to obtaining evidence from the opposing party to support the motion include depositions (see §5.33), answers to interrogatories (see §5.38), requests for admissions (see §5.38), documents produced in response to demands for inspection (see §§5.39-5.41), and reports of physical or mental examinations (see CCP §§2032.010-2032.650).

PRACTICE TIP: Because the burden of production does not shift until the defendant adequately shows that the plaintiff cannot establish his or her case (see §§4.6-4.8), it is important to propound clear, direct, written discovery asking the plaintiff to identify all facts, documents, and witnesses that support plaintiff's contentions. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841.

NOTE: Although discovery admissions are not incontrovertible judicial admissions (see §5.44), the trial court has discretion to give great weight to admissions made in discovery responses and disregard contradictory and self-serving affidavits of the party. *Scalf v D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1522, 27 CR3d 826.

On discovery generally, see California Civil Discovery Practice (4th ed Cal CEB 2006).

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§5.33 A. Deposition Transcripts

Depositions can be used to support a summary judgment motion subject to the same rules of admissibility as a witness's affidavit or declaration. CCP §437c(b)(1). See §§5.16-5.23, 6.42. *Saporta v Barbagelata* (1963) 220 CA2d 463, 468, 33 CR 661. "Legal contention" questions, although proper when posed as interrogatories (see §5.38), cannot be asked at a deposition (*Rifkind v Superior Court* (1994) 22 CA4th 1255, 27 CR2d 822), and some courts may not readily grant summary judgment motions that rely only on deposition testimony.

JUDICIAL PERSPECTIVE: Admissions, especially in deposition testimony, are often critical in deciding summary judgment motions. It is not unusual in a summary judgment motion, especially when a party's mental state is at issue, for one side to submit a self-serving witness declaration and the other side to submit that witness's admission at deposition that is dispositive on the issue.

PRACTICE TIP: Because the scope of examination at depositions is broader than the admissible evidence standard, review all deposition testimony used to support the motion with the rules of evidence in mind. See CCP §2017.010 (matter is discoverable if it either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence). Otherwise, the opposing party may be able to object successfully to inadmissible deposition testimony. Despite the ability to file reply papers, counsel for the moving party may not have time to show by alternative means the truth of supporting facts, thus seriously weakening the moving party's position before the court rules on the motion.

JUDICIAL PERSPECTIVE: Like declarations, transcripts of deposition testimony are subject to the same objections and scrutiny as testimony at trial, and should be carefully reviewed before use.

PRACTICE TIP: A party generally may not use its own deposition at trial or at a hearing under CCP §2025.620; however, CCP §437c(b)(1) authorizes the use of depositions to support summary judgment motions without qualification and without reference to §2025.620. Most counsel submit a client's declaration in support of or opposition to a summary judgment motion. To avoid a challenge on this issue, file a client's declaration stating what transpired at the deposition. If it is necessary to submit the client's deposition in support of the motion, argue that, because the deposition itself allowed the opponent the opportunity for cross-examination, the deposition should be admissible under CCP §437c(b)(1).

CAUTION: In any event, a party's deposition testimony may not be contradicted by its own self-serving declarations. See *Archdale v American Int'l Specialty Lines Ins. Co.* (2007) 154 CA4th 449, 473, 64 CR3d 632, citing *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 22, 112 CR 786; §5.32.

On preparing a deposition as an exhibit, see §§5.34-5.37.

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§5.34 1. Accompany Transcript With Authenticating Declaration

To satisfy the personal knowledge and secondary evidence requirements (see §§5.18-5.22, 5.62-5.70), an attorney who was present at the deposition should provide an authenticating declaration stating, under penalty of perjury, that

- He or she was present at the deposition; and
- The transcript accurately reflects the questions asked and answers given.

PRACTICE TIP: Identify, in the authenticating declaration, questions and responses by page and line, and set them out verbatim if they are short and pivotal to the motion.

On authenticating evidence, see §§5.59-5.61.

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§5.35 2. Obtain Signed Deposition

After the deposition, the deponent is notified when the transcript is available and requested to sign it. Even if the deponent refuses to sign or fails to respond, the deposition has the same force and effect as a signed deposition. CCP §2025.520(f). For example, in *Gray v Reeves* (1977) 76 CA3d 567, 142 CR 716, the defendants moved to file the plaintiff's unsigned deposition in support of their summary judgment motion. The appellate court affirmed the granting of summary judgment in the defendants' favor and upheld the trial court's right to find facts from the deposition transcript even though the plaintiff had filed a counterdeclaration that the testimony in the "uncorrected" transcript was incorrect. It is, however, preferable to have the deponent's signature on the transcript or the writing accompanying the recording, because a deponent who has signed the transcript cannot explain away inconsistencies as easily and any later motion to suppress a signed deposition may not as readily succeed.

PRACTICE TIP: If the deposition has not been signed, use a declaration of an attorney or the court reporter in attendance to identify the transcript as a correct rendition of the testimony given, unless a standard stipulation was in effect that an unsigned deposition can be used with the same force and effect as a signed one. See §5.34.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.36 3. Prepare Deposition as Exhibit

§5.36 3. Prepare Deposition as Exhibit

Excerpts from deposition transcripts should be copied and attached as exhibits to a declaration that authenticates the excerpts. There are several technical requirements for use of a deposition as an exhibit, including the following:

- State the deponent's name and the date of the deposition on the first page of the deposition (Cal Rules of Ct 3.1116(a));
- Include only relevant pages of transcript (other than the title page) and clearly show the original deposition page number at the bottom of each page (Cal Rules of Ct 3.1116(b)); and
- Mark all relevant portions of the deposition testimony to call attention to them, *e.g.,* by highlighting with a marker or underlining (Cal Rules of Ct 3.1116(c)).

PRACTICE TIP: It is preferable to underline rather than highlight the relevant deposition testimony, because it reproduces more clearly and will be easier to read on appeal.

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§5.37 4. Lodge Original

Unless local rules provide otherwise, lodge the original deposition transcript with the court clerk, who will return the material after the court rules on the motion. Cal Rules of Ct 3.1302(a). Counsel must include a self-addressed, stamped envelope with the lodged material. Cal Rules of Ct 3.1302(b).

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§5.38 B. Interrogatories and Request for Admissions

A party's answers to interrogatories, and admissions in response to a Request for Admissions, may be used against that party. See *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 21, 112 CR 786 (parties are bound by admissions made during discovery); *Hejmadi v AMFAC, Inc.* (1988) 202 CA3d 525, 553, 249 CR 5 ("on motion for summary judgment, no further evidence of the matters so deemed admitted is required"). A mistaken admission, however, cannot be the basis for summary judgment. See *Mason v Marriage & Family Ctr.* (1991) 228 CA3d 537, 545, 279 CR 51.

PRACTICE TIP: The party that uses interrogatories or responses to a request for admissions should include the relevant answers and admissions relied on in the moving papers, because they may not otherwise be filed with the court. See CCP §§2030.280(a), 2033.270(a). Attach copies and incorporate them by reference into the moving papers as appropriate. See §§5.76-5.78.

It is important to draft interrogatories carefully to request all facts supporting each element of the opponent's claims or defenses. A defendant moving for summary judgment may rely on "factually devoid discovery responses" to show that the plaintiff's cause of action has no merit and to shift the burden to the plaintiff to demonstrate that a triable issue of one or more material facts exists as to that cause of action. *Union Bank v Superior Court* (1995) 31 CA4th 573, 589, 37 CR2d 653. But see *Great Am. Ins. Cos. v Gordon Trucking, Inc.* (2008) 165 CA4th 445, 451, 81 CR3d 65 (when insured is asked by interrogatory for all facts that insured is aware of that support some allegation, subject of which is not matter within insured's personal knowledge, insurer should not be bound by insured's factually deficient answer). On the use of factually devoid discovery responses, see §§4.21-4.23.

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§5.39 C. Documentary Evidence Obtained Through Discovery

Documents produced in response to demands for inspection may be used to support or oppose a summary judgment motion. See CCP §437c(b)(1). The fact that documents are produced in response to a demand, however, will not overcome any admissibility problems. To use these documents as evidence, they must be

- Identified and authenticated (see §§5.58-5.61);
- Admissible under the secondary evidence rule (see §§5.62-5.70); and
- Nonhearsay or admissible under a hearsay exception (see §§5.71-5.75).

PRACTICE TIP: Because presenting tangible evidence, such as objects or recordings, may be awkward, it is preferable and customary to use documentary evidence, such as photographs or transcripts, instead. For example, instead of using a video recording showing property damage, it may be better to submit photographs of the damaged property.

JUDICIAL PERSPECTIVE: If evidence is critical to a party's position in the summary judgment motion, then that party should make every effort to ensure that the evidence is easily accessible and available to the judge when deciding the motion. Use tabs, highlighting, and anything else appropriate in preparing exhibits so that the judge can easily locate and review the evidence.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.40 1. Prepare Supporting Declaration

§5.40 1. Prepare Supporting Declaration

Documentary evidence must be accompanied by a supporting declaration that authenticates the document(s) relied on. On declarations, see §§5.8-5.23.

PRACTICE TIP: Consider quoting relevant portions of the document verbatim in the declaration, if they are short and pivotal to the motion.

JUDICIAL PERSPECTIVE: Always highlight or underline the critical portions of the document. Make it easy for the judge to find and consider the evidence you cite in support of your position.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.41 2. Prepare Documentary Evidence as Exhibit

§5.41 2. Prepare Documentary Evidence as Exhibit

The presentation requirements of Cal Rules of Ct 3.1110(f) apply when preparing documentary evidence as an exhibit. Under that rule, each exhibit must be separated by a hard 8½ × 11 sheet with hard paper or plastic tabs extending below the bottom of the page with the exhibit designation. Exhibits must be indexed, and the proponent of the evidence must provide such index to the court. Pages from a single deposition and associated exhibits must be designated as a single exhibit.

NOTE: Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter. Cal Rules of Ct 3.1110(g).

Exhibits must also comply with the requirements for binding of papers, including that

- All pages of each document and exhibit must be attached together at the top such that pages can be easily turned and their entire content read (Cal Rules of Ct 3.1110(e)); and
- If the evidence exceeds 25 pages, it must be in a separately bound volume with a table of contents (Cal Rules of Ct 3.1350(g)).

PRACTICE TIP: It is good practice to underline or highlight all relevant portions of any exhibits for ease of use by court and counsel, even if not required by local or court rules. Underlining is preferable because it reproduces more clearly and will be easier to read on appeal.

JUDICIAL PERSPECTIVE: Use tabs to label and separate documents to make it easy for the judge to locate the evidence in support of your position.

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§5.42 V. ADMISSIONS IN PLEADINGS AND STIPULATIONS

An admission of fact that is contained in pleadings, a response to a Request for Admissions, or stipulations is conclusively binding as against the party that made the admission. *Myers v Trendwest Resorts, Inc.* (2009) 178 CA4th 735, 746, 100 CR3d 658. In summary judgment motions, admissions of fact can be shown from any adverse party's pleadings (see §§5.42-5.45) or stipulations of fact (see §§5.46-5.47). See, *e.g., Brown v Surety Co. of the Pac.* (1981) 122 CA3d 614, 618, 176 CR 143 (statements were found to be admissible as "adoptive admissions" under Evid C §1221, because adverse party acknowledged truth of statements). On requests for admission, see §5.38.

CAUTION: A motion for summary judgment and a separate statement filed in conjunction with that motion are not pleadings. Agreement by a party in a separate statement that a fact is undisputed is only a concession made for purposes of the summary judgment motion; it is not a judicial admission, nor is it evidence that can be used against that party as a binding judicial admission. *Myers,* 178 CA4th at 747. On what filings constitute pleadings, see §5.43.

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§5.43 A. Admissions in Pleadings

Pleadings in civil actions are complaints, demurrers, answers, and cross-complaints. CCP §422.10. The pleadings set out the formal allegations of the parties' respective claims and defenses. CCP §420. To the extent the pleadings contain factual allegations, the opposing party may rely on those allegations as binding judicial admissions by the party that made them. *Castillo v Barrera* (2007) 146 CA4th 1317, 1324, 53 CR3d 494.

An admission of fact in a pleading is a "judicial admission" that either party may rely on as part of the case. *Valerio v Andrew Youngquist Constr.* (2002) 103 CA4th 1264, 1271, 127 CR2d 436. The admission "is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues." *Walker v Dorn* (1966) 240 CA2d 118, 49 CR 362. See *Pinewood Invs. v City of Oxnard* (1982) 133 CA3d 1030, 1035, 184 CR 417.

On summary judgment, a judicial admission is proper and overcomes evidence even when the opposing party seeks to contradict the prior admission. *Kurinij v Hanna & Morton* (1997) 55 CA4th 853, 870, 64 CR2d 324.

CAUTION: Admissions in *any* pleading filed by a party may be used against that party in a summary judgment motion, not simply an admission in a pleading filed in the current action in which summary judgment is being sought. *Kurinij v Hanna & Morton* (1997) 55 CA4th 853, 870, 64 CR2d 324. Such an admission in another action becomes an evidentiary admission in the current action. *Magnolia Square Homeowners Ass'n v Safeco Ins. Co.* (1990) 221 CA3d 1049, 1061, 271 CR 1.

PRACTICE TIP: Check for judicial admissions in the pleadings and documents filed by the opposing party that may be used to show that facts are not in dispute. Do not refer to judicial admissions in a declaration; rather, include them in the memorandum. *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 370 n15, 110 CR 353.

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§5.44 1. Cannot Be Controverted

Unequivocal admissions in pleadings, *i.e.,* "judicial admissions," cannot be controverted by the pleader. *Myers v Trendwest Resorts, Inc*. (2009) 178 CA4th 735, 746, 100 CR3d 658. An admission in a pleading is not merely evidence of fact; it can be treated as a conclusive concession sufficient to remove the issue as a triable issue. *Smith v Walter E. Heller & Co.* (1978) 82 CA3d 259, 268, 147 CR 1 (admission in complaint); *Brown v City of Fremont* (1977) 75 CA3d 141, 146, 142 CR 46 (admission of fact in complaint).

EXAMPLE 1: Plaintiff's repeated allegations that he acted as defendant's manager was a binding judicial admission, and he was not permitted to change course in response to a summary judgment motion and argue he was not filing suit in his capacity as manager. *Castillo v Barrera* (2007) 146 CA4th 1317, 1324, 53 CR3d 494.

EXAMPLE 2: Plaintiff was bound by the admission in her complaint that the ski slope was "largely deserted" at the time of the collision. *Lackner v North* (2006) 135 CA4th 1188, 1203 n6, 37 CR3d 863.

PRACTICE TIP: Unlike admissions made during discovery (see §5.38), a judicial admission in a pleading may usually be eliminated by amending the pleadings. See §7.14.

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§5.45 2. May Be Implied

In addition to express admissions, implied pleading admissions can be used to support or oppose a summary judgment motion, including

- Implied admissions resulting from a failure to deny (*Reich v Yow* (1967) 249 CA2d 12, 14, 57 CR 117); and
- Implied admissions resulting from a defective denial (see *Oliver v Swiss Club Tell* (1963) 222 CA2d 528, 537, 35 CR 324 (denial on information and belief, or for want of information or belief, of alleged fact that may be ascertained from public record constitutes admission of allegation in complaint)).

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B. Stipulations

§5.46 1. Stipulation as Admission of Fact

Stipulations can be used to show that material facts are not in dispute (*Parker v Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 181, 89 CR 737), when parties have agreed in writing or orally in court. Stipulations are very useful for eliminating the need for proof at the hearing or trial on the matters so stipulated, freeing up time and resources to focus on the remaining issues in dispute.

JUDICIAL PERSPECTIVE: If there are no disputed facts, the parties may, as an alternative to filing competing summary judgment motions, seek leave of court to allow for trial based on stipulated facts. Such a motion is less taxing and need not comply with the procedural requirements of summary judgment motions. In addition, the parties are certain to obtain a quick resolution to the action. Sometimes, with competing summary judgment motions, both motions are denied. The key here, however, is to get both parties to stipulate to all essential facts.

If a moving party possesses the original, signed stipulation, it should file the stipulation as a document in support of the summary judgment motion. No additional proof of the matters to which a stipulation has been made is required. See Jefferson's California Evidence Benchbook, chap 3 (4th ed CJA-CEB 2009). If, however, the moving party has only a copy of the stipulation, it may attach the copy, *e.g.,* a letter signed by both parties concerning uncontested facts, to an affidavit or declaration identifying and authenticating the stipulation (see §5.60), and subpoena or request the original stipulation, if necessary.

PRACTICE TIP: Oral stipulations can be problematic. The best practice is to reduce stipulations to writing when made. This limits the potential for problems later on due to forgetfulness or misunderstandings. Written stipulations can be submitted with moving or opposing papers for the court's review and consideration before the hearing on the summary judgment motion.

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§5.47 2. Attorney's Authority to Bind Client

One issue that arises in the use of stipulations is whether a stipulation executed between the attorneys is authorized by and binding on the client. See CCP §283(1) (authority of attorney to bind client). Generally, an attorney may bind a client on procedural matters, but cannot stipulate to impair the client's substantive rights without authority from the client. *Levy v Superior Court* (1995) 10 C4th 578, 584, 41 CR2d 878 (written stipulation to settle was substantive matter that required client's signature); *Stewart v Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 1581, 36 CR3d 901 (stipulation waiving mediation confidentiality was procedural matter). Stipulations on substantive matters must be specifically authorized or ratified by the client to be binding. See, *e.g., Blanton v Womancare, Inc.* (1985) 38 C3d 396, 403, 212 CR 151 (attorney's stipulation to binding arbitration was not enforceable over client's objection).

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VI. MATTERS JUDICIALLY NOTICED

§5.48 A. Matters Subject to Judicial Notice

A summary judgment motion may be based on matters of which the court must, or may, take judicial notice. CCP §437c(b)(1). See Evid C §§451-452 (setting out matters that must or may be judicially noticed). In fact, summary judgment may be granted based solely on matters that have been judicially noticed if the matters noticed are sufficient to dispose of the issues. *Comora v Comprehensive Care Corp.* (1983) 140 CA3d 369, 189 CR 538. See *Magnolia Square Homeowners Ass'n v Safeco Ins. Co.* (1990) 221 CA3d 1049, 1056, 271 CR 1 (trial court took judicial notice of allegation in complaint filed by plaintiff in separate action, which showed knowledge that precluded recovery in present action).

JUDICIAL PERSPECTIVE: A common pitfall is to request judicial notice of matters that are neither authorized by Evid C §451 (mandatory) nor Evid C §452 (discretionary). See §§5.49-5.50.

On judicial notice generally, see Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009). On procedures for requesting judicial notice, see §§5.53-5.57.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.49 1. Mandatory Notice

§5.49 1. Mandatory Notice

Evidence Code §451 sets out the matters of which courts are required to take judicial notice, including

- California and federal decisional, constitutional, and statutory law;
- California Rules of Professional Conduct;
- Rules of pleading, practice, and procedure prescribed by the United States Supreme Court (*e.g.,* Federal Rules of Civil Procedure);
- The true significance of all English words and phrases and all legal expressions; and
- Facts and propositions that are "so universally known" that they cannot reasonably be the subject of dispute (*e.g.,* geographical points on a map).

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§5.50 2. Discretionary Notice

Evidence Code §452 sets out the matters of which courts may in their discretion take judicial notice, including

- Case or statutory laws of any state and resolutions of the United States Congress and the California legislature;
- Federal regulations;
- Official acts of federal or state legislative, executive, and judicial departments;
- Records and rules of court;
- Laws of foreign nations;
- Facts and propositions of such common knowledge within the court's territorial jurisdiction "that they cannot reasonably be the subject of dispute"; and
- Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of "reasonably indisputable accuracy."

NOTE: Facts personally observed by the court are not properly considered on summary judgment and are not generally subject to judicial notice. See 1 Witkin, California Evidence, *Judicial Notice* §2 (4th ed 2000) (judge's personal knowledge of matter is not sufficient basis for taking judicial notice of it unless it is already proper subject of judicial notice as determined by statute or case law).

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§5.51 3. When Discretionary Becomes Mandatory

The court must take judicial notice of any matter specified in Evid C §452 (see §5.50) if a party prepares a proper request that (Evid C §453)

- Gives adverse parties sufficient notice of the request(s); and
- Provides the court with sufficient information to take judicial notice of the matter.

EXAMPLE 1: In an action based on a manufacturer's failure to warn an air-conditioning technician about the dangers of exposure to a refrigerant, the supreme court took judicial notice, at the technician's request, of several regulations and regulatory interpretations of the federal Hazard Communication Standard under Evid C §§452-453. *Johnson v American Std., Inc.* (2008) 43 C4th 56, 64 n4, 74 CR3d 108.

EXAMPLE 2: On appeal from dismissal of plaintiff's action for parental sexual abuse, the court assumed that the trial court took judicial notice of the record in a prior action by plaintiff against her parents that was dismissed on statute-of-limitations grounds, even though the clerk's transcript did not contain an order granting judicial notice, because the parents gave the daughter sufficient notice of the request and furnished the trial court with sufficient information, as required by Evid C §453. *Aaronoff v Martinez-Senftner* (2006) 136 CA4th 910, 918, 39 CR3d 137.

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§5.52 4. No Judicial Notice of Hearsay in Official Records

As requested in many cases, the court may take judicial notice of the existence of a document in a public record, including a court file. Evid C §452(d). A court may not, however, take judicial notice of hearsay or other inadmissible evidence just because it is part of the public record. *Ramsden v Western Union* (1977) 71 CA3d 873, 879, 138 CR 426 (court cannot take judicial notice of truth of facts asserted in documents in court files unless they are "orders, findings of fact and conclusions of law, and judgments"). See *Espinoza v Calva* (2008) 169 CA4th 1393, 1396, 87 CR3d 492 (court took judicial notice of fact that pleadings were filed, but not of truth of statements contained in them); *Linear Technol. Corp. v Applied Materials, Inc.* (2007) 152 CA4th 115, 126 n3, 61 CR3d 221 (court declined to take judicial notice of factual assertions in motions to compel answers to interrogatories and to sever claims, finding them not to be judicially noticeable matters).

On procedures for requesting judicial notice of a court file, see §§5.56-5.57. On hearsay, see §§5.71-5.75.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.53 B. Procedures for Requesting Judicial Notice

§5.53 B. Procedures for Requesting Judicial Notice

The Rules of Court set out specific procedures and requirements for requesting judicial notice. Generally, the party requesting judicial notice must present necessary documentation for the material sought to be judicially noticed (*e.g.,* a statute book or printout from an online service; an almanac showing the time the sun rose on a certain day). In certain circumstances, it may be necessary to present an affidavit to support the request or to ask an expert to testify (*e.g.,* have a law professor testify on laws of a foreign nation).

JUDICIAL PERSPECTIVE: If the court denies a request to take judicial notice, it must advise the parties as early as possible (usually either in the tentative ruling or, if there is no tentative ruling, at the hearing), and indicate on the record that the request for judicial notice has been denied. See Evid C §456.

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§5.54 1. Use Separate Document

A request for judicial notice listing the specific matters for which notice is requested must be made in a separate document. Cal Rules of Ct 3.1113(*l*), 3.1350(c)(5) (moving party), 3.1350(e) (opposing party).

The request should identify facts and issues that are supported by the matters to be judicially noticed, *e.g.,* that a complaint on file in another case shows that the plaintiff discovered his or her alleged injury long ago, and the statute of limitations has run on the present claim. These facts and issues should also be identified in the separate statement of undisputed material facts. On moving party's separate statement, see §§6.21-6.35; on opposing party's separate statement, see §§7.23-7.29.

PRACTICE TIP: The moving party should state in the notice of motion that it is requesting judicial notice, *e.g.,* "Notice is also given that judicial notice is requested of the matters set forth in the accompanying Request for Judicial Notice." On notice of motion, see §§6.53-6.56.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.55 2. Provide Copies to Court and Each Party

§5.55 2. Provide Copies to Court and Each Party

A party requesting judicial notice of material under Evid C §452 or §453 must provide the court and each party with a copy of the material. Cal Rules of Ct 3.1306(c).

JUDICIAL PERSPECTIVE: A common pitfall is not providing the court with a copy of the material to be noticed, including highlighted copies of documents from the court's own files. When copies are not provided, it can be very inconvenient for the judge to find the requested documents in a large file.

PRACTICE TIP: Make the court's job as easy as possible by providing copies of everything that is important to a favorable decision. Use highlighter, underlining, tabs, or some other means to enable the court to find quickly and easily the evidence or argument. Do not make the court dig around in the moving or opposing papers to locate key evidence or argument.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/ 3. Comply With Procedures for Requesting Judicial Notice of Court File/§5.56 a. When File Is in Same Court

3. Comply With Procedures for Requesting Judicial Notice of Court File

§5.56 a. When File Is in Same Court

If the material is part of a file in the court in which the matter is being heard, the party requesting judicial notice must (Cal Rules of Ct 3.1306(c)(1)-(2))

- Prepare a written Request to Clerk for Files, stating the
- Filing date,
- Title of the filed document, and
- Exact part of court file to be judicially noticed;
- Arrange with the clerk to have the file in the courtroom at the time of the hearing; and
- File a Request to Clerk for Files directly in the department in which the motion is noticed at least **5 days** before the date set for hearing. See, *e.g.,* Los Angeles Ct R 9.2(b); San Francisco Ct R 8.6(A).

JUDICIAL PERSPECTIVE: Even when requesting judicial notice of a court file that is in the same court, make it easy and convenient for the judge to review the evidence. Provide copies of the requested materials lodged as an exhibit, with the pertinent parts marked with highlighting or legibly underlined.

PRACTICE TIP: Because any incorporation by reference of a matter in the court's files must specify the exact matter, and not just refer to the entire file (CCP §437c(b)(7); Cal Rules of Ct 3.1306(c)(1)), do not request judicial notice of an entire court file when only certain documents are germane to the motion.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.57 b. When File Is From Another Court

§5.57 b. When File Is From Another Court

When requesting court pleadings from another court,

- Obtain certified copies of pleadings from the other court; and
- File them with the declaration of counsel, stating that the copies are certified.

See, *e.g.,* Los Angeles Ct R 9.2(c); San Francisco Ct R 8.6(B).

JUDICIAL PERSPECTIVE: When requesting judicial notice of a court file that is from another court, provide copies of the requested materials lodged as an exhibit, with the pertinent parts marked with highlighting or legibly underlined.

PRACTICE TIP: Although it is possible to subpoena the original files from the other court, the usual practice is to obtain certified copies.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.58 VII. LAYING FOUNDATION FOR EVIDENCE

§5.58 VII. LAYING FOUNDATION FOR EVIDENCE

All evidence used in connection with a summary judgment motion must have a proper foundation. Evidence must be

- Authenticated (see §§5.59-5.61);
- Compliant with the secondary evidence rule (see §§5.62-5.70);
- Nonhearsay or fall within an exception to the hearsay rule (see §§5.71-5.75); and
- Incorporated and properly attached to the moving or opposing papers (see §§5.76-5.78).

Summary judgment motions are generally supported or opposed by documentary evidence only. To the extent that tangible evidence, *e.g.,* photographs, is used, it is treated as an exhibit. The use of oral testimony at a summary judgment hearing is extremely rare and will be allowed only at the court's discretion for good cause shown. Cal Rules of Ct 3.1306(b).

PRACTICE TIP: A party seeking leave to introduce oral testimony at the hearing must file a statement on the nature and extent of the evidence to be introduced and a reasonable time estimate for the oral testimony at least **3 court days** before the hearing. If the statement is filed less than **5 court days** before the hearing then the statement must be served on the other parties at least **2 court days** before the hearing. Cal Rules of Ct 3.1306(b). On the admissibility of oral testimony to prove the content of a writing, see Evid C §1523.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.59 A. Authenticate Documentary Evidence

§5.59 A. Authenticate Documentary Evidence

Before a document or its contents may be introduced and considered by the court, the proponent must show sufficient facts to sustain a finding that the document is the writing the proponent claims it to be; a document is authenticated when sufficient evidence has been produced to sustain a finding that the document is what it purports to be. Evid C §§1400-1402. See *Jazayeri v Mao* (2009) 174 CA4th 301, 320, 94 CR3d 198 (testimony that USDA poultry condemnation certificates submitted as exhibits and offered for truth of matters stated were received from USDA Freedom of Information Act office in response to defendant's request was sufficient to authenticate them).

It is usually necessary to obtain declarations from custodians of records to show that the copy of the document attached as an exhibit is a true and correct copy of an original kept by the custodian in the normal course of business. Any declaration from a custodian of records should be tailored to meet the business records exception to the hearsay rule. Evid C §§1270-1272. See §5.74.

PRACTICE TIP: Ensure that all documentary evidence is properly authenticated, and if not, schedule needed depositions immediately to determine who can authenticate the evidence, and then prepare that person's declaration.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.60 1. Use of Declarations to Authenticate

§5.60 1. Use of Declarations to Authenticate

In summary judgment motions, the proponent typically authenticates a document by preparing a declaration that establishes the foundational matters, *i.e.,* the witness's personal knowledge concerning the identity of the proffered evidence and that it is what the proponent says it is. See *U.S. v Dibble* (9th Cir 1970) 429 F2d 598, 602 ("a writing is not authenticated simply by attaching it to an affidavit"; foundation is laid by testimony of witness with personal knowledge of facts who attests to identity, execution, and delivery of document).

EXAMPLE 1: Although a more elaborate authentication could have been presented, plaintiff's counsel sufficiently authenticated its documents when he declared that they were true and correct copies of documents sent by and received from prior counsel for plaintiff involved in this litigation. *Landale-Cameron Court, Inc. v Ahonen* (2007) 155 CA4th 1401, 1409, 66 CR3d 776.

EXAMPLE 2: A deposition transcript offered by plaintiff was properly authenticated because defendant admitted its authenticity when it sought to use portions of that deposition in support of its motion for summary judgment. See Evid C §1414. Further, plaintiff's attorney attested, under penalty of perjury, that the copies of the documents lodged constituted "true and correct copies of what they purport to be." *Ambriz v Kelegian* (2007) 146 CA4th 1519, 1527, 53 CR3d 700.

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§5.61 2. Methods of Authentication

There are several methods for authenticating documents, including the following:

- Testimony of anyone who saw the writing made or executed (Evid C §1413);

EXAMPLE: When defendant came to my office on April 12, 2009, I watched him write the letter and sign it. A true copy is attached as Exhibit A.

- Evidence that the opposing party has admitted its authenticity or acted on it as if it were genuine (Evid C §1414);

EXAMPLE: When defendant came to my office on April 12, 2009, he asked me if I had received the letter he had sent me. I showed him the letter and he stated that the letter was in fact the one he had sent. A true copy is attached as Exhibit A.

- Testimony confirming the authenticity of the signature or handwriting by a witness personally familiar with the handwriting, by a handwriting expert, or by the trier of fact (Evid C §§1415-1418);

EXAMPLE: I have known defendant since we went to high school together, a period of over 11 years. We have often corresponded, and I recognize the signature on the note as being his signature.

- Evidence that the writing was received in response to a communication sent to the claimed author (Evid C §1420);

EXAMPLE: On March 1, 2010, I sent a letter to defendant, a true and correct copy of which is attached and incorporated as Exhibit A. On March 14, 2010, I received in reply the letter, a true and correct copy of which is attached and incorporated as Exhibit B.

- Evidence that the writing states matters unlikely to be known by anyone other than the purported author (Evid C §1421).

EXAMPLE: Defendant states in the letter, which is attached and incorporated as Exhibit A, that he would take off from work on the 16th so that he could go to his bank and discuss the Spring Street loan. The court's attention is directed to the declaration of Mr. John Jones in which he states that on the 16th defendant was at the bank to discuss the Spring Street loan.

Authentication may also be accomplished by appropriate use of discovery devices, *e.g.,* requests for admission, interrogatories, or depositions.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.62 B. Secondary Evidence Rule

§5.62 B. Secondary Evidence Rule

All documents submitted in support of or in opposition to a summary judgment motion are subject to the secondary evidence rule. Under this rule, when the original of a document is unavailable, its contents may be proved by otherwise admissible secondary evidence—usually a photocopy—unless (Evid C §1521(a))

- A genuine dispute exists regarding material terms of the writing, and justice requires exclusion; or
- Admission would be unfair.

PRACTICE TIP: To avoid problems with the secondary evidence rule, serve requests for admissions concerning the genuineness of documentary evidence before filing or opposing a summary judgment motion. This will avoid any objections to your use of copies and will be the only authentication needed.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.63 1. Electronic Evidence and Secondary Evidence Rule

§5.63 1. Electronic Evidence and Secondary Evidence Rule

Evidence in electronic form is increasingly common and is often involved in summary judgment motions. On the Electronic Discovery Act (operative June 29, 2009), which modernized California's law on the discovery of electronically stored information (CCP §§1985.8, 2016.020, 2031.010-2031.320), see California Civil Discovery Practice (4th ed Cal CEB 2006).

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§5.64 a. Computer Printouts

Evidence Code §255 expressly defines "original" as including computer printouts shown to reflect the data accurately. Computer printouts that "accurately portray computer data" are deemed originals, and thus fall outside the secondary evidence rule. Evid C §255. This includes computer-generated evidence such as e-mail, instant messages, website printouts, and audit trails.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.65 b. Business Records in Electronic Form

§5.65 b. Business Records in Electronic Form

Under Evid C §1550, a writing that is copied or reproduced in any of the following ways is as admissible as the writing itself if the copy or reproduction was made and preserved as a part of the records of a business (as defined by Evid C §1270) in the regular course of that business:

- A nonerasable optical image reproduction, provided that additions, deletions, or changes to the original document are not permitted by the technology; or
- A photostatic, microfilm, microcard, miniature photographic, or other photographic copy or reproduction, or an enlargement of it.

The introduction of the copy, reproduction, or enlargement does not preclude admission of the original writing if it still exists. A court may require the introduction of a hard copy printout of the document. Evid C §1550.

Thus, business and official records stored in electronic form that do not fall within the Evid C §255 exception (see §5.64), and that might not otherwise qualify as admissible secondary evidence, are nonetheless admissible under Evid C §1550. Typically, the proffered records must be derived from applications formatted to prevent alterations (*e.g.,* read-only documents, microfiche). Under this exception, computer records such as archived duplicates, handwritten forms, forwarded e-mails, and digital re-recordings may be admitted.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.66 2. Checklist: Declaration for Documentary Secondary Evidence

§5.66 2. Checklist: Declaration for Documentary Secondary Evidence

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When submitting secondary evidence, attach the evidence to a declaration that does all of the following:

- 1. Authenticates the original writing based on the personal knowledge of the declarant;
- 2. Establishes that the proffered evidence is secondary evidence of the original; and
- 3. Includes facts establishing that there is no dispute concerning material terms of the document, and no unfairness in admission of the evidence.

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§5.67 3. When Secondary Evidence Is Not Permitted

If the use of a copy or other secondary evidence is not permitted under the secondary evidence rule, the original must be produced. See Evid C §1521(a), discussed in §5.62.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.68 a. If Party Proffering Document Possesses Original

§5.68 a. If Party Proffering Document Possesses Original

If the party proffering the document as evidence possesses the original, it should

- Attach a copy of the document to the authenticating declaration (see §5.60);
- State in the declaration that it will produce the original at the hearing on the motion; and
- At the hearing, state for the record that it has brought the original, and allow the court and opposing party to inspect it.

NOTE: Although it is not required that the party possessing the original of a document produce it at the hearing and offer it to the opposing party to inspect, some judges may still require that the document be produced at the hearing and counsel should be prepared to do so.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.69 b. If Opposing Party Possesses Original

§5.69 b. If Opposing Party Possesses Original

If the opposing party possesses the original,

- Attach a copy to the declaration that authenticates the original writing (see §5.60);
- State in the declaration that the original is being sought; and
- At least **20 days** before the hearing, serve notice on the opposing party requesting production of the original at the hearing (CCP §1987(c)).

For a sample form of Notice to Attend and Produce Evidence at Trial, see California Trial Practice: Civil Procedure During Trial §4.70 (3d ed Cal CEB 1995).

NOTE: If the opposing party fails to produce the original at the hearing, the copy attached to the declaration should be admissible secondary evidence under Evid C §1521.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.70 c. If Third Party Possesses Original

§5.70 c. If Third Party Possesses Original

If a third party possesses the original,

- Attach a copy to the declaration that authenticates the original writing (see §5.60);
- State in the declaration that the original is being sought; and
- Serve a subpoena duces tecum on the third party and require production of the original at the hearing.

For sample completed subpoenas, see Handling Subpoenas (Cal CEB Action Guide May 2009).

NOTE: If the third party fails to produce the original at the hearing, the copy attached to the declaration should be admissible secondary evidence under Evid C §1521.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.71 C. Hearsay Rule

§5.71 C. Hearsay Rule

Unless it falls under a hearsay exception (see §§5.72-5.75), evidence is inadmissible hearsay (Evid C §1200) if it

- Consists of an out-of-court statement made by someone other than the testifying witness; and
- Is offered for the truth of the matter stated.

See *Colarossi v Coty US, Inc.* (2002) 97 CA4th 1142, 119 CR2d 131 (declaration regarding supervisor's stated intention to "get revenge" on those who cooperated in sexual harassment investigation was admissible under hearsay rule exceptions; summary judgment reversed).

If the mere existence of a document, and not the truth of its contents, is essential to the fact to be shown in a summary judgment motion, no hearsay problem arises. See Evid C §1200. When a document is used in a summary judgment motion to prove the truth of the matters stated in it, the hearsay problem must be overcome.

CAUTION: Given the CCP §437c provisions on waiver of objections (see §437c(b)(5), (d)), if a party to a summary judgment motion includes hearsay evidence as part of an affidavit or attached exhibit, and the adverse party fails to make a hearsay objection, the court must consider the inadmissible evidence offered to support the proponent's position. On waiver of objections, see §9.3.

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§5.72 1. Exceptions to Hearsay Rule Generally

When a document is used in a summary judgment motion to prove the truth of the matters stated in it, the hearsay problem must be overcome by finding its use to fit within one of the exceptions to the hearsay rule. See Evid C §§1201-1380.

EXAMPLE: In a wrongful termination action, the declarant stated that a co-worker told her of her supervisor's stated intention to "get revenge" on those, including the declarant, who cooperated in the sexual harassment investigation against the supervisor. The appellate court found that the testimony in the declaration was admissible under the hearsay rule exception for an admission made by a party opponent (Evid C §1220) and reversed summary judgment that had been granted for her employer. See *Colarossi v Coty US, Inc.* (2002) 97 CA4th 1142, 119 CR2d 131.

On exceptions to the hearsay rule, see Jefferson's California Evidence Benchbook, chap 2 (4th ed CJA-CEB 2009).

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§5.73 2. Exceptions Commonly Arising in Summary Judgment Context

Two of the most commonly used hearsay exceptions in the summary judgment context are those for business records (see §5.74) and official records (see §5.75).

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.74 a. Business Records Exception

§5.74 a. Business Records Exception

For a document to fall within the business records exception to the hearsay rule, the proponent of the evidence must show that (Evid C §1271)

- The writing was made in the regular course of business at or near the time of the act, condition, or event;
- The custodian or other qualified witness attests to the record's identity and the mode of its preparation; and
- The sources of information and method and time of preparation were such as to indicate the record's trustworthiness.

For purposes of this exception, "business" is defined broadly to include every kind of business, profession, occupation, or calling; government activities; and various operations of for-profit and nonprofit institutions. Evid C §1270. See, *e.g., Garibay v Hemmat* (2008) 161 CA4th 735, 741, 74 CR3d 715 (although hospital and medical records are hearsay, they can be admitted under business records exception to hearsay rule).

The purpose of these writings is to prepare a record of an act or event pertaining to the business, not to provide evidence; the fact that they may become relevant evidence does not change the purpose for which they were prepared. *People v Taulton* (2005) 129 CA4th 1218, 29 CR3d 203 (prison records are business records). See California Trial Objections §19.26 (Cal CEB Annual).

PRACTICE TIP: To make the requisite showing under the business records exception, use the declaration of the custodian or other qualified witness.

EXAMPLE 1: To show that no payment was made on an account, have the responsible employee prepare a declaration stating: "I am an employee of the plaintiff and one of my duties is to make and to maintain accurate records of payments received on accounts. I am required to, and do, receive all payments on these accounts and make all entries relating to them. On August 14, 2009, I opened an account for defendant, with a computerized ledger for recording all payments received. Had I received any payments, I would have recorded them in this computer file within a day or so after receiving them. I have searched defendant's ledger file, and it appears from it that no entries have been made reflecting the payment of any sums by defendant on this account since the date the account was created. A printout of this file is attached and incorporated as Exhibit D."

EXAMPLE 2: To show a document's mode of preparation, timeliness, and trustworthiness, have the custodian declare: "I am the credit manager of [name of company] and have been so employed since January 2005. My duties include supervision and control over the employees and the bookkeeping procedures in the receivables department. I am required to know, and in fact do know, the responsibilities of the employees I supervise, and the methods they use in making bookkeeping entries and maintaining other records for which I am responsible. The receivables department records incoming payments directly from the checks or drafts used to make such payments. These entries are made in computer files. For each account, a file is maintained that contains all the transactions respecting that account. The file is kept in the computer directory with all similar files. As supervisor, I require that entries be made on the file of each account within 2 days after the date a payment is received or a charge is incurred. The files and other records are audited semiannually to preserve their accuracy.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.75 b. Official Records Exception

§5.75 b. Official Records Exception

For a document to fall within the official records exception to the hearsay rule, the proponent of the evidence must show that it is a writing made (Evid C §1280)

- As a record of an act, condition, or event;
- By and within the scope of duty of a public employee;
- At or near the time of the act, condition, or event recorded; and
- With use of information sources and a method and time of preparation that indicate its trustworthiness.

See *People v Martinez* (2000) 22 C4th 106, 119, 91 CR2d 687 (uncertified computer printouts as evidence that defendant was habitual offender admissible under official records exception). See also *People v Delgado* (2008) 43 C4th 1059, 77 CR3d 259 (abstract of judgment was sufficient to prove prior felony conviction); *Hildebrand v DMV* (2007) 152 CA4th 1562, 1570, 62 CR3d 234 (police officer's sworn statement and unsworn arrest report were admissible in DMV administrative hearing as public employee records, even to extent each reported fire captain's observations that defendant was driving).

PRACTICE TIP: Unlike the business records exception (see §5.74), the exception for official records under Evid C §1280 does not require that the custodian or other qualified witness testify about the identity and mode of preparation of the writing itself. See Comment to Evid C §1280.

On the official records exception generally, see California Trial Objections §19.27 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 5 (4th ed CJA-CEB 2009).

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§5.76 D. Incorporation of Document by Reference in Declaration

Portions of a pleading or document filed in the case, or any other paper in the court file, may be incorporated by reference into a declaration. *Raczynski v Judge* (1986) 186 CA3d 504, 509 n3, 230 CR 741. On declarations, see §§5.8-5.31.

If documents are incorporated by reference, copies of the incorporated material should be attached directly to the declaration, and the specific pertinent portions should be referenced in the declaration, memorandum, and separate statement of undisputed facts. Failure to attach exhibits to a declaration referred to in that declaration may preclude entry of summary judgment. See *Ritchey v Villa Nueva Condominium Ass'n* (1978) 81 CA3d 688, 697, 146 CR 695, superseded by statute on other grounds (if party fails to attach document, it risks losing motion); *Dugar v Happy Tiger Records, Inc.* (1974) 41 CA3d 811, 815, 116 CR 412.

PRACTICE TIP: If a party fails to attach or submit documents with the authenticating declaration, that party should immediately prepare and file a new declaration and attach the omitted exhibit. The court may, however, deny or continue the motion if this documentary evidence is served less than **75 days** before the hearing, because of the failure to give the opposing party adequate notice. See CCP §437c(a). Thus, if it is necessary to add documentary evidence, the moving party should consider continuing the motion so that the opposing party has **75 days** to respond to all supporting matters. On obtaining a continuance, see §§3.34-3.46.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.77 1. Do Not Incorporate Entire Court File

§5.77 1. Do Not Incorporate Entire Court File

Any incorporation by reference of matter in the court's files must specify the exact matter to be incorporated, and not just refer to the entire file. CCP §437c(b)(7).

PRACTICE TIP: In addition to specifying the matter to be incorporated, it is good practice to attach copies to the moving or opposing papers as exhibits to make it easier for the court to find and consider the documents specified.

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.78 2. Do Not Incorporate Documents Containing Inadmissible Matter

§5.78 2. Do Not Incorporate Documents Containing Inadmissible Matter

Incorporation of documents that contain statements or testimony of anyone other than the declarant may be improper because such statements or testimony are hearsay. See, *e.g., DiCola v White Bros. Performance Prods., Inc.* (2008) 158 CA4th 666, 679, 69 CR3d 888; *Rincon v Burbank Unified Sch. Dist.* (1986) 178 CA3d 949, 955, 224 CR 88. On hearsay, see §§5.71-5.75.

PRACTICE TIP: Review the moving or opposition papers before filing them to ensure that all documents are properly attached. If a declaration was mistakenly filed without exhibits that were incorporated by reference, file a new declaration by the same declarant.

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VIII. DECLARATION CHECKLISTS

§5.79 A. Checklist: Contents for All Declarations

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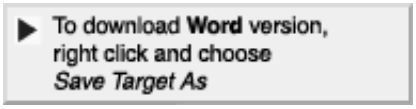
All declarations (or affidavits) used to authenticate evidence should contain the following:

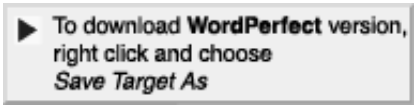
- 1. A caption that includes (Cal Rules of Ct 3.1110(b), 3.1115; see §5.13)
- A. The name of the declarant or affiant;
- B. The title of the motion that it supports, *e.g.,* Declaration of Sam Jones in Support of Plaintiff John Smith's Motion for Summary Judgment or Summary Adjudication;
- C. The hearing date, time, and location, and the name of the hearing judge, if ascertainable;
- D. The nature or title of any attached document other than an exhibit;
- E. The date the action was filed; and
- F. The trial date (if set).
- 2. Facts showing the declarant's personal knowledge of the evidence (see CCP §437c(d); Evid C §702; §5.18), *e.g.,* by
- A. Observation of an event (*e.g.,* "I saw the car run the red light");
- B. Presence during a conversation (*e.g.,* "I was present and heard Sue say … "); or
- C. Receipt of a document (*e.g.,* "I received the letter from defendant on February 2").
- 3. Facts showing that declarant is competent to testify to the matters stated in the declaration. See CCP §437c(d); Evid C §§700-701. See §5.23. See also Effective Introduction of Evidence in California, chap 32 (2d ed Cal CEB 2000).
- 4. Facts supporting the motion:
- A. Admissible evidence, *not, e.g.,* hearsay or opinions (see §5.3); and
- B. Evidentiary facts, *not* legal conclusions or ultimate facts (see §5.4).
- 5. Declarant's signature under penalty of perjury (CCP §2015.5; see §5.14).

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.80 B. Checklist: Contents of Declarations for Authentication of or Laying Foundation for Documentary Evidence

§5.80 B. Checklist: Contents of Declarations for Authentication of or Laying Foundation for Documentary Evidence





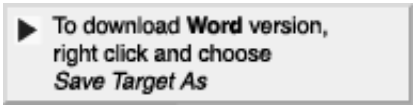
If the declaration is being used to authenticate or lay the foundation for documentary evidence, include the following (see §§5.58-5.61):

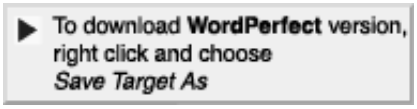
- 1. Reference to the document, *e.g.,* "attached hereto as Exhibit A is a true and correct copy of [document]";
- 2. Location of original documents referred to as evidence, *e.g.,* in the court file;
- 3. Foundational facts that will allow the court to receive the document in evidence;
- 4. Verbatim quotations of relevant portions of the document (including page and paragraph or line references to the document) if short and pivotal to the motion, so the judge can review relevant evidence without searching for the original document;
- 5. Copies of the documents attached with other exhibits at the end of the moving and supporting papers (see Cal Rules of Ct 3.1110(f)); or if the documentary evidence exceeds 25 pages, a separately bound volume that includes a table of contents (Cal Rules of Ct 3.1350(g)); and
- 6. Highlighted or underlined relevant portions of deposition testimony used as an exhibit (Cal Rules of Ct 3.1116(c)).

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Source: Civil Litigation/California Summary Judgment/5 Developing and Proffering Evidence/§5.81 C. Checklist: Contents for Expert Declarations

§5.81 C. Checklist: Contents for Expert Declarations





If the declaration is by an expert witness, include the following (see §§5.25-5.30):

- 1. Witness's expert qualifications;
- 2. What the expert was asked to do;
- 3. What the expert did;
- 4. Expert's precise opinions; and
- 5. Facts on which the expert based for his/her opinion.

For a sample declaration, see §14.10.

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6

Moving Papers

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§6.1 I. INTRODUCTION

After considering alternatives and determining that it is appropriate to move for summary judgment or summary adjudication (see §6.2; chap 1), a moving party begins the process of preparing the necessary moving papers. First, the moving party should review the strict timing and other statutory procedural requirements for the motion. See §§6.3-6.7. Next, the moving party should evaluate the pleadings and review discovery and other evidence that may be used in support of the motion. See §§6.8-6.14. The moving party then creates a plan for preparing the moving papers, including consideration of the order in which the papers are to be prepared. See §§6.15-6.19. The required moving papers include the separate statement of undisputed facts (see §§6.21-6.35), evidence in support of motion (see §§6.37-6.51), the notice of motion (see §§6.52-6.56), the supporting memorandum (see §§6.57-6.65), and the proposed order (see §6.66). Finally, the moving party schedules a hearing date (see §§6.67-6.69) and serves and files the moving papers on the court and the opposing party (see §§6.70-6.76).

NOTE: This chapter generally refers to "summary judgment" as encompassing both summary judgment and summary adjudication, unless the terms are discussed distinctly. See §§2.13-2.29 on the similarities and differences between summary judgment and summary adjudication.

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II. INITIAL TASKS

§6.2 A. Decide Whether to Move for Summary Judgment and/or Summary Adjudication

Counsel for the moving party must evaluate its case and decide whether to move for summary judgment, summary adjudication, or both in the alternative. See chap 2 on the requirements for each. The decision to move for summary judgment or summary adjudication gives rise to risks and benefits that should be carefully evaluated in light of the overall case objectives and strategy. See chaps 1-2 on evaluating the case and deciding whether to move and which motion to bring.

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§6.3 B. Review Timing

There are strictly enforced timing requirements for summary judgment and summary adjudication motions. See CCP §437c(a). It is crucial that counsel review these timing requirements before filing the motion. The required timing may persuade counsel to pursue another method of challenging the pleadings, *e.g.,* by demurrer, which has shorter timing requirements. In addition, the failure to comply with the timing requirements will result in denial of the motion and significant wasted expense. On alternative procedures for early termination of the action or narrowing the issues, see chap 1. On timing requirements, see chap 3.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.4 C. Review Statutory Procedural Requirements

§6.4 C. Review Statutory Procedural Requirements

Summary judgment procedure is explicitly set out in CCP §437c, with additional detailed procedural requirements for the moving papers in Cal Rules of Ct 3.1350. The moving party cannot deviate from these mandated rules of procedure and must comply strictly with all the procedural requirements. *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 116, 94 CR3d 109; *Department of Gen. Servs. v Superior Court* (1978) 85 CA3d 273, 284, 147 CR 422.

JUDICIAL PERSPECTIVE: Generally, the court will first check for format and procedural errors. Although some local rules may be preempted (see Cal Rules of Ct 3.20), the failure to comply with procedural requirements and applicable local rules may result in the court not considering the substantive argument and denying (typically without prejudice) or continuing the motion.

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§6.5 1. Statutory Procedure Cannot Be Altered by Local Rules

Local rules and policies have the force of procedural statutes, as long as they do not conflict with or modify legislative enactments. Under Cal Rules of Ct 3.20(a), local court rules relating to motions and form and format of court papers are preempted. Although Cal Rules of Ct 3.20(b) excepts local rules adopted under the Trial Court Delay Reduction Act (Govt C §§68600-68620), the time limits in CCP §437c take precedence over these "fast track" rules. See *Polibrid Coatings, Inc. v Superior Court* (2003) 112 CA4th 920, 923, 6 CR3d 7 (fast track rules must yield to statutory right to bring summary judgment motion).

EXAMPLE 1: The trial court may not discourage a party from filing a summary judgment motion by placing impermissible restrictions on the motion, *i.e.,* requiring a notice of intent first. *First State Ins. Co. v Superior Court (Jalisco Corp., Inc.)* (2000) 79 CA4th 324, 330, 94 CR2d 104 (however, once party filed CCP §437c motion, court had inherent authority to adopt procedure for deferred hearing of motion).

EXAMPLE 2: Local policy forcing a party to consult first with the trial judge, meet and confer with the opposing party, and agree on a different procedure improperly interfered with the party's right to make a motion under CCP §437c. *Lokeijak v City of Irvine* (1998) 65 CA4th 341, 344, 76 CR2d 429.

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§6.6 2. Statutory Procedure Cannot Be Altered by Parties' Stipulation

The parties cannot stipulate to the court entering summary judgment. *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 94 CR3d 109. In *Magana,* the parties attempted to stipulate that the court would have granted summary judgment, although the parties did not comply with any of the summary judgment procedural rules. The appellate court found that the legislature has determined the procedure for summary judgment and the parties have no place, even in complex litigation, "to rewrite the Code of Civil Procedure for their own convenience and economic interests." 174 CA4th at 121.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.7 3. Statutory Requirements in Particular Proceedings

§6.7 3. Statutory Requirements in Particular Proceedings

In certain types of cases, the moving party must review special statutory requirements in addition to CCP §437c and Cal Rules of Ct 3.1350:

- Unlawful detainer and forcible entry actions (see CCP §1170.7 and §§13.2-13.10);
- Consumer class actions (see CC §1781(c)); and
- Certain actions brought in bad faith (see CCP §1038).

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D. Evaluate Pleadings

§6.8 1. Motion Limited to Issues Raised by Pleadings

Motions for summary judgment are limited to issues raised by the pleadings. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841; *Bosetti v United States Life Ins. Co.* (2009) 175 CA4th 1208, 1233, 96 CR3d 744, citing *Ferrari v Grand Canyon Dories* (1995) 32 CA4th 248, 252, 38 CR2d 65. The court will grant summary judgment only on causes of action (or defenses) properly pleaded. *AARTS Prods., Inc. v Crocker Nat'l Bank* (1986) 179 CA3d 1061, 1064, 225 CR 203. The court will not grant summary judgment on an affirmative defense not raised in answer. *California Concrete Co. v Beverly Hills Sav. & Loan Ass'n* (1989) 215 CA3d 260, 261 CR 484.

PRACTICE TIP: Because of the importance of the pleadings, it is critical to review the pleadings to ascertain whether they contain all necessary elements of each cause of action or defense that must be proved to obtain summary judgment. See *Allyson v Department of Transp.* (1997) 53 CA4th 1304, 1316, 62 CR2d 490 (in reviewing motion, court first analyzes pleadings, including affirmative defenses, because pleadings define issues).

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§6.9 2. Pleadings Reveal Elements to Be Proved

Review of the pleadings will reveal the elements of each cause of action that must be proved, or disposed of, for the moving party to obtain summary judgment. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841.

The pleadings also show whether a party has made a judicial admission that may be used in the motion. See *Scalf v D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1522, 27 CR3d 826 (for summary judgment purposes, incontrovertible judicial admissions include concessions in pleadings); *State Farm Mut. Auto. Ins. Co. v Eastman* (1984) 158 CA3d 562, 573, 204 CR 827 ("the credibility of the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or evasive"). See also §5.43.

PRACTICE TIP: A judicial admission in the opposing party's pleading may not be the bonanza it appears to be, because it can usually be eliminated by amending the pleadings. See §6.10.

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§6.10 3. Pleadings May Be Amended

To allow the court to consider a previously unpleaded issue, the moving party may request leave to amend. *Bostrom v County of San Bernardino* (1995) 35 CA4th 1654, 1663, 42 CR2d 669. By amending the complaint or answer, the moving party may add any missing allegations in causes of action or defenses to ensure that the court will grant the judgment. If the opposing party's evidence would show some factual assertion, legal theory, defense, or claim not yet pleaded, the moving party should seek leave to amend the pleadings before filing a motion for summary judgment. *Distefano v Forester* (2001) 85 CA4th 1249, 1264, 102 CR2d 813. See CCP §472; Cal Rules of Ct 3.1324.

EXAMPLE 1: After a car accident, plaintiff sued defendant public entity for dangerous placement or location of a light pole. Defendant successfully moved for summary judgment because the light pole issue was not included in the complaint, and was raised for the first time in opposition to the summary judgment motion. Plaintiff did not seek leave to amend her complaint before the hearing on the summary judgment motion. *Laabs v City of Victorville* (2008) 163 CA4th 1242, 1252, 78 CR3d 372.

EXAMPLE 2: Defendant's summary judgment motion was properly granted because plaintiff failed to plead that defendant's conduct was reckless. Plaintiff should have sought leave to amend the pleadings before the hearing on the summary judgment motion. *Distefano v Forester, supra*.

EXAMPLE 3: Plaintiff knew of the circumstances on which he based his amended complaint on the day he was injured, almost 3 years before he sought leave to amend his complaint to raise an unpleaded theory in opposition to defendant's summary judgment motion. An "unwarranted delay" in presenting an amendment that arises from the same conduct as that in the original complaint was a valid reason for the trial court's denial of leave to amend. *Record v Reason* (1999) 73 CA4th 472, 486, 86 CR2d 547.

EXAMPLE 4: The trial court abused its discretion by denying the plaintiff leave to amend his complaint after defendants moved for summary judgment. The events giving rise to new causes of action transpired after the original complaint was filed. The fact that defendants' summary judgment motion was pending did not affect the plaintiff's right to amend his complaint. *Honig v Financial Corp.* (1992) 6 CA4th 960, 965, 7 CR2d 922.

On amending pleadings, see California Civil Procedure Before Trial, chaps 16, 25 (4th ed Cal CEB 2004).

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§6.11 E. Review Discovery and Other Evidence

Admissible evidence is required to support a motion for summary judgment or summary adjudication. CCP §437c(b)(1). See §5.3. Before moving for summary judgment, the moving party should review all discovery and other evidence to determine what is needed to support the motion.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.12 1. Gather Evidence

§6.12 1. Gather Evidence

The moving party should gather all evidence needed to support the motion just as it would in preparing for trial, including:

- Results of any fact investigation;
- Discovery responses; and
- Original or admissible copies of necessary documents and foundational proof for all evidence to be presented. See chap 5.

PRACTICE TIP: As part of the gathering process, the moving party should interview witnesses and make arrangements for supporting declarations or affidavits, including setting deadlines for reviewing and signing the declarations. It is also important to interview or depose persons who can authenticate documents. See §§5.60-5.61.

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2. Complete Necessary Discovery

§6.13 a. Moving Party Cannot Rely on Its Pleading to Support Motion

Pleadings, even verified pleadings, contain "ultimate facts," as opposed to "evidentiary facts" found in discovery responses; thus, the moving party cannot rely on its own pleadings to support its motion. CCP §437c(p); *Parker v Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 181, 89 CR 737. See §5.4.

PRACTICE TIP: The moving party may, however, use admissions made in another party's pleadings as admissible evidence in support of the motion. See *Pinewood Invs. v City of Oxnard* (1982) 133 CA3d 1030, 1034, 184 CR 417 (court accepted admission in defendant's answer as conclusive concession of truth of matter that effectively removed issue). See §6.9. See also §5.43.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.14 b. Moving Party Needs Declarations and Discovery Reponses to Support Motion

§6.14 b. Moving Party Needs Declarations and Discovery Reponses to Support Motion

Rather than using the pleadings (see §6.13), the court decides whether a triable issue of fact exists primarily by reviewing supporting declarations and discovery responses. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 855, 107 CR2d 841; chap 5. Given this, it is crucial that the moving party

- Continually assess existing evidence to determine whether any issues need further development;
- Evaluate whether the evidence is reasonably susceptible to more than one interpretation; and
- Consider whether there are any gaps in the evidence allowing the opponent to create a disputed fact.

To the extent that existing evidence is revealed to be lacking, the moving party should conduct further discovery and/or obtain additional declarations.

PRACTICE TIP: Because the moving party's evidence will not be admitted unless it meets the foundational and other requirements for admissibility, counsel should consider any discovery necessary to create foundational evidence. On evidence admissibility requirements, see Effective Introduction of Evidence in California, chap 4 (2d ed Cal CEB 2000); Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008).

On drafting declarations and preparing discovery responses for submission with a summary judgment motion, see chap 5. On obtaining discovery, see California Civil Discovery Practice (4th ed Cal CEB 2006).

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3. Determine Which Documents Are Necessary to Prepare

§6.15 a. Required Documents

A motion for summary judgment or summary adjudication (or both) must contain and be supported by the following documents (CCP §437c; Cal Rules of Ct 3.1350(c)):

- Notice of motion (see §§6.52-6.56);
- Separate statement of undisputed material facts (see §§6.21-6.35);
- Evidentiary and supporting papers proving underlying facts of motion (see §§6.37-6.51);
- Request for judicial notice, if appropriate (see §6.45); and
- Supporting memorandum (see §§6.57-6.65).

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§6.16 b. Optional Documents

Certain documents are not required to be filed in support of a motion for summary judgment or summary adjudication (see §6.15), but can be useful and sometimes necessary to a successful motion. These documents include:

- Proposed order granting summary judgment or summary adjudication (see §6.66);
- Joinder in motion;
- Ex parte request for relief from page limits (and proposed order) (see §6.63).

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§6.17 4. Consider Order of Document Preparation

In preparing a summary judgment motion, counsel should consider the order in which to prepare the supporting documents. Depending on whether legal research has already been completed, it may be advantageous to begin with preparation of the separate statement or the supporting memorandum. Counsel also might consider preparing a rough draft of the notice and proposed order first, as a "roadmap" for the other documents.

The following sections present two different options for preparing the documents in support of a summary judgment motion. The options are intended to help counsel comply with substantive and procedural statutory requirements and properly frame issues. The choice of which option to use depends on personal style and the complexity of the legal issues involved.

PRACTICE TIP: For convenience, the remainder of this chapter is generally organized to follow the steps in §6.18. Regardless of the method adopted, it will inevitably be necessary to go back and forth between the separate statement and the memorandum in the drafting process to make sure they complement each other. Once complete, the separate statement and memorandum need to be compared and reviewed to ensure consistency and the existence of evidentiary support for all facts asserted or arguments made.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.18 a. Prepare Separate Statement First

§6.18 a. Prepare Separate Statement First

If legal research is already completed, there are advantages to beginning with preparation of the separate statement because it can serve as a checklist for preparing additional documents. The documents can be prepared in the following order:

- Prepare separate statement of undisputed facts;
- Prepare supporting evidence, using the separate statement of undisputed material facts as a checklist to make sure there is evidence for all elements of the causes of action or defenses to be proved or disproved;
- Prepare the notice and proposed order, carefully phrasing the issues in terms of the arguments and evidence, and clearly articulating the relief sought;
- Draft the supporting memorandum, including information developed in the previous documents, as well as legal authorities and argument.

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§6.19 b. Draft Supporting Memorandum First

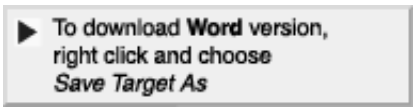
If legal research is not yet completed, beginning with the preparation of the supporting memorandum may help identify the substantive elements of causes of action or defenses that must be proved or disproved, and the facts necessary to support the position. Under this option, the documents are prepared in the following order:

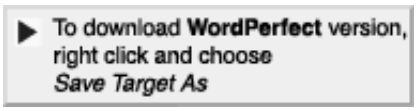
- Draft the supporting memorandum;
- Prepare a separate statement of undisputed material facts for use as a checklist for evidence once the legal issues have been defined;
- Prepare supporting papers to ensure that there is evidence for all elements of the causes of action or defenses to be proved or disproved;
- Prepare a notice and proposed order, carefully phrasing the issues in terms of the arguments and evidence, and clearly articulating the relief sought.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.20 F. Checklist: Initial Tasks

§6.20 F. Checklist: Initial Tasks





- 1. Have you reviewed the timing requirements? See chap 3.
- 2. Have you reviewed the form and format requirements stated in Cal Rules of Ct 3.1350? See §6.4.
- 3. If you may be requesting judicial notice, have you checked Evid C §§451-453 and local rules for procedures when requesting court files? See §6.45.
- 4. If you are bringing an expedited summary procedure in an unlawful detainer or forcible entry action, have you reviewed CCP §1170.7? See §§6.7, 6.73.
- 5. If you are bringing an expedited summary procedure in a consumer class action, have you reviewed CC §1781(c)? See §6.7.
- 6. If you are a defendant moving for summary judgment and are being sued for indemnity, contribution, or under the California Government Claims Act, have you reviewed CCP §1038 concerning the procedure for recovering costs if you prevail on the motion? See §6.7.
- 7. Have you evaluated the pleadings? See §§6.8-6.10.
- A. Do the pleadings contain all the necessary elements of each cause of action or defense that must be proved to prevail on the motion?
- B. If there are defects on the face of the pleadings, will opposing counsel stipulate to amend the pleading? If counsel will not stipulate, have you filed a motion to amend?
- C. If there are defects on the face of your opponent's pleadings, should you instead consider making a motion for judgment on the pleadings?
- D. If you plan to move for summary judgment based on a defect in your opponent's pleadings (such as a failure to properly plead a cause of action), should you consider the possibility that your opponent may respond to your motion by simply filing a motion to amend his pleadings?
- E. What are the material facts set out in the (amended) pleadings?
- 8. Have you assessed the state of the evidence? See §§6.11-6.14.
- A. Does the evidence gathered to date establish to the requisite degree of proof that the material facts are undisputed?
- B. Is the evidence susceptible of more than one meaning?
- C. Is further discovery necessary?
- D. Is the evidence on which the motion is based admissible?
- 9. Are stipulations from the opposing party prepared and obtained, if appropriate? See §6.40.
- 10. Have you determined the best sequence for preparing the documents supporting the motion? See §§6.17-6.19.

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III. PREPARING MOVING PAPERS

§6.21 A. Separate Statement

Papers filed in support of a motion for summary judgment or summary adjudication must include "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed." CCP §437c(b)(1); *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 117, 94 CR3d 109 (summary judgment procedure requires moving party "to support its motion with evidence in the relatively elaborate form of separate statements"). Each material fact stated must have a reference to the supporting evidence. CCP §437c(b)(1); Cal Rules of Ct 3.1350.

For a sample separate statement, see Cal Rules of Ct 3.1350(h). See also §§14.11-14.13.

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§6.22 1. Purpose of Separate Statement

The purpose of a separate statement of undisputed facts is to

- Provide the court with a document that plainly and concisely specifies all material facts that are claimed to be undisputed (CCP §437c(b)(1));
- Provide the court with clear reference to evidence supporting each material fact (Cal Rules of Ct 3.1350); and
- Afford due process to opposing parties (*State ex rel Harris v PricewaterhouseCoopers LLP* (2005) 125 CA4th 1219, 1262 n28, 23 CR3d 529, rev'd on other grounds (2006) 39 C4th 1220, 48 CR3d 144; *United Community Church v Garcin* (1991) 231 CA3d 327, 335, 282 CR 368).

See also *Collins v Hertz Corp.* (2006) 144 CA4th 64, 74, 50 CR3d 149 (separate statement serves two important functions of notifying parties of material facts at issue, and providing "convenient and expeditious vehicle permitting the trial court to hone in on the truly disputed facts"); *Parkview Villas Ass'n v State Farm Fire & Cas. Co.* (2005) 133 CA4th 1197, 1210, 35 CR3d 411 (separate statement serves dual function of giving opponent notice of facts and permitting trial court to focus on facts relevant to issues).

PRACTICE TIP: The separate statement is "not merely a technical requirement"; rather, it is an exceedingly important document, and should not be viewed as an afterthought. *Whitehead v Habig* (2008) 163 CA4th 896, 902, 77 CR3d 679. For motions in which the applicable law is straightforward and well known to the court, the judge may read the separate statement first and form an impression on whether the motion is well taken.

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§6.23 2. Effect of Failure to File Adequate Separate Statement

All facts necessary to grant the motion should be contained in the separate statement. The moving party's failure to comply with the separate statement requirements is a sufficient ground for denying the motion. CCP §437c(b)(1); *Teselle v McLoughlin* (2009) 173 CA4th 156, 168, 92 CR3d 696 (moving party must comply with provisions of §437c(b)(1), and if it fails to do so, court must deny summary judgment motion).

EXAMPLE 1: In a dispute arising from a trustee's allegedly mistaken conveyance of real property into another trust, the summary judgment movants' separate statement did not address a material fact in the complaint, did not assert a prima facie case of entitlement to a summary judgment, and did not shift the burden to the trustee to file an opposing separate statement. *Teselle v McLoughlin, supra.*

EXAMPLE 2: Each codefendant must file its own separate statement in support of a summary judgment or summary adjudication motion. When some defendants properly support their motion with a separate statement, other defendants cannot simply file a notice of joinder in the motion without filing their own separate statement. *Frazee v Seely* (2002) 95 CA4th 627, 636, 115 CR2d 780. See also *Wilson v Blue Cross* (1990) 222 CA3d 660, 671, 271 CR 876 (summary judgment could not be granted as to moving parties).

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.24 3. Contents

§6.24 3. Contents

The separate statement must separately identify (Cal Rules of Ct 3.1350(d))

- Each cause of action, claim for damages, issue of duty, or affirmative defense;
- Each supporting material fact claimed to be undisputed with respect to each cause of action, claim for damages, issue of duty, or affirmative defense; and
- Supporting evidence that establishes those undisputed facts, with citations to the evidence for each fact, including references to exhibits, titles, and page and line numbers.

The moving party cannot rely on the allegations or denials of its pleadings to show the existence of a triable issue of material fact; rather, the moving party must identify all material undisputed facts that support each necessary element of a cause of action, defense, claim for damages, or issue of duty. See CCP §437c(c).

EXAMPLE: Defendant employer did not set out facts and reference evidence showing that plaintiff employee's individual actions were protected "concerted" activity. Defendant's separate statement did not contain an assertion that any employee impliedly authorized plaintiff to act on his or her behalf. At most, defendant showed that plaintiff intended to benefit himself as well as his coworkers. This showing is legally insufficient to impute concerted action, and thus the summary adjudication motion is "legally inadequate." *Haney v Aramark Uniform Servs., Inc.* (2004) 121 CA4th 623, 636, 17 CR3d 336.

CAUTION: If the moving party seeks summary adjudication, whether separately or in the alternative, the specific cause of action, affirmative defense, claim for damages, or issue of duty must be stated in the separate statement exactly as it appeared in the notice of motion. Cal Rules of Ct 3.1350(b). On notice of motion, see §§6.52-6.56.

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§6.25 a. Identify Only Material Undisputed Facts

All undisputed facts listed in the separate statement must be material, *i.e.,* those that tend to prove or disprove an element of the cause of action or defense. A factual issue is nonmaterial when it has no significance in determining the outcome of the case. On material issues of fact, see §1.44.

EXAMPLE: In an action to determine whether defendant ski-lift operator negligently failed to remove a tree from the edge of a slope, plaintiff's supposed disputed facts are "clearly peripheral" to the legal determination that must be made, including facts relating to plaintiff's treatment by defendant after her injury on the slope. As to these assertions, the response is "so what?," *i.e.,* none of them are material to the decisional task of measuring defendant's duty to remove the tree. See *Danieley v Goldmine Ski Assocs.* (1990) 218 CA3d 111, 126, 266 CR 749.

PRACTICE TIP: Explanatory facts, *e.g.,* facts about the background of the case, may be immaterial. To make the court aware of explanatory facts, albeit immaterial, include them in the supporting memorandum (with citations to supporting evidence), not in the separate statement.

CAUTION: If the moving party's separate statement includes immaterial facts, and the opposing party provides evidence to dispute them, it may incorrectly appear that a triable issue of fact exists and the motion may be denied. It is difficult to convince the court that a fact included in the separate statement is now immaterial.

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§6.26 b. Identify Only Necessary Facts

The moving party should not include too many proposed facts in its separate statement. Motions can be lost when an opposing party focuses on a proposed fact in the moving party's separate statement and can show that a dispute exists about it. This is particularly troubling if that proposed fact was not actually necessary to the motion.

PRACTICE TIP: Refine and limit the number and scope of proposed facts. Every case is different, but it is a rare summary judgment motion that requires a list of more than 20 to 30 proposed material facts.

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§6.27 c. Do Not Overstate Facts

The moving party should always accurately state the facts in evidence. It is critical not to overstate the proposed facts in the separate statement; rather, evidentiary citations must actually support the proposition, ideally in the precise language. The opposing party will almost certainly bring any overreaching to the court's attention, resulting in the moving party's position losing credibility.

PRACTICE TIP: Credibility is an important factor. Overstating the facts or overreaching in the application of the law will damage counsel's credibility with the court.

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§6.28 d. Identify Evidence for Each Fact

For each material, necessary, and accurate fact, the moving party must identify supporting evidence. See, *e.g., Union Bank v Superior Court* (1995) 31 CA4th 573, 37 CR2d 653 (moving defendant could rely on plaintiffs' Judicial Council form interrogatory answers as evidentiary basis for its separate statement).

JUDICIAL PERSPECTIVE: It is important to identify in the separate statement where the evidence supporting each material fact is specifically located, *e.g.,* "page 2, lines 3-12 of plaintiff's deposition" or "on page 4 of Exhibit B, attached to the declaration of defendant."

On developing and proffering evidence, see chap 5.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.29 (1) Evidence Must Be Admissible

§6.29 (1) Evidence Must Be Admissible

As with all evidence, evidence submitted in support of a motion must have a sufficient foundation (see §5.58) and be admissible.

PRACTICE TIP: Attorneys frequently make mistakes about the admissibility of evidence. Ensure that all photographs, reports, contracts, and other documents are adequately authenticated through declarations or deposition testimony. Declarations filed in support of the motion should bear original signatures and avoid hearsay. On declarations, see §§5.8-5.31.

On evidence foundation and admissibility, see Effective Introduction of Evidence in California (2d ed Cal CEB 2000); Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008).

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§6.30 (2) Additional Requirement for Summary Adjudication Motions

A summary adjudication motion made in the alternative may refer to and depend on the same evidence submitted in support of the summary judgment motion. See §2.29. If summary adjudication is sought, however, the separate statement must link each undisputed material fact to the specific cause of action, affirmative defense, claim for damages, or issue of duty, which must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement. Cal Rules of Ct 3.1350(b).

On evidence in support of motion, see §§6.37-6.51. On the court's consideration of evidence not presented in the moving party's separate statement in making its ruling, see §11.17.

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§6.31 (3) Sample Application of Evidence to Undisputed Facts

The decision in *C. L. Smith Co. v Roger Ducharme, Inc.* (1977) 65 CA3d 735, 135 CR 483, demonstrates how each fact necessary to prove or disprove an element of the cause of action must be attached to supporting evidence.

In that case, the defendant moved for summary judgment based on the absence of a written contract, an essential element of the plaintiff's breach of contract cause of action. One fact that supported the absence of a contract was that a written contract was never signed by the defendant. Evidentiary proof of that fact was a written document that the defendant did not sign and that the plaintiff admitted in deposition was not signed. Other facts supporting the nonexistence of a contract were that the plaintiff and defendant orally negotiated the contract terms and intended to enter into a written contract. Evidentiary support of those facts was found in the plaintiff's deposition and the defendant's declaration.

See §§14.11-14.13 for sample separate statements to see how the undisputed facts and supporting evidence citations are set out.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.32 4. Format

§6.32 4. Format

The separate statement filed in support of a summary judgment or summary adjudication motion must follow the format set out in the sample in Cal Rules of Ct 3.1350(h). See also §§14.11-14.13. The separate statement should be a separate document, *i.e.,* not part of the supporting memorandum or other document.

CAUTION: It is important to precisely follow this mandatory format or risk the motion's denial. See §6.23.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.33 a. Two-Column Requirement

§6.33 a. Two-Column Requirement

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The required contents of the separate statement (§§6.24-6.31) must be presented in a two-column format:

- The first column lists the undisputed facts in numerical sequence, followed by the supporting evidence that establishes the undisputed facts, with references to exhibits, titles, and page and line numbers (Cal Rules of Ct 3.1350(d); see §6.31);
- The second column should be left blank by the moving party (to await opposing party's evidence).

EXAMPLE 1: The format specified in Cal Rules of Ct 3.1350(h) for the separate statement supporting a summary judgment motion appears as follows:

Moving Party's Undisputed Material Facts and Supporting Evidence:	**Opposing Party's Response and Supporting Evidence:**
1. Plaintiff and defendant entered into a written contract for the sale of widgets. **Jackson declaration, 2:17-21; contract, Ex. A to Jackson declaration.**	
2. No widgets were ever received. **Jackson declaration, 3:7-21.**	

Comment: This format is one of two specified by Cal Rules of Ct 3.1350(h) for separate statements. Counsel must follow this format.

EXAMPLE 2: The second format specified in Cal Rules of Ct 3.1350(h) is for the separate statement supporting a summary adjudication motion and appears as follows:

ISSUE 1—THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY

Moving Party's Undisputed Material Facts and Supporting Evidence:	**Opposing Party's Response and Supporting Evidence:**
1. Plaintiff was injured while mountain climbing on a trip with Any Company USA. **Plaintiff's deposition, 12:3-4.**	
2. Before leaving on the mountain climbing trip, plaintiff signed a waiver of liability for acts of negligence. **Smith declaration, 5:4-5; waiver of liability, Ex. A to Smith declaration.**	

Comment: This format is specified by Cal Rules of Ct 3.1350(h) for separate statements in summary adjudication motions. Counsel must follow this format.

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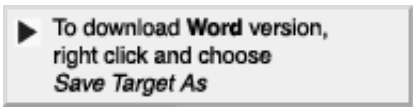
§6.34 b. Electronic Version Requirement

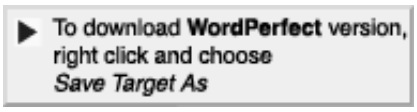
Within **3 days** of a request, the moving party must provide to any other party or the court an electronic version of its separate statement. The electronic version may be provided in any form on which the parties agree. If the parties cannot agree on the form, the moving party must provide the electronic version of the separate statement that it used to prepare the document filed with the court. The moving party is not required, however, to create an electronic version or any new version of any document to transmit to the requesting party. Cal Rules of Ct 3.1350(i).

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.35 5. Checklist: Preparing Separate Statement

§6.35 5. Checklist: Preparing Separate Statement





When preparing the separate statement, consider the following:

- 1. Are specific facts set out showing the existence of a triable issue of material fact as to the cause of action or defense? See §§6.25-6.27.
- A. Are only the undisputed material facts laid out?
- B. Are only necessary facts laid out?
- C. Are any facts overstated?
- 2. Is evidence identified for each fact? See §§6.28-6.31.
- A. Is there a logical relationship between the facts stated and the supporting evidence?
- B. Is the evidence susceptible of more than one meaning?
- C. What additional evidence would make the case stronger?
- 3. Is the separate statement in a separate document? See §6.32.
- 4. Is the separate statement in a two-column format? See §6.33.

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§6.36 B. Evidence in Support of Motion

A summary judgment motion must be supported by evidence establishing the moving party's right to the relief sought. CCP §437c(b)(1). If the moving party contends that an issue of fact lacks support in the record, "it must set forth all the material evidence on the point and not merely the evidence favorable to it." *Rio Linda Unified Sch. Dist. v Superior Court* (1997) 52 CA4th 732, 740, 60 CR2d 710.

On developing evidence for the motion, see chap 5. On objecting to evidence presented in opposition to the motion, see chap 9.

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§6.37 1. Permissible Types of Evidence

Many types of documents are used as evidence in connection with a summary judgment motion (CCP §437c(b)(1)), including:

- Opposing party's pleadings, *e.g.,* the moving plaintiff may rely on a defendant's admission of a material allegation contained in the complaint (*Schulze v Schulze* (1953) 121 CA2d 75, 81, 262 P2d 646), and the moving defendant may rely on the plaintiff's admission in the complaint (*Smith v Walter E. Heller & Co.* (1978) 82 CA3d 259, 269, 147 CR 1; see *Joslin v Marin Mun. Water Dist.* (1967) 67 C2d 132, 148, 60 CR 377, superseded by statute on other grounds) (see §6.13);
- Declarations or affidavits (see §6.38; see also §§5.8-5.31);
- Judicial admissions by the opposing party, *e.g.,* in counsel's concessions or the opposing party's stipulations (see §6.39);
- Discovery responses (see §§5.32-5.47);
- Depositions (see §6.42);
- Answers to interrogatories and requests for admissions (see §6.43);
- Documents produced in response to demands for inspection (see §6.44); or
- Matters of which the court must or may take judicial notice (see §6.45; see also §§5.48-5.57).

Documents used in support of a summary judgment motion must be properly authenticated or they may not be considered. *Callahan v Chatsworth Park, Inc.* (1962) 204 CA2d 597, 22 CR 606. See §§5.59-5.61. They must also comply with the secondary evidence rule, *i.e.,* the rule permitting proof of the contents of an unavailable document. See §§5.62-5.70.

On how to establish an evidentiary foundation and satisfy secondary evidence requirements, see Effective Introduction of Evidence in California (2d ed Cal CEB 2000); Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008).

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§6.38 a. Declarations and Affidavits

Most summary judgment motions are based largely on affidavits or declarations. See CCP §437c(b)(1). It is important to draft declarations and affidavits to establish each undisputed and foundational fact. To support an unopposed summary judgment, the declarations need only establish the facts essential to the judgment that remain unresolved. *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 370 n15, 110 CR 353. See also *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 417, 94 CR3d 288 (if plaintiff did not controvert defendants' declarations in support of their summary judgment motion, then court properly accepted them as true for purposes of motion under CCP §437c(e)).

Supporting affidavits or declarations must (CCP §437c(d))

- Be made by someone with personal knowledge;
- Set out admissible evidence; and
- Affirmatively show that the affiant/declarant is competent to testify to the stated matters.

See *Mamou v Trendwest Resorts, Inc.* (2008) 165 CA4th 686, 692 n1, 81 CR3d 406 (considering whether declaration had foundation in personal knowledge).

PRACTICE TIP: Be careful not to include argument in a declaration or affidavit. Simply present the facts that will authenticate the document without characterizing them or arguing their importance. *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 370 n15, 110 CR 353 (affidavits or declarations filed in support of summary judgment motion need only contain requisite facts controverted by pleadings).

On declarations and affidavits, see §§5.8-5.31. For a sample declaration supporting defendant's motion for summary judgment or summary adjudication, see §14.10.

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§6.39 b. Judicial Admissions

In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to judicial admissions, *e.g.,* those made in pleadings or by stipulation, as opposed to those obtained through discovery, and disregard a party's contradictory and self-serving affidavits. *Benavidez v San Jose Police Dep't* (1999) 71 CA4th 853, 860, 84 CR2d 157. A party's admissions receive unusual deference in summary judgment proceedings and are binding absent a credible explanation for the party's inconsistent positions. *LeBourgeois v Fireplace Mfrs., Inc.* (1998) 68 CA4th 1049, 1060 n12, 80 CR2d 660. Admissions in an opposing party's pleadings are binding and conclusive concessions of truth. *Valerio v Andrew Youngquist Constr.* (2002) 103 CA4th 1264, 1271, 127 CR2d 436. See 4 Witkin, California Procedure, *Pleading* §413 (5th ed 2008). The moving party should always look for judicial admissions in pleadings and documents filed by the opposing party that may be used to show that facts are not in dispute. See §6.9. See also §5.43.

EXAMPLE 1: In his complaint, plaintiff alleged that defendant breached an oral agreement for plaintiff to manage defendant's boxing career. Defendant moved for summary judgment on the ground that plaintiff was not a licensed manager. In a declaration filed in opposition to the motion, plaintiff argued that his description of himself as manager was a conclusion not supported by the underlying factual allegations in the complaint. The court held that defendant could rely on the allegations in plaintiff's complaint, which constitute judicial admissions. Having repeatedly alleged his status of manager, plaintiff could not change course in response to a summary judgment motion. *Castillo v Barrera* (2007) 146 CA4th 1317, 1324, 53 CR3d 494.

EXAMPLE 2: Plaintiff's admission of the existence of a written contract in his answer to defendant's cross-complaint had the effect of establishing the truth of the existence of the written contract. *Valerio v Andrew Youngquist Constr.* (2002) 103 CA4th 1264, 1271, 127 CR2d 436.

EXAMPLE 3: In the underlying case and the indemnity action, plaintiff sought to establish his right to the attorney fees requested. In doing so, he vouched for the fact that the fees were reasonable. This judicial admission is binding and dispositive without further evidence. *Kurinij v Hanna & Morton* (1997) 55 CA4th 853, 868, 64 CR2d 324.

PRACTICE TIP: Do not refer to judicial admissions in a declaration; rather, include them in the supporting memorandum. See *Rooney v Vermont Inv. Corp.* (1973) 10 C3d 351, 370 n15, 110 CR 353 (affidavits or declarations filed in support of summary judgment motion need not include facts admitted by adverse pleadings). When using a judicial admission in a pleading as evidence, file a request to take judicial notice of such pleading. See §6.45.

On admissions and concessions, see Jefferson's California Evidence Benchbook, chap 3 (4th ed CJA-CEB 2009).

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.40 c. Stipulations

§6.40 c. Stipulations

The moving party may use stipulations to show that:

- Material facts are not in dispute (see, *e.g., Parker v Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 182 n4, 89 CR 737 (motion for summary judgment was submitted for decision on stipulation by parties that plaintiff was discharged); or
- Parties have agreed either in writing or orally in court (see CCP §283(1) (authority of attorney to bind client)).

PRACTICE TIP: If the motion relies on a written stipulation, attach the original stipulation to the motion. No additional proof of the matters to which a stipulation has been made is required.

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§6.41 d. Discovery Responses

All evidence derived from discovery may be used to support a summary judgment motion as long as the discovered matter is not hearsay or otherwise objectionable under the rules of evidence. CCP §437c(b)(1) (summary judgment or summary adjudication motion must be supported by all material evidence, including admissions, answers to interrogatories, and depositions). But see *Rio Linda Unified Sch. Dist. v Superior Court* (1997) 52 CA4th 732, 740, 60 CR2d 710 (moving party's statement of undisputed facts must include opponent's discovery responses even if their content is inadmissible, such as hearsay). See §§5.32-5.41.

In establishing the right to summary judgment, the moving party may note that the opposing party's discovery responses present no evidence to support some or all elements of the cause of action. *216 Sutter Bay Assocs. v County of Sutter* (1997) 58 CA4th 860, 875, 68 CR2d 492. "Factually devoid" and vague responses to discovery may be used to show the absence of evidence to support a party's case. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854, 107 CR2d 841; *Andrews v Foster Wheeler LLC* (2006) 138 CA4th 96, 102, 41 CR3d 229 (defendant conducted comprehensive discovery and plaintiff's factually devoid responses indicated that plaintiff could not prove causation). See §§4.21-4.23.

PRACTICE TIP: If the moving party intends to rely on answers to interrogatories, deposition testimony, or responses to requests for admissions, it is necessary to identify and authenticate discovery responses. See §5.59.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.42 (1) Depositions

§6.42 (1) Depositions

Depositions can be used to support a motion for summary judgment subject to the same rules of admissibility as a witness's affidavit or declaration. CCP §437c(b)(1); *Saporta v Barbagelata* (1963) 220 CA2d 463, 468, 33 CR 661. If it is not too lengthy, the moving party's declaration should (see Cal Rules of Ct 3.1116)

- Quote verbatim the portions of the deposition on which it is relying; and
- Attach to the declaration copies of the relevant pages, highlighted, as exhibits.

PRACTICE TIP: Because the scope of examination at depositions is broader than the admissible evidence standard, counsel for the moving party must review all deposition testimony used to support the motion with the rules of evidence in mind. See CCP §2017.010 (matter is discoverable if it is itself admissible in evidence or appears reasonably calculated to lead to discovery of admissible evidence). The opposing party may object successfully to inadmissible deposition testimony. Do not rely on the ability to file reply papers, because there may not be time to show by alternative means the truth of supporting facts, thus seriously weakening the moving party's position before the court rules on the motion.

CAUTION: Because a party may not use its own deposition at trial or at a hearing under CCP §2025.620, it is questionable whether the moving party may use its own deposition to support its summary judgment motion, although the summary judgment statute authorizes the use of depositions to support summary judgment motions without qualification. See CCP §437c(b)(1). Counsel may definitely, however, file a declaration stating what transpired, or argue that the deposition itself allowed the opponent the opportunity to cross-examine, which is a greater challenge to the moving party's testimony than if a declaration were filed.

On the use of depositions as evidence, see §5.33.

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§6.43 (2) Interrogatories and Requests for Admission

The moving party may use another party's answers to interrogatories and admissions in response to requests for admission against that party. In addition, the trial court may disregard declarations or affidavits by the opposing party that contradict its admissions made in response to discovery requests. *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 21, 112 CR 786. But see *Scalf v D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1521, 27 CR3d 826 (court cannot ignore other credible evidence that "contradicts or explains" discovery responses).

PRACTICE TIP: Include the opposing party's relevant answers and admissions in the moving papers, because they may not otherwise be filed with the court. See CCP §§2030.280(a), 2033.270(a). Copies may also be attached and incorporated by reference into the moving papers as appropriate. See §5.76.

On the use of interrogatories and requests for admissions as evidence, see §5.38.

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§6.44 (3) Demands for Inspection

Documents produced in response to demands for inspection may be used to support a summary judgment motion. CCP §437c(b)(1). The mere fact that these documents have been produced, however, will not overcome any admissibility problems. To use these documents, the moving party must authenticate them, comply with the secondary evidence rule, or, when appropriate, establish that they fall within the business records exception to the hearsay rule. See §§5.59-5.75.

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§6.45 e. Matters Judicially Noticed

A summary judgment or summary adjudication motion must be supported by all material evidence, including matters of which judicial notice must or may be taken. CCP §437c(b)(1). See Evid C §§451-452. For example, courts must take judicial notice of facts and propositions that are "so universally known" that they cannot reasonably be the subject of dispute, *e.g.,* geographical points on a map. Evid C §451(f).

PRACTICE TIP: If a proposition is not universally accepted as true, it is better to prove it by declaration rather than by request for judicial notice.

A court may take judicial notice of files in its own court system or any other United States court. Evid C §452(d). If requesting judicial notice of a court's file, however, the moving party must specify the "exact matter to which reference is being made." CCP §437c(b)(7). See Cal Rules of Ct 3.1306(c)(1). The court cannot incorporate by reference the entire file. CCP §437c(b)(7).

PRACTICE TIP: When requesting judicial notice of pleadings in a prior action to use as a evidence of an admission (see §6.39), attach copies of the pleading to the request to make them easily available to the court.

A request for judicial notice must be made in a separate document listing the specific items for which notice is requested, and must comply with Cal Rules of Ct 3.1306(c)(1). Cal Rules of Ct 3.1113(*l*), 3.1350(c).

On matters subject to judicial notice and judicial notice procedure, see §§5.48-5.57. See also California Trial Practice: Civil Procedure During Trial §§14.26-14.35 (3d ed Cal CEB 1995).

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§6.46 2. Impermissible Types of Evidence

The moving party may not rely on the following types of evidence to prove a fact needed to support a summary judgment motion:

- Moving party's own pleadings (either complaint or answer) (*Slobojan v Western Travelers Life Ins. Co.* (1969) 70 C2d 432, 436, 74 CR 895);
- Inconsistent theories or facts pleaded by opposing party (see *Conn v National Can Corp.* (1981) 124 CA3d 630, 639, 177 CR 445);
- Unauthenticated documents (see Evid C §1401; §5.59);
- Opposing party's clearly mistaken discovery response (*Mason v Marriage & Family Ctr.* (1991) 228 CA3d 537, 545, 279 CR 51); and
- Discovery responses from parties other than the party against whom the motion is directed (CCP §§2030.010 (interrogatories), 2033.010 (admissions)).

In addition, the moving party should avoid methods that the court may consider insufficiently persuasive, such as a declaration on an individual's particular state of mind or lack thereof under CCP §437c(e). See §11.14.

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§6.47 3. Format

Counsel should incorporate and properly attach the supporting evidence to the moving papers. All documents should be clearly labeled, and tabbed if necessary or useful, so that the court can easily locate relevant materials while reviewing the papers.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.48 a. Must Bind Separately if Over 25 Pages

§6.48 a. Must Bind Separately if Over 25 Pages

If the evidence in support of the motion exceeds 25 pages, it must (Cal Rules of Ct 3.1350(g))

- Be bound in a separate volume; and
- Include a table of contents.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.49 b. Bind Each Exhibit Together and Create Index to Exhibits

§6.49 b. Bind Each Exhibit Together and Create Index to Exhibits

The pages of each exhibit should be bound together at the top to permit easy page-turning. Cal Rules of Ct 3.1110(e). In addition, each exhibit must be separated by a hard 8½ by 11 sheet with hard paper or plastic extending below the bottom of the page with the exhibit designation. There must also be an index to exhibits. Cal Rules of Ct 3.1110(f).

NOTE: Pages from a single deposition and associated exhibits must be designated as a single exhibit. Cal Rules of Ct 3.1110(f).

Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter. Cal Rules of Ct 3.1110(g).

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.50 c. Use Proper Format for Deposition Transcript as Exhibit

§6.50 c. Use Proper Format for Deposition Transcript as Exhibit

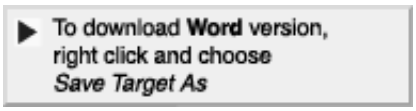
On the first (title) page of any deposition used as an exhibit, counsel should state the name of the deponent and the date of the deposition. Cal Rules of Ct 3.1116(a). Other than the title page, counsel should use only relevant pages of the transcript for the exhibit, with the original page number of the deposition page clearly visible. Cal Rules of Ct 3.1116(b).

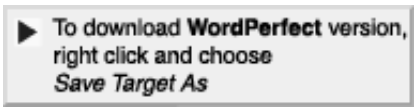
PRACTICE TIP: Mark the relevant portions of the deposition testimony in any way that highlights the testimony. Cal Rules of Ct 3.1116(c). Use labeled tabs or different colors or highlighting so that the court can easily find the relevant material.

On the use of deposition transcript as evidence, see §§5.33-5.37.

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§6.51 4. Checklist: Supporting Evidence





- 1. Is there a declaration to establish a foundation for each item of documentary evidence, including, *e.g.,* discovery responses, deposition transcripts, photographs, contracts, and reports? See §6.38.
- 2. Are stipulations a possible means of eliminating disputed issues? See §6.40.
- 3. Are discovery responses helpful evidence in support of the motion? See §§6.41-6.44.
- 4. Have all requests for judicial notice been prepared? See §6.45.
- 5. Is the evidence presented in the format required by the California Rules of Court? See §§6.47-6.50.

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C. Notice of Motion

§6.52 1. Contents

A notice of motion for summary judgment or summary adjudication must be a document distinct from the separate statement of undisputed facts and supporting memorandum. Cal Rules of Ct 3.1350(c)(1)-(3). The notice of motion must identify the time, date, and place of the hearing (CCP §1010), as well as:

- The nature of the relief sought, *i.e.,* summary judgment, summary adjudication, or both (Cal Rules of Ct 3.1110(a));
- The specific grounds on which the motion is made (CCP §1010; Cal Rules of Ct 3.1110(a));
- The identity of each party against whom the motion is directed;
- All documents on which the moving party is relying (CCP §1010); and
- The nature of any attached document**,** except an exhibit.

For sample notice of motion for summary judgment or summary adjudication, see §14.8.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.53 a. When Seeking Summary Adjudication

§6.53 a. When Seeking Summary Adjudication

If the motion is for summary adjudication, the notice must also specify the "specific cause of action, affirmative defense, claims for damages, or issues of duty" sought to be summarily adjudicated. Cal Rules of Ct 3.1350(b). Although not required, the moving party should include a citation to the numbered undisputed facts that support each cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication is sought, creating an outline of the motion for the court.

PRACTICE TIP: When the defendant is the moving party, the statement of grounds in the notice of motion can usually be more specific than if the plaintiff were the moving party, because a defendant generally attacks only one or two elements of the cause of action or relies on an affirmative defense. If a defendant's motion is based on the absence of a necessary element of the plaintiff's case, the notice of motion should clearly set out the missing element. A moving defendant that relies on an affirmative defense should briefly state the defense in the notice of motion and the facts that show it is applicable.

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§6.54 b. When Requesting Judicial Notice

If requesting judicial notice, the moving party should include a statement in the notice of motion that judicial notice is requested, *e.g.,* "as set forth in accompanying separate request for judicial notice."

On judicial notice, see §6.45.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.55 2. Format

§6.55 2. Format

The moving party should attach the notice of motion to the supporting memorandum (see §§6.58-6.65). Cal Rules of Ct 3.1113(j). The notice of motion should follow the rules governing the format of court papers generally. See Cal Rules of Ct 3.1110(b); California Civil Procedure Before Trial, chap 11 (4th ed Cal CEB 2004).

In both the title and the body of the notice, the moving party should specifically name the party against whom the motion is directed, rather than designating "All Parties and Their Attorneys of Record." Cal Rules of Ct 3.1112(d). This is particularly important in complicated cases with numerous parties. The caption should include, beneath the number of the case, the following information:

- Title of the document;
- Hearing judge (if ascertainable);
- Date the action was filed;
- Trial date (if set); and
- Date, time, and location of the hearing.

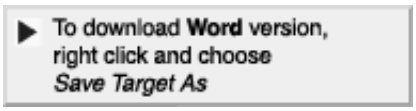
EXAMPLE: In a summary judgment motion against a defendant, the title of the notice of motion might read: "NOTICE OF MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT ABC CO., INC."

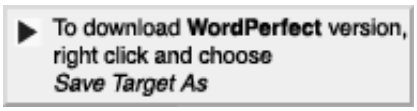
On preparing a notice of motion generally, see California Civil Procedure Before Trial §§12.8-12.29 (4th ed Cal CEB 2004). For sample notices, see California Civil Litigation Forms Manual §37.1 (Cal CEB 1980).

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.56 3. Checklist: Notice of Motion

§6.56 3. Checklist: Notice of Motion





- 1. Do the opening paragraphs of the notice of motion identify the parties against whom it is directed, state the nature of the relief sought, the grounds on which the motion is made, and the date, time and place of the hearing, and identify the nature of papers or documents attached (except exhibits)? See §§6.52, 6.55.
- 2. If the moving party is a defendant and the motion is based on the denial of a fact that is necessary to the plaintiff's case, does the notice clearly state the fact denied? See §6.52.
- 3. If the moving party is a defendant and the motion is based on the failure of the plaintiff to establish all elements of a cause of action, does the notice clearly state the element that has not been established? See §6.52.
- 4. If the moving party is relying on an affirmative defense, does the notice briefly state the defense in the notice of motion and the facts that show it is applicable? See §6.52.
- 5. If summary adjudication is sought, are the specific causes of action, affirmative defenses, claims for damages, or issues of duty separately stated? See §6.53.

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§6.57 D. Supporting Memorandum

A summary judgment motion must be supported by a memorandum. Cal Rules of Ct 3.1350(c)(3). The supporting memorandum provides the court with a summary of facts, statutes, case law, and legal argument in support of the motion. The memorandum should cut through the allegations and demonstrate what the facts actually prove and how legal authorities relate to those facts. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841.

WARNING: The court may construe a failure to file a supporting memorandum as an admission that the motion is not meritorious, and deny it. Cal Rules of Ct 3.1113(a).

For a sample supporting memorandum, see §14.9.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.58 1. Contents

§6.58 1. Contents

The supporting memorandum should include (Cal Rules of Ct 3.1113(b))

- Statement of facts;
- "Concise" statement of the law that applies to all elements of
- Causes of action or defenses (or claims for damages or issues of duty) that the moving party must establish; or
- Separate causes of action or defenses, issues of punitive damages, or issues of duty that the moving party claims are undisputed;
- Evidence and arguments; and
- Discussion of the statutes, cases, and treatises cited in support of the motion, *i.e.,* relate evidence to the legal authorities provided.

PRACTICE TIP: Reference to cases restating general principles of summary judgment law is seldom necessary, but the memorandum should clearly connect the issues and the authorities supporting the moving party's position on those issues. Most, if not all, memorandums cite to *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841, and CCP §437c. Given the frequency with which these authorities are cited, it is likely unnecessary to include lengthy, single-spaced quotations from them. The trial court is already familiar with them and the space saved would be better spent on other argument or authorities.

It is unnecessary to organize the supporting memorandum by causes of action (*Hope Int'l Univ. v Superior Court* (2004) 119 CA4th 719, 14 CR3d 643), but the moving party should decide on some systematic way in which to present its argument. Given the page limitations, counsel should evaluate the issues and focus on the most important ones, giving more space to those issues and less space to the less important issues.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.59 2. Optional Summary of Issues and Evidence

§6.59 2. Optional Summary of Issues and Evidence

Although not required by statute, it may be to the moving party's advantage to include a brief (1-2 page) summary of the issues and evidence in the supporting memorandum so that the court will not have to glean the information from the entire file. The judge who rules on a summary judgment motion rarely has background knowledge of the facts and issues in the case. A summary, which immediately orients the court to the salient facts and where the disputes lie, can make the motion more persuasive. This is especially important in complicated cases with multiple parties and cross-actions.

An effective and often-used method of presenting fact issues is by a detailed statement of facts, with references to the record, which can be made at the beginning of the supporting memorandum.

PRACTICE TIP: Adding a summary of issues and evidence may cause the supporting memorandum to exceed the maximum 20 pages (see §6.60). Although counsel may then make an ex parte application to the court to file a longer memorandum, such requests are often denied. See §6.63.

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3. Format

§6.60 a. Memorandum Cannot Exceed 20 Pages

The moving party's supporting memorandum is limited to a maximum of 20 pages. Cal Rules of Ct 3.1113(d). The page limit is exclusive of exhibits, declarations, attachments, a table of contents, a table of authorities, and the proof of service. Cal Rules of Ct 3.1113(d), (h). On pagination of the memorandum, see Cal Rules of Ct 3.1113(h). The motion must be printed on recycled paper. Cal Rules of Ct 2.101.

PRACTICE TIP: Do not use a tiny typeface or font to get around the page limitations. If more space is needed for the supporting memorandum, then request that the court grant relief from the page limitations (see §6.63). The reduced font size will be readily apparent to the court, and counsel risks giving the court something that has been reduced to an unreadable size.

CAUTION: A memorandum that exceeds the page limit must be filed and treated as a late paper, *i.e.,* the court, in its discretion, may refuse to consider it in ruling on the motion. Cal Rules of Ct 3.1113(g), 3.1300(d).

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.61 (1) If Over 10 Pages, Table of Contents and Table of Authorities Required

§6.61 (1) If Over 10 Pages, Table of Contents and Table of Authorities Required

If the memorandum exceeds 10 pages, it must include (Cal Rules of Ct 3.1113(f))

- A table of contents; and
- A table of authorities.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.62 (2) If Over 15 Pages, Opening Summary Required

§6.62 (2) If Over 15 Pages, Opening Summary Required

In addition to the table of contents and table of authorities, an opening summary of argument is required if the memorandum exceeds 15 pages. Cal Rules of Ct 3.1113(f).

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.63 (3) Ex Parte Request for Relief From Page Limits

§6.63 (3) Ex Parte Request for Relief From Page Limits

If absolutely necessary, the moving party may make an ex parte application to the court, with written notice to the other parties, for permission to file a longer memorandum. The application must be made at least **24 hours** before the memorandum is due and state the reasons that the argument cannot be made within the page limit. Cal Rules of Ct 3.1113(e).

PRACTICE TIP: This is a risky procedure if it is close to the filing deadline, because such requests are often denied. Rather than spending time on an ex parte application, time is better spent streamlining the supporting memorandum to conform to the page limit. If it is absolutely essential to request additional pages, make an ex parte application as early as possible, so there will be sufficient time to file a shortened motion if the request is denied.

JUDICIAL PERSPECTIVE: Many, if not most, law and motion judges will routinely refuse permission to file oversize briefs. Check local practice and custom. Some judges prefer to review a draft of the memorandum to determine the necessity for the excess length, so counsel might want to bring a copy to the ex parte hearing. Counsel should anticipate that a judge will ask him or her exactly how many pages are needed. Do not expect a blanket order allowing the memorandum to exceed the page limit.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.64 b. Copies of Out-of-State, Federal, and Recent Authority Required

§6.64 b. Copies of Out-of-State, Federal, and Recent Authority Required

For the court's convenience, the moving party must attach and tab (Cal Rules of Ct 3.1113(i))

- A copy of any cited authority from another state or federal court; and
- California cases cited before publication in the Advance Sheets.

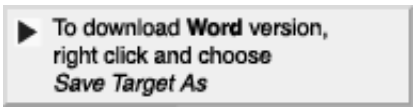
PRACTICE TIP: When attaching copies of authorities from jurisdictions other than California, be sure the copies are legible. Do not give the court blurry photocopies or faxed materials that are difficult to read.

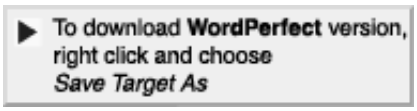
JUDICIAL PERSPECTIVE: Failure to attach out-of-state or federal authorities may necessitate continuing the hearing so that the authorities can be submitted to the court.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.65 4. Checklist for Supporting Memorandum

§6.65 4. Checklist for Supporting Memorandum





- 1. Is there a statement of facts? See §6.58.
- 2. Is there a concise statement of the law that applies to all elements of the causes of actions or defense (or claims for damages or issues of duty) that must be established to prevail? See §6.58.
- 3. Alternatively, is there a concise statement of the law that applies to the separate cause of action or defenses, issues of punitive damages, or issues of duty that are contended to be without dispute? See §6.58.
- 4. Are there references to the evidence and the arguments on which you rely? See §6.58.
- 5. Is there a discussion of the statutes, cases, and treatises on which you rely, *i.e.*, that relate your evidence to the legal authorities that you have provided? See §6.58.
- 6. If appropriate, have you included a summary of the issues and evidence in the motion? See §6.59.
- 7. If your memorandum exceeds 10 pages, have you included a table of contents and table of authorities? See §6.61.
- 8. If your memorandum exceeds 15 pages, have you included an opening summary of argument? See §6.62.
- 9. Is your memorandum no more than 20 pages? See §6.60.
- 10. If your memorandum will be more than 20 pages in length, have you (at least **24 hours** before the filing deadline) moved ex parte for permission to file a longer brief? See §6.63.
- 11. Have you copied any cited authority from another state or federal court and tabbed it as an exhibit? See §6.64.
- 12. Have you included a copy of any cases that have not been published in the advance sheets and tabbed it as an exhibit? See §6.64.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.66 E. Proposed Order Granting Motion

§6.66 E. Proposed Order Granting Motion

Neither CCP §437c nor Cal Rules of Ct 3.1350 requires that a proposed order or judgment be submitted with a motion for summary judgment or summary adjudication, but, because the court is required to specify the reasons for its ruling, some attorneys file a proposed order with the moving papers. See CCP §437c(g). A proposed order filed and served with the moving papers must be a separate, unattached document. Cal Rules of Ct 3.1113(m).

PRACTICE TIP: Check local rules or with the court clerk for any requirements relating to proposed orders filed with moving papers.

Submitting a proposed order with the moving papers may make it easier for the judge to grant a summary judgment motion and may help the judge formulate the wording of the order issued and the reasons for the determination. It may be better to include a proposed order with the reply papers (see chap 8) instead, so that the order can address the opposition evidence.

JUDICIAL PERSPECTIVE: Counsel should be careful that the matters listed in a proposed order are identical to those listed in the notice of motion and in the separate statement. The court will review the technical elements of the motion first, and move from the notice to the separate statements before considering the evidence and the memorandum. A well-drafted proposed order may serve as a road map for the court.

On proposed orders, see chap 11. For sample proposed orders granting summary judgment and granting summary adjudication, see §§14.14-14.15.

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IV. SCHEDULING HEARING DATE FOR MOTION

A. When to Schedule Hearing Date

§6.67 1. Hearing on Motion Must Be at Least 30 Days Before Trial

The hearing on a motion for summary judgment or summary adjudication is required to be no later than **30 days** before the trial date. CCP §437c(a). See §3.21.

NOTE: Two appellate courts have held that, if the trial date has been continued, the moving party may be able to set hearing on the motion for **30 days** before the new trial date. See *Green v Bristol Myers Co.* (1988) 206 CA3d 604, 609, 253 CR 745 (Second District); *Sentry Ins. Co. v Superior Court* (1989) 207 CA3d 526, 529, 255 CR 13 (First District). Check the practice of the court where the motion is to be filed.

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§6.68 2. Court May Waive 30-Day Rule for Good Cause

Unlike the **75-day** period for serving the motion before the hearing (see §6.71), the court, for good cause, may allow the hearing to be set less than **30 days** before trial. See CCP §437c(a). To obtain a hearing date less than **30 days** before trial, the moving party should prepare a declaration under penalty of perjury showing "good cause" to set the hearing date closer to trial. On what constitutes good cause, see §§3.24-3.26.

PRACTICE TIP: Avoid delay in petitioning the court for a later hearing date; petition as soon as it is clear that a later hearing will be needed. In the proposed order accompanying the petition, leave blank spaces for the new dates to file opposition and reply papers.

JUDICIAL PERSPECTIVE: Most courts will require substantial good cause before allowing a hearing to take place less than **30 days** before trial, but, in a single assignment court, the judge may be willing to hear the motion even within the 30-day period to obviate the need for a trial. If the moving party filed the motion on time, but the opponent's request under CCP §437c(h) for a continuance to permit more discovery was granted, there may not be enough time to hear the motion within the deadline. Granting a continuance will not necessarily be considered good cause to hear the motion close to trial.

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§6.69 B. How to Set Hearing Date

Many courts assign a law and motion hearing date and require counsel to contact the court to reserve a date before the motion is filed and served. Because of crowded calendars, law and motion hearing dates may not be available for several months. The court cannot refuse to hear a summary judgment motion filed within the time limits of CCP §437c, however, even if the court calendar makes it difficult to schedule the hearing before trial. *Sentry Ins. Co. v Superior Court* (1989) 207 CA3d 526, 529, 255 CR 13.

PRACTICE TIP: Check local rules and, if required, contact the court clerk to ascertain local procedure for setting the hearing date.

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V. SERVING AND FILING MOTION

A. Serve Motion

§6.70 1. What to Serve

The moving party must serve a copy of each of the following documents on counsel for each party (or on unrepresented party):

- Notice of motion (see §§6.52-6.56) and supporting memorandum (see §§6.57-6.65);
- Separate statement of undisputed material facts (see §§6.21-6.35);
- Supporting evidentiary papers (see §§6.37-6.51);
- Request, if any, for judicial notice, and request to clerk for file (see §6.45);
- Proposed order, if any (see §6.66); and
- Proof of service (see California Civil Procedure Before Trial §17.64 (4th ed Cal CEB 2004)).

To the extent practicable, all supporting memorandums, declarations, and affidavits must be served with the notice of motion. Cal Rules of Ct 3.1113(j).

PRACTICE TIP: Check local rules or with the court clerk to determine the number of copies required.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.71 2. When to Serve

§6.71 2. When to Serve

The moving party must serve the required documents (see §6.70) on other parties at least (CCP §437c(a))

- **75 days** before the hearing if by personal delivery;
- **80 days** if served by mail to an address within California;
- **85 days** if served by mail to an address in another state;
- **95 days** if served by mail to an address outside United States; and
- **2 additional court days** added to the end of the 75-day period if served by fax, Express Mail, or other overnight delivery service.

A joinder motion must be served and filed in accordance with time limits that apply to summary judgment motions. *Frazee v Seely* (2002) 95 CA4th 627, 115 CR2d 780.

EXAMPLE 1: The 75th day after defendant's service of the summary judgment motion by overnight service on Thursday, November 4, 2004, was Tuesday, January 18, 2005. Adding two court days makes the 77th day Thursday, January 20, 2005, which was the day scheduled for the motion to be heard. Thus, defendant's motion was timely served. *Barefield v Washington Mut. Bank* (2006) 136 CA4th 299, 302, 38 CR3d 858.

EXAMPLE 2: Defendant moved for summary adjudication on August 8, 2003, and the hearing on the motion was originally set for September 19, 2003. However, on August 18, plaintiff moved to continue the hearing date to January 15, 2004, on the grounds that she needed additional time to conduct discovery and prepare her opposition. The court granted her motion in part and continued the hearing to October 31, 2003. Defendant filed his motion 84 days before this rescheduled hearing date; thus it was timely, even with the additional 5 days for service by mail. The notice requirement in CCP §437c(a) is measured from the date notice is served to the date of the actual hearing, not the originally scheduled hearing. *Lackner v North* (2006) 135 CA4th 1188, 1207, 37 CR3d 863.

PRACTICE TIP: If service is going to be delayed for a few days, the moving party should obtain a later hearing date, ask the court to allow the moving party to extend time for the opposing party's response (court may need to obtain opposition papers within statutory requirements), or seek a court order to shorten the time for serving the motion. The court may view an offer to the opposing party to extend the time to respond as a reasonable attempt to offset any prejudice caused by a delay in service, and grant a motion to shorten time.

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§6.72 a. Court Cannot Shorten Time for Service Without Parties' Consent

The court cannot shorten the **75-day** notice period without the parties' consent. See *Urshan v Musicians' Credit Union* (2004) 120 CA4th 758, 763, 15 CR3d 839 (legislature deprived trial court of authority to shorten notice period for hearing summary judgment motions). Additionally, a court's local rules cannot require a longer notice period for "complex motions" than that provided by CCP §437c(a). *Wells Fargo Bank v Superior Court* (1988) 206 CA3d 918, 922, 254 CR 68.

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§6.73 b. Only 5 Days' Notice Required in Unlawful Detainer Actions

In forcible and unlawful detainer actions, a summary judgment motion requires only **5 days'** notice. See CCP §1170.7, discussed in §13.4.

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B. File Motion in Court

§6.74 1. When to File

As with motions generally, a motion for summary judgment or summary adjudication must be filed at least **16 court days** before the hearing date. CCP §1005(b); Cal Rules of Ct 3.1300(a). Although CCP §437c(a) contains specific requirements for serving moving papers on other parties (see §6.71), it does not specifically address the time for filing moving papers with the court.

A proof of service must be filed no later than **5 court days** before the hearing. Cal Rules of Ct 3.1300(c).

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.75 2. What to File

§6.75 2. What to File

Unless local rules otherwise require, the moving party must file one set of original documents with the clerk of the court in which the action is pending. CCP §1004; Cal Rules of Ct 3.1302(a).

PRACTICE TIP: Counsel should always check local rules or with the court clerk to determine the number of copies required. It is often advisable to make a duplicate set for the moving party, in addition to the office copy. It can also be helpful to make an extra working copy for use when drafting the reply papers.

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Source: Civil Litigation/California Summary Judgment/6 Moving Papers/§6.76 3. Filing Fee

§6.76 3. Filing Fee

On filing, the moving party must pay the applicable filing fee of $200. Govt C §70617(d).

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7

Opposition Papers

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§7.1 I. INTRODUCTION

The opposing party's sole objective is to convince the court that there is a "triable issue of material fact." CCP §437c(c). See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841 (to defeat summary adjudication motion, opposing party must show triable issue of material fact as to challenged causes of action, punitive damages claims, or defenses). To do this, the opposing party must prepare opposition papers that both comply with all procedural requirements and substantively focus on this objective.

After reviewing all timing requirements for the opposition (see §7.2), the opposing party should consider all possible procedural, evidentiary, and substantive challenges to the moving papers (see §§7.3-7.12). The opposing party should then evaluate the pleadings and review discovery and other evidence for triable issues. See §§7.13-7.19.

The opposing party's separate statement is the most important way to graphically demonstrate the existence of a triable issue. See §§7.23-7.29. The evidence supporting the opposition and any objections to the moving party's evidentiary support are the other two critical components of the opposition's papers that demonstrate that at least one triable issue of material fact exists in the action. See §§7.30-7.40. The opposition papers are completed with a memorandum in opposition to the motion and a proposed order denying the motion. See §§7.41-7.44. The opposing party must be sure to timely serve and file these opposition papers. See §7.45.

In some cases, the opposing party may also decide to be the moving party on a cross-motion for summary judgment or summary adjudication, in which case all rules applicable to moving papers apply. See chap 6; §§7.46-7.48.

For an overview of the diagnostic questions that counsel for the opposing party should ask before preparing the opposition papers, see §7.49.

NOTE: This chapter generally refers to "summary judgment" as encompassing both summary judgment and summary adjudication, unless the terms are discussed distinctly. See §§2.13-2.29 on the similarities and differences between summary judgment and summary adjudication.

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II. INITIAL TASKS

§7.2 A. Review Timing

Any opposition to a motion for summary judgment and summary adjudication must be served and filed at least **14 days** before the notice or continued hearing date. CCP §437c(b)(2). See *Cooksey v Alexakis* (2004) 123 CA4th 246, 19 CR3d 810 (declaration in opposition filed on date of summary judgment hearing was not timely under §437c(b)). The court may, for good cause, permit the opposing party to file its papers closer to the hearing date. CCP §437c(b)(2).

On timing requirements, see §§3.30-3.31.

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B. Review Moving Papers for Possible Challenges

1. Procedural Challenges

§7.3 a. Untimely Notice

If the moving party files its papers outside the statutory time limit, the court must deny the motion. CCP §437c(a). See §§3.30-3.31, 6.3.

CAUTION: If the opposing party fails to object to the notice as untimely in the opposition papers, this challenge may be waived. See, *e.g., Reedy v Bussell* (2007) 148 CA4th 1272, 1288, 56 CR3d 216 (issue of timeliness of motion in limine for terminating sanctions was clearly waived because opposing parties failed to even suggest that notice was defective in their oppositions).

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§7.4 b. Improper Notice of Motion

The moving party must file and serve a notice of motion for summary judgment or summary adjudication that is a document distinct from the separate statement of undisputed facts and supporting memorandum. Cal Rules of Ct 3.1350(c)(1)-(3). The notice of motion must identify certain information, including the time, date, and place of the hearing, as well as the relief sought, the specific grounds on which the motion is made, the identity of each party against whom the motion is directed, and the documents on which the moving party is relying. CCP §1010; Cal Rules of Ct 3.1110. If the moving party fails to include a notice of motion with all of this information, the opposing party may use that deficiency to challenge the moving papers.

On the required elements of the notice of motion, see §§6.52-6.56.

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§7.5 c. Invalid Separate Statement

The moving party's failure to comply with the separate statement requirements is a sufficient ground for denying the motion. CCP §437c(b)(1); *Teselle v McLoughlin* (2009) 173 CA4th 156, 168, 92 CR3d 696 (moving party must comply with provisions of §437c(b)(1), and if it fails to do so, court must deny summary judgment motion). See §6.24.

PRACTICE TIP: The court will likely notice this deficiency on its own, but if it does not, the opposing party should raise the issue and use it as another reason for the court to deny the motion.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.6 d. Failure to Comply With Statutes and Court Rules

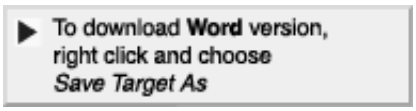
§7.6 d. Failure to Comply With Statutes and Court Rules

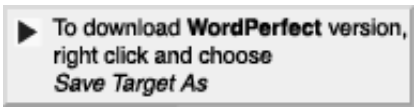
The opposing party should definitely make a procedural challenge when the separate statement, evidence, or other pleading fails to conform to requirements of the Code of Civil Procedure or the California Rules of Court and any local rules not preempted by Cal Rules of Ct 3.20(a). See Cal Rules of Ct 3.1350. See also *Thatcher v Lucky Stores, Inc.* (2000) 79 CA4th 1081, 1086, 94 CR2d 575 (local rule is invalid as applied to summary judgment motions because it conflicts with statutory law and case law construing CCP §437c).

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.7 e. Checklist: Procedural Challenges

§7.7 e. Checklist: Procedural Challenges





- 1. Is the motion timely? If not, failure to object constitutes a waiver. See §7.3.
- 2. Does the notice of motion comply with CCP §1010 and Cal Rules of Ct 3.1350? See §§6.52-6.55, 7.4.
- 3. Does the moving party's separate statement comply with the requirements of Cal Rules Ct 3.1350? See §§6.22-6.35, 7.5.
- 4. Do all of the moving papers comply with the applicable statutes and court rules? See §7.6.

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§7.8 2. Evidentiary Challenges

One of the most important tasks of the opposition is to controvert the moving party's evidence and thereby create a triable issue of fact. In addition to presenting opposing evidence (see §§7.30-7.36), the opposing party can challenge the moving party's evidence by showing that it is inadmissible or lacks foundation because it consists of, *e.g.,* inadmissible hearsay or documentary evidence that fails the secondary evidence rule. On admissibility issues, see §§5.58-5.78.

PRACTICE TIP: The moving party's declarations and affidavits are often a good target for an evidentiary challenge. The opposing party should consider whether these documents were properly based on personal knowledge and establish that the evidence is what it is represented to be. See §§5.18-5.22, 6.38. Another possible avenue to challenge a declaration or affidavit is that it improperly contains argumentative assertions of fact, asserts legal conclusions, or refers to previous discovery controversies.

The opposing party may also be able to controvert the moving party's evidence by showing that it does not bear a logical relationship to the facts asserted or it is susceptible to more than one meaning.

If grounds for an evidentiary challenge exist, the moving party should prepare written objections to evidence. On objections to evidence, see §§7.37-7.40 and chap 9.

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3. Substantive Challenges

§7.9 a. Burden Not Met

The opposing party may challenge the summary judgment motion on the basis that the moving party failed to meet its burden of showing no triable issue of material fact (CCP §437c(c)), *e.g.,* conflicting evidence exists that gives rise to reasonable conflicting inferences and shows that there is a triable issue of material fact. See *Unjian v Berman* (1989) 208 CA3d 881, 884, 256 CR 478 (opposing party presented evidence that gave rise to inference that he did not discover moving party's negligence more than 1 year before filing suit, making his filing timely).

EXAMPLE: In response to an investors' suit for breach of contract and fraud, defendants sought summary judgment on statute of limitations grounds, asserting, among other things, that the statutes of limitations began to run many years earlier when plaintiffs were on notice of their injury. The trial court agreed and granted defendants summary judgment. The court of appeal reversed, finding conflicting evidence raising reasonable conflicting inferences about when a reasonably prudent person would have suspected his or her injury and some wrongful cause for it. *Cleveland v Internet Specialties W., Inc.* (2009) 171 CA4th 24, 31, 88 CR3d 892.

On moving party's burden of proof, see §§4.24-4.32.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.10 b. Different Law Applies

§7.10 b. Different Law Applies

The opposing party may contend that different law applies or that the moving party cited incorrect law. To the extent the moving party misstates the law applicable to the case, the opposing party should point that out to the court and argue that the moving party's position in the summary judgment motion is undermined by its misapprehension of the applicable law.

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§7.11 c. Summary Adjudication Is Inappropriate

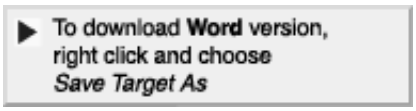
A party may move for summary adjudication as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty. CCP §43c(f)(1). A moving party cannot seek to adjudicate less than an entire cause of action, however; if the moving party attempts to do so, the opposing party must object to preserve the issue on appeal. *Fidelity Mortgage Trustee Serv. v Ridgegate E. Homeowners Ass'n* (1994) 27 CA4th 503, 507 n5, 32 CR2d 521.

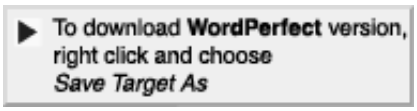
On the differences between moving for summary judgment and summary adjudication, see §§2.13-2.29.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.12 d. Checklist: Substantive Challenges

§7.12 d. Checklist: Substantive Challenges





- 1. Did the moving party meet its burden of proof? See §7.9.
- 2. Are there reasonable conflicting inferences in the evidence that create a triable issue of material fact? See §7.9.
- 3. Has the moving party cited the correct law? §7.10.
- 4. Does the motion seek to adjudicate less than an entire cause of action? See §7.11.

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C. Evaluate Pleadings

§7.13 1. Opposition Limited to Issues Raised in Pleadings

After reviewing the moving papers, the opposing party may want to oppose the motion based on a defense or claim not previously pleaded. Counter-declarations are restricted to issues raised by the pleadings (see §5.7), so counsel must amend its pleadings so that all causes of action and defenses raised appear in the pleadings. See *Oakland Raiders v National Football League* (2005) 131 CA4th 621, 648, 32 CR3d 266 (pleadings set boundaries of issues for summary judgment); *Government Employees Ins. Co. v Superior Court* (2000) 79 CA4th 95, 99 n4, 93 CR2d 820 ("plaintiff cannot bring up new, unpleaded issues in his or her opposing papers"); *Keniston v American Nat'l Ins. Co.* (1973) 31 CA3d 803, 812, 107 CR 583, quoting *Craig v Earl* (1961) 194 CA2d 652, 656, 15 CR 207 ("counter-affidavits filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings [and] are not a substitute for an amendment to the pleadings").

PRACTICE TIP: If the moving party fails to object to a claim interposed for the first time in the opposition papers, but instead addresses it squarely in its reply, the court may find that the moving party has waived its objection to the opposing party's irregular way of asserting a claim. *Stalnaker v Boeing Co.* (1986) 186 CA3d 1291, 1302, 231 CR 323. Counsel certainly should not raise an unpleaded claim with the hope that the moving party will not object and the court will waive the issue. Rather, counsel should always amend the pleading to encompass the desired defense or claim.

On amending pleadings, see §§7.14-7.17.

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§7.14 2. Pleadings May Be Amended

The opposing party should seek to amend its pleading whenever its evidence would show some factual assertion, legal theory, defense, or claim not yet pleaded. *Distefano v Forester* (2001) 85 CA4th 1249, 1264, 102 CR2d 813 (opposing party did not seek to amend pleading before hearing to allege intentional or reckless conduct in off-road vehicle accident, and on appeal was not allowed to amend complaint to conform to proof). Once the opposing party identifies the need for an amendment, it can either ask the moving party to stipulate to the amendment, or seek leave of court to amend the pleading. The opposing party seeking to amend its pleading has the burden of requesting leave to amend. *Cullincini v Deming* (1975) 53 CA3d 908, 915 n5, 126 CR 427; *Krupp v Mullen* (1953) 120 CA2d 53, 57, 260 P2d 629. On motions to amend a pleading, see Cal Rules of Ct 3.1324. See also §§6.10, 7.15-7.17; California Civil Procedure Before Trial §§25.70-25.78, chap 16 (4th ed Cal CEB 2004).

PRACTICE TIP: Amending the complaint or answer can defeat or soften the impact of the motion, and in some instances render the motion moot.

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§7.15 a. Courts Liberally Grant Leave to Amend

If the opposing party makes a proper application for amendment, then the court will most likely grant leave to amend. See *Residents of Beverly Glen, Inc. v City of Los Angeles* (1973) 34 CA3d 117, 128, 109 CR 724 (on summary judgment motion, trial court should use considerable liberality in allowing amendments that "do not completely and entirely depart from the general area of the cause set up in the pleadings").

CAUTION: The court may properly deny an amendment if the opposing party makes no effort to amend or seek a continuance. Diligence in seeking to amend is an important factor in obtaining leave of court. See, *e.g., A.N. v County of Los Angeles* (2009) 171 CA4th 1058, 1067, 90 CR3d 293 (in exercising its broad discretion when presented with motion for leave to file amended pleading, court may consider whether proffered pleading states facts that could have been pleaded earlier, and whether party has established reasonable excuse for delay); *Emerald Bay Community Ass'n v Golden Eagle Ins. Corp.* (2005) 130 CA4th 1078, 1097, 31 CR3d 43 ("even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial").

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§7.16 b. Court May Continue Hearing to Allow Time to Amend

If defects in the pleadings first come to light at the hearing itself, the opposing party may move orally for a continuance (and later file a declaration in support of the motion for continuance to preserve the record if the moving party petitions for a writ of mandate after the motion is denied). The continuance would provide the opposing party with time to amend its pleading. See CCP §594a (court may postpone trial to allow time for amendment); *Stalnaker v Boeing Co.* (1986) 186 CA3d 1291, 1302, 231 CR 323 (court has discretion to defer ruling on summary judgment motion until amendment process is complete).

On obtaining a continuance, see §§3.34-3.46.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.17 c. Court May Grant Oral Motion to Amend

§7.17 c. Court May Grant Oral Motion to Amend

If the amendment desired is not extensive, the opposing party can make an oral motion to amend its pleading instead of seeking leave to file a motion to amend the pleading. The opposing party makes an oral motion to amend by (Cal Rules of Ct 3.1324(d))

- Asking the court's permission to amend by alteration on the face of the pleading; and
- Requesting that the court or clerk initial the alterations.

Alternatively, as in trial, the opposing party may move orally to amend the pleadings to conform to proof. See California Trial Practice: Civil Procedure During Trial §§18.103-18.123 (3d ed Cal CEB 1995).

PRACTICE TIP: If possible, either have the amended pleadings available to present to the court or prepare and file them soon after the hearing.

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§7.18 3. Checklist: Evaluating Pleadings

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- 1. Is there a defense to the motion based on a defense or claim not pleaded? See §7.13.
- 2. If there is a defense to the motion based on a defense or claim not pleaded, have you diligently sought to amend? See §7.14.
- 3. Have you sought a continuance of the hearing to amend the complaint? See §7.16.
- 4. Are you prepared to make an oral motion to amend at the hearing? See §7.17.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.19 D. Review Discovery and Other Evidence

§7.19 D. Review Discovery and Other Evidence

Each material fact contended by the opposing party to be disputed must be followed by a reference to the supporting evidence. CCP §437c(b)(3). Before opposing a summary judgment motion, it is important to review all discovery and other evidence to determine what can be used to oppose the motion. On developing evidence to oppose the motion, see chap 5. On types of evidence that may be used, see §§6.37-6.46, 7.30-7.34.

PRACTICE TIP: Consider whether additional evidence to oppose the motion exists that has yet to be obtained through discovery or investigation. If such evidence might exist, prepare an ex parte application for a continuance to obtain further discovery. See §§3.38-3.40. See also the Judicial Perspective in §11.4.

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III. PREPARING OPPOSITION PAPERS

§7.20 A. Purpose of Opposition Papers

The purpose of filing papers in opposition to a motion for summary judgment is to show the court that there is at least one triable issue of fact. To that end, the opposing papers should clearly show the court that at least one triable issue exists by listing the issue(s) and supporting evidence at the beginning of the opposition papers, and making it as easy as possible for the court to rule against the moving party.

CAUTION: Although the opposing party's papers are liberally construed (*City of Oceanside v Superior Court* (2000) 81 CA4th 269, 96 CR2d 621), it is important to carefully follow the rules governing opposition papers and not complacently rely on the court's leniency. The court expects counsel to know and follow the procedures involved. As a result, the court may not grant leave to fix problems or inadequacies in the opposing papers simply because counsel was not diligent in preparing its initial papers.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.21 1. Required Documents

§7.21 1. Required Documents

The opposition to a motion for summary judgment, summary adjudication, or both must consist of the following documents, separately stapled and titled as shown (CCP §437c(b)(3); Cal Rules of Ct 3.1350(e)):

- Opposing party's memorandum (see §§7.41-7.43);
- Opposing party's separate statement of undisputed material facts (see §§7.23-7.29);
- Opposing party's evidence (see §§7.30-7.36); and
- Opposing party's request for judicial notice (see §7.33).

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.22 2. Optional Documents

§7.22 2. Optional Documents

The following documents are optional, but often useful, in opposing a summary judgment or summary adjudication motion:

- Opposing party's objections to the moving party's evidence (see §§7.37-7.40);
- Ex parte application to continue the hearing (see §§3.34-3.46); and
- Proposed order denying the motion (see §7.44).

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.23 B. Separate Statement in Opposition

§7.23 B. Separate Statement in Opposition

The party opposing a summary judgment motion must submit a separate statement of disputed and undisputed facts corresponding to the moving party's separate statement. *Lewis v County of Sacramento* (2001) 93 CA4th 107, 113 CR2d 90 (in opposition to motion, plaintiff must submit separate statement with specific facts that show that triable issue of material fact exists).

NOTE: The separate statement requirement does not apply to unlawful detainer actions. See §§13.8-13.9.

On the purpose of a separate statement, see §6.22.

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§7.24 1. Effect of Failure to File Adequate Separate Statement

The opposing party's failure to file an adequate responsive statement is a sufficient ground, in the court's discretion, to grant the summary judgment motion. CCP §437c(b)(3); *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 576, 88 CR3d 363; *Frazee v Seely* (2002) 95 CA4th 627, 115 CR2d 780; *Kaplan v LaBarbera* (1997) 58 CA4th 175, 179, 67 CR2d 903. An immediate grant of summary judgment is usually too harsh a consequence for failure to file an adequate opposing separate statement. "[T]he proper response in most instances, if the trial court is not prepared to address the merits of the motion in light of the deficient separate statement, is to give the opposing party an opportunity to file a proper separate statement." *Parkview Villas Ass'n v State Farm Fire & Cas. Co.* (2005) 133 CA4th 1197, 1211, 35 CR3d 411. In rare cases, the court may decide to consider the merits of the opposition, despite the lack of a separate statement. See *Gilbertson v Osman* (1986) 185 CA3d 308, 315, 229 CR 627 (court considered merits despite lack of separate statement because case involved "single, simple issue" with little evidentiary support), disapproved on other grounds in *Woods v Young* (1991) 53 C3d 315, 279 CR 613.

EXAMPLE 1: The trial court held that it would be an abuse of discretion for it to grant summary judgment based on the opposing party's failure to file a separate statement if the moving parties failed in their moving papers to set out a prima facie showing for summary judgment. The court went on to find, however, that the moving parties had made such a showing and that allowing the opposing party time to file a separate statement would have been futile because he did not have the evidence necessary to submit a complying separate statement. *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 416, 94 CR3d 288.

EXAMPLE 2: The trial court wrongly granted summary judgment on the ground that the trustee was one day late in filing an opposing separate statement. Although the trustee was late, the moving parties did timely reply, giving the trial court adequate time to consider the matter before the hearing on the motion. *Teselle v McLoughlin* (2009) 173 CA4th 156, 92 CR3d 696.

EXAMPLE 3: The trial court properly granted landlords' summary adjudication motion after tenants failed to file an opposition separate statement. The document that the tenants claimed was their separate statement failed because it contained no citations to evidence. The tenants took the time to file a sur-reply to the reply brief and could have used that opportunity to remedy their deficiency, but did not do so. *Whitehead v Habig* (2008) 163 CA4th 896, 902, 77 CR3d 679.

EXAMPLE 4: The trial court specified deficiencies in the opposing party's separate statement, identified precisely how those deficiencies could be rectified, and afforded them ample opportunity to prepare new papers in compliance with applicable rules. The court need not do anything more and did not abuse its discretion by striking those portions of the opposing separate statement that failed to comply with the procedural requirements. *Collins v Hertz Corp.* (2006) 144 CA4th 64, 74, 50 CR3d 149.

PRACTICE TIP: Despite the willingness of some courts to consider an inadequate separate statement or provide an opportunity to prepare a compliant one, you should always prepare a complete separate statement to be filed with the opposition papers. The court is well within its discretion to hold counsel to the requirements set out in CCP §437c and the Rules of Court, and can refuse to consider inadequate or late filings.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.25 2. Contents

§7.25 2. Contents

The opposition separate statement must (CCP §437c(b)(3))

- Respond to each of the material facts claimed to be undisputed;
- Plainly and concisely list any other material facts that the opposing party contends are disputed; and
- Reference each material disputed fact to supporting evidence.

PRACTICE TIP: It is not uncommon for counsel responding to the separate statement to state an objection to the moving party's evidentiary showing without indicating whether the fact itself is disputed. This is a risky practice. If the objection is overruled, the fact will be deemed undisputed. Thus, make clear in the opposition separate statement whether each fact set out in the moving party's separate statement is disputed or undisputed regardless of whether an objection is made.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.26 3. Format

§7.26 3. Format

The separate statement filed in opposition must follow the format set out in the sample in Cal Rules of Ct 3.1350(h). For sample separate statement in opposition to motion for summary judgment or summary adjudication, see §14.16.

PRACTICE TIP: The court is not required to grant a continuance to allow a party to put its opposition papers into the proper format. *Lucas v George T. R. Murai Farms, Inc.* (1993) 15 CA4th 1578, 19 CR2d 436. Thus, it is important to carefully review the format requirements and comply with them to avoid the need to seek a continuance in which to file a correct statement. On continuances, see §§3.34-3.46.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.27 a. Use Two-Column Format

§7.27 a. Use Two-Column Format

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The opposing party's separate statement must use a two-column format (Cal Rules of Ct 3.1350(f)):

- The first column repeats each material fact claimed by the moving party to be undisputed followed by the evidence advanced by the moving party to establish that fact; and
- The second column, directly opposite the recitation of each of the moving party's undisputed facts, states whether the fact is "disputed" or "undisputed." As to those facts that are disputed, the opposing party must
- State the nature of the dispute; and
- Describe the evidence supporting the position that the fact is controverted, with citation to exhibit, title, page, and line numbers in the evidence submitted.

PRACTICE TIP: Attach excerpts or copies of controverting evidence to the separate statement to make it easier for the court to find it.

EXAMPLE 1: The first format specified in Cal Rules of Ct 3.1350(h) is for the separate statement supporting a summary judgment motion and appears as follows:

Moving Party's Undisputed Material Facts and Alleged Supporting Evidence:	**Opposing Party's Response and Evidence:**
1. Plaintiff and defendant entered into a written contract for the sale of widgets. **Jackson declaration, 2:17-21; contract, Ex. A to Jackson declaration.**	Undisputed.
2. No widgets were ever received. **Jackson declaration, 3:7-21.**	Disputed. The widgets were received in New Zealand on August 31, 2001. **Baygi declaration, 7:2-5.**

Comment: This format is specified by Cal Rules of Ct 3.1350(h) for separate statements in summary judgment motions. Counsel must follow this format.

EXAMPLE 2: The second format specified in Cal Rules of Ct 3.1350(h) is for the separate statement supporting a summary adjudication motion and appears as follows:

ISSUE 1—THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY

Moving Party's Undisputed Material Facts and Alleged Supporting Evidence:	**Opposing Party's Response and Evidence:**
1. Plaintiff was injured while mountain climbing on a trip with Any Company USA. **Plaintiff's deposition, 12:3-4.**	Undisputed.
2. Before leaving on the mountain climbing trip, plaintiff signed a	Disputed. Plaintiff did not sign the waiver of liability; the signature on

waiver of liability for acts of negligence. **Smith declaration, 5:4-5; waiver of liability, Ex. A to Smith declaration.**	the waiver is forged. **Jones declaration, 3:6-7.**

Comment: This format is specified by Cal Rules of Ct 3.1350(h) for separate statements in summary adjudication motions. Counsel must follow this format.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.28 b. Request Electronic Copy of Moving Party's Separate Statement

§7.28 b. Request Electronic Copy of Moving Party's Separate Statement

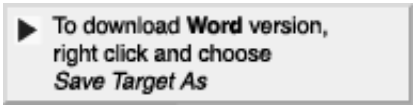
The opposing party should request an electronic copy of the moving party's separate statement immediately to avoid having to retype the information into the first column (see §7.27). See Cal Rules of Ct 3.1350(i) (on request, moving party must within **3 days** provide electronic version of its separate statement if one exists). On the moving party's responsibility to provide an electronic version of the separate statement on request, see §6.34.

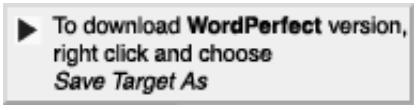
PRACTICE TIP: An electronic version is particularly useful when the moving party's separate statement is very long and includes many "undisputed" facts.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.29 4. Checklist: Separate Statement in Opposition

§7.29 4. Checklist: Separate Statement in Opposition





- 1. Have you requested the electronic version of the moving party's separate statement? See §7.28.
- 2. Have you identified the facts you dispute and those you do not dispute? See §7.25.
- 3. Have you referenced your affirmative evidence? See §7.25.
- 4. Have you complied with the two-column format? See §7.27.

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§7.30 C. Evidence in Opposition

To defeat a summary judgment motion, the opposing party must produce evidence showing at least one triable issue of material fact. See CCP §437c(b)(3). See also *Shepherd v Jones* (1982) 136 CA3d 1049, 1062, 186 CR 708 (opposing papers cannot merely assert that jury trial is opponent's right without any evidence on issues raised in motion). To defeat a summary adjudication motion, the opposing party must show that there is a triable issue of material fact as to the challenged causes of action, punitive damages claims, or defenses. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. If the opposing party fails to counter the moving party's affidavits or declarations, the moving party's evidence will be accepted as true. *Melorich Builders, Inc. v Superior Court* (1984) 160 CA3d 931, 935, 207 CR 47.

NOTE: There are instances in which the opposing party cannot reasonably be expected to produce controverting evidence, *e.g.,* when the moving party's state of mind is at issue. Under such circumstances, the court may deny summary judgment to allow the trier of fact to judge the moving party's credibility. CCP §437c(e). See §11.14.

Unlike the moving party's evidentiary submissions, which are strictly construed, evidence submitted in opposition to a summary judgment motion is given a liberal construction. *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 768, 107 CR2d 617; *Jos. Schlitz Brewing Co. v Downey Distrib.* (1980) 109 CA3d 908, 917, 167 CR 510. Despite this liberality, the same evidentiary standards apply to both the moving and opposing parties. *Aguilar,* 25 C4th at 851. For example, both opposing and supporting affidavits must be based on personal knowledge and admissible evidence; the declarant's statement "to the best of my knowledge" is insufficient. *Overland Plumbing, Inc. v Transamerica Ins. Co.* (1981) 119 CA3d 476, 484, 174 CR 1. See §§5.3, 5.18-5.22.

PRACTICE TIP: If the opposing party's evidence would show some factual assertion, legal theory, defense, or claim not yet pleaded, the party should seek leave to amend the pleadings before the hearing on the summary judgment motion. *Distefano v Forester* (2001) 85 CA4th 1249, 1264, 102 CR2d 813. On amending pleadings, see §§7.14-7.17.

On preparing evidence for submission with opposing papers, see chap 5.

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§7.31 1. Permissible Types of Evidence

The same types of evidence available to the moving party can also be used to oppose the motion. See §§6.37-6.45.

CAUTION: Just as with evidence used in support of the motion, the opposition's evidence must be properly authenticated or it may not be considered. *Callahan v Chatsworth Park, Inc.* (1962) 204 CA2d 597, 606, 22 CR 606. See §5.59.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.32 a. Affidavits and Declarations

§7.32 a. Affidavits and Declarations

The primary means by which the opposing party establishes that material facts are in dispute is by testimony in affidavits and declarations. Facts alleged in the opposition party's affidavits must be accepted as true. *Eagle Oil & Ref. Co. v Prentice* (1942) 19 C2d 553, 556, 122 P2d 264; *Singleton v United States Gypsum Co.* (2006) 140 CA4th 1547, 45 CR3d 597. See also *AARTS Prods., Inc. v Crocker Nat'l Bank* (1986) 179 CA3d 1061, 1065, 225 CR 203 (affidavits and declarations need not prove opposition's case; they suffice if they disclose existence of triable issue). On evidentiary rules for affidavits and declarations, see §§5.8-5.31.

CAUTION: If the court determines that any affidavits or declarations were filed in bad faith or solely for the purpose of delay, it must order the party presenting them to pay the other party's reasonable expenses incurred by their filing. CCP §437c(j). See §§5.17, 11.40.

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§7.33 b. Matters to Be Judicially Noticed

Judicial notice may be taken of the records in the court file and other matters that are enumerated in Evid C §§451-452. On how to request judicial notice, see §§5.53-5.57.

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§7.34 2. Impermissible Types of Evidence

Types of impermissible evidence are the same for the moving and opposing parties. See §6.46. For example, the opposing party cannot use its own pleadings to oppose the motion, even if they are verified, because admissible evidence rather than ultimate facts is required in a summary judgment motion. *Coyne v Krempels* (1950) 36 C2d 257, 262, 223 P2d 244. See also *Gatton v A.P. Green Servs.* (1998) 64 CA4th 688, 75 CR2d 523 (deposition from another case was inadmissible under Evid C §1292(a) in opposition to summary judgment motion). On permissible evidence, see §§5.3-5.6.

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Source: Civil Litigation/California Summary Judgment/7 Opposition Papers/§7.35 3. Format

§7.35 3. Format

The format for evidence in opposition to a summary judgment motion is subject to the same rules as for supporting evidence, *e.g.,* if evidence in opposition exceeds 25 pages, it must be in a separately bound volume and must include a table of contents. Cal Rules of Ct 3.1350(g). On evidence format rules, see §§6.48-6.50.

PRACTICE TIP: Attach excerpts or copies of controverting evidence to the separate statement to make it easier for the court to find it.

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§7.36 4. Checklist: Evidence in Opposition

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- 1. Is there a declaration to establish foundation for each item of documentary evidence including discovery responses and deposition transcripts? See §7.32.
- 2. Do the declarations that establish foundation for each item, establish that each document is the document that opposing party asserts it to be, and that it is either the original document or that the declaration satisfies the requirements of the secondary evidence rule? See §§5.60, 7.32.
- 3. Have all requests for judicial notice been prepared? See §7.33.
- 4. Have you complied with all format rules? See §7.35 and chap 5.

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§7.37 D. Objecting to Moving Party's Evidence

In determining whether the moving papers show that there is no triable issue as to any material fact, the court must necessarily first decide what admissible evidence it has before it. *Hollywood Screentest, Inc. v NBC Universal, Inc.* (2007) 151 CA4th 631, 642, 60 CR3d 279. See CCP §437c(c) (court must consider all evidence in papers, "except that to which objections have been made and sustained by the court"). Evidentiary objections are thus an important part of any opposition.

On evidentiary objections, see chap 9.

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§7.38 1. Objections May Be Made in Writing or Orally

Objections to the moving party's evidence may be made either by a written document filed with the opposition papers (see Cal Rules of Ct 3.1354, discussed in §§9.12-9.14) or orally at the hearing (see CCP §437c(b)(5), discussed in §9.15). Presenting written objections before the hearing is almost always preferable to making oral objections. See §9.11.

PRACTICE TIP: The opposing party may file written objections either in a separate document titled "Objections to Evidence" with supporting authorities, or in its memorandum. See Cal Rules of Ct 3.1352. Although a separate document is not required by CCP §437c, the opposing party's objections should be contained in a separate document because the judge may be more likely to rule in the party's favor if the objections are set out clearly and the judge has the time to consider them before the hearing. If oral objections must be made, prepare them before the hearing and read them into the record.

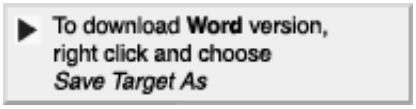
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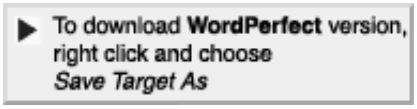
§7.39 2. Objections Not Made Are Waived

Evidentiary objections not made at the hearing are waived (CCP §437c(b)(5)), as are objections to declarations (and affidavits) or a declarant's personal knowledge or competence to testify (CCP §437c(d)). See §9.3. If a trial court fails to rule on evidentiary objections, then the objections are ordinarily deemed waived on appeal. See §9.4.

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§7.40 3. Checklist: Objecting to Moving Party's Evidence





- 1. Have you prepared objections to evidence, identifying the page and line number of the documents to which the objection is made and the specific ground for the objection? See §§7.38, 9.13.
- 2. If you have not prepared written objections to the evidence, have you made arrangements to have a court reporter for the hearing? See §§7.38, 9.15.

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E. Opposition Memorandum

§7.41 1. Contents

The opposition to a summary judgment motion must be supported by a memorandum. Cal Rules of Ct 3.1350(e)(1). The opposing party's memorandum should

- Specify the material fact(s) that are clearly in dispute, with references to evidence showing the controversy;
- Meet each argument raised in the moving party's memorandum;

PRACTICE TIP: Whenever possible, the opposing memorandum should mirror the moving party's memorandum so that the judge will not overlook specific opposing points and will more easily grasp why the motion should be denied.

- Include citations holding that the moving party has the burden of showing there is no triable issue of fact (see §4.3); and
- Distinguish or otherwise negate cases supporting the moving party's position.

PRACTICE TIP: The opposing party's memorandum will be more credible if it does not ignore cases that support the moving party's position. Instead, distinguish such cases and provide the court with a clear reason why they do not apply.

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§7.42 2. Format

The format requirements for the opposing memorandum are the same as for the supporting memorandum: it cannot exceed 20 pages, apart from exhibits, declarations, attachment, a table of contents, a table of authorities, or the proof of service. Cal Rules of Ct 3.1113(d). On format for memorandum, see §§6.60-6.63.

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§7.43 3. Checklist: Opposition Memorandum

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- 1. Have you specified the material fact(s) in dispute, with references to supporting evidence? See §7.41.
- 2. Have you countered each of the moving party's arguments? See §7.41.
- 3. Have you distinguished the moving party's authorities with well thought out reasons as to why they do not apply? See §7.41.
- 4. Is your memorandum no more than 20 pages? See §7.42.

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§7.44 F. Proposed Order Denying Motion

If a motion is denied, the court must specify one or more material facts on which a triable controversy exists and specifically refer to the evidence indicating that a triable controversy exists. CCP §437c(g). See §11.26. To help the court meet this requirement, the opposing party should include a proposed order specifying the issues still in dispute with appropriate page references to the controverting evidence. Counsel should attach excerpts or copies of the evidence to the opposing papers to facilitate the court's examination.

PRACTICE TIP: The opposing party's proposed order gives the court a road map to denying the motion.

On a proposed order denying the motion, see §§11.26-11.27. For sample proposed orders denying summary judgment and summary adjudication motions, see §§14.17, 14.20.

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§7.45 IV. SERVING AND FILING OPPOSITION

Any opposition to a motion for summary judgment must be served and filed at least **14 days** before the date of hearing unless for good cause the court orders otherwise. CCP §437c(b)(2). There is no extension of time for service by mail. CCP §437c(b)(6) (time extensions under CCP §§1005, 1013(a) are inapplicable). See §§3.30-3.31.

All opposition papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with CCP §§1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party(ies) no later than the close of the next business day after the opposing papers are filed. CCP §1005(c) (applying section to service of opposition papers on motions for summary judgment or adjudication).

CAUTION: The court may refuse to consider opposition papers served and filed after the deadline absent a court order finding good cause for the late submission. See *Hobson v Raychem Corp.* (1999) 73 CA4th 614, 623, 86 CR2d 497, disapproved in part on other grounds in *Colmenares v Braemar Country Club, Inc.* (2003) 29 C4th 1019, 1031, 130 CR2d 662. See §8.7.

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V. FILING CROSS-MOTION

§7.46 A. When Appropriate

When gathering evidence to oppose the motion, counsel should consider filing a cross-motion for summary judgment or summary adjudication against the moving party. A cross-motion may be appropriate when, *e.g.,* the facts are undisputed and liability turns on the application of statutory or contract language. On strategic considerations for bringing a motion for summary judgment or summary adjudication, see §1.4.

The failure to file a cross-motion for summary judgment results in the court's inability to grant the opposing party summary judgment, even if the court determines, after review of the evidence, that the opposing party is entitled to summary judgment as a matter of law. See, *e.g., Peerless Lighting Corp. v American Motorists Ins. Co.* (2000) 82 CA4th 995, 1017 n14, 98 CR2d 753 (after reversing summary judgment in favor of insured, court of appeal noted that, because insurer failed to file cross-motion for summary judgment on issue of duty to defend as it should have, it lacked power to direct trial court to grant nonexistent motion); *Sierra Craft, Inc. v Magnum Enters., Inc.* (1998) 64 CA4th 1252, 75 CR2d 681 (court of appeal invalidated local rule that permitted court to render judgment in favor of opposing party even though opposing party made no cross-motion; all procedural requirements for granting summary judgment motion must be satisfied before court grants remedy).

PRACTICE TIP: Carefully consider whether the opposing party may be entitled to affirmative relief and include a cross-motion along with the opposition papers when appropriate. If you decide to file a cross-motion for summary judgment or adjudication in response to the moving party, be aware that the timing and notice requirements for that cross motion are the same as those for the original motion. See §7.47.

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§7.47 B. Timing and Other Requirements

An opposing party's cross-motion is governed by the same timing, procedures, and substantive requirements as the moving party's motion. See chap 6. On timing for moving papers, see §§6.3, 3.13-3.29.

PRACTICE TIP: It is efficient for both the court and counsel to hear and argue any cross-motion at the same hearing as the original motion. If there are fewer than the requisite **75 days** before the hearing on the original summary judgment motion (see CCP 437c(a); §3.16), the opposing party should move to continue the original date to accommodate the notice period required for the cross-motion or apply ex parte for an order shortening time before the cross-motion is heard. On obtaining a continuance of the hearing date, see §§3.34-3.46; on applying for an ex parte order shortening time, see §3.23-3.27.

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§7.48 C. Checklist: Cross-Motions

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- 1. Are the facts undisputed and does liability turn on the interpretation of statutory language? See §7.46.
- 2. Have you complied with all applicable time and notice requirements? Have you moved to continue the hearing, so that the cross-motion may be heard at the same time? See §§3.34-3.46, 7.47.
- 3. Have you complied with all procedural and substantive requirements related to moving papers? See chap 6; §7.47.

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§7.49 VI. DIAGNOSTIC QUESTIONS: OPPOSING PARTY'S TACTICAL CONSIDERATIONS

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Answers to the following questions may assist counsel for the party opposing a motion for summary judgment or summary adjudication:

- 1. Is there is at least one triable issue of material fact? See §7.1.
- 2. Can this be shown in the required separate statement of disputed and undisputed facts? See §§7.23-7.29.
- 3. Do your opposition papers contain only admissible evidence? See §§5.3, 7.30-7.34.
- 4. Are your declarations made in good faith? See §§5.17, 7.32
- 5. Are there objections to the moving party's evidence? See §§7.37-7.40; chap 9.
- 6. Are there points and authorities that will effectively counter the moving party's memorandum? See §§7.41-7.43.
- 7. Would it be useful to attach a proposed order to your opposition papers? See §7.44; chap 11.
- 8. Does the proposed order list each material triable issue of fact and specifically refer to the evidence that establishes the triable issue of fact? See §7.44; chap 11.
- 9. When must your opposition be timely filed and served? See §7.45.
- 10. Would a cross-motion for summary judgment be advisable? If so, should you move for continuance of hearing date or for order shortening time within which to serve cross-motion (**75 days'** notice required)? See §§7.46-7.48.

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8

Reply Papers

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§8.1 I. STRATEGY FOR REPLY PAPERS

The purpose of the reply brief is to give the moving party the opportunity to respond to arguments raised by the opposition. The opposition may have misconstrued legal authority, relied on inadmissible evidence, emphasized immaterial facts, or failed to follow the correct procedure. The reply is the moving party's chance to bring these to the court's attention and correct any misimpression. Ideally, the reply is not the time to introduce new evidence, although courts have been known to consider such evidence as long as the opposing party's due process rights are protected. See §8.21.

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II. INITIAL TASKS

A. Review Timing

§8.2 1. Must Be Filed at Least 5 Days Before Hearing

Papers in reply to the opposition to a motion for summary judgment or summary adjudication must be served and filed at least **5 days** before the date set for the hearing, unless the court orders otherwise for good cause. CCP §437c(b)(4). See §3.32.

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Source: Civil Litigation/California Summary Judgment/8 Reply Papers/§8.3 2. Must Be Served by Method That Ensures Next-Day Delivery

§8.3 2. Must Be Served by Method That Ensures Next-Day Delivery

Reply papers must be served by personal delivery, fax, express mail, or other means consistent with CCP §§1010-1013, and reasonably calculated to ensure delivery to the other party or parties no later than the close of the next business day after the reply papers are filed with the court. CCP §1005(c).

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§8.4 3. Time to Reply Not Extended by Manner of Service of Opposition

Provisions of CCP §§1005 and 1013, extending the time within which a right may be exercised or an act may be done, do not apply to extend the time for serving and filing the reply papers. CCP §437c(b)(6).

On time periods applicable to service of the moving papers, see CCP §437c(a). See also §§6.71-6.73.

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§8.5 B. Request Electronic Version of Opposing Party's Separate Statement

To lessen the word processing burden, the moving party may request a copy of the electronic version of the opposing party's separate statement. If the parties agree on the form of the electronic version, the opposing party must provide it to the moving party within **3 days**. Cal Rules of Ct 3.1350(i). The moving party should calendar the request at least **4 days** before the reply is due.

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C. Review Opposition Papers for Possible Challenges

§8.6 1. Procedural Challenges

The moving party may challenge procedural deficiencies by the opposition. The court will not grant summary judgment based on a procedural error by the opposing party unless it first determines that the moving party has met its initial burden of proof. *Thatcher v Lucky Stores, Inc.* (2000) 79 CA4th 1081, 1084, 94 CR2d 575. Even if the motion is entirely unopposed, summary judgment and summary adjudication motions can be denied for failure of the moving party to carry the initial burden. *Certain Underwriters at Lloyds of London v Superior Court* (1997) 56 CA4th 952, 65 CR2d 821 (defendant's failure to submit evidence of plaintiff's inability to establish coverage). On the moving party's initial burden, see §§4.25, 4.30.

NOTE: Because of this high hurdle, it is risky for the moving party to rely merely on procedural errors by the opposition in its reply.

PRACTICE TIP: Keep in mind, however, that granting a motion for summary judgment based on procedural error by the opposing party is equivalent to a sanction terminating the action in favor of the other party. *Security Pac. Nat'l Bank v Bradley* (1992) 4 CA4th 89, 97, 5 CR2d 220.

EXAMPLE: The trial court erred in granting defendant insurer's summary judgment motion based on an inadequate statement of undisputed facts submitted by plaintiff homeowners association. Plaintiff's separate statement was not completely deficient, in that it did indicate which facts were disputed and included at least general references to the evidence supporting its position; thus, it was a curable defect. *Parkview Villas Ass'n v State Farm Fire & Cas. Co.* (2005) 133 CA4th 1197, 1214, 35 CR3d 411.

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§8.7 2. Untimely Opposition

The reply may challenge the opposition as untimely if it was not filed at least **14 days** before the hearing date, absent a court order granted for good cause (see §§3.30, 7.45). CCP §437c(b)(2). As noted in §8.6, however, courts may be reluctant to grant summary judgment based only on procedural defects by the opposition.

EXAMPLE: It was an abuse of discretion for the trial court to grant summary judgment against a party that filed its response one day late in favor of a moving party whose motion failed to address a material fact in dispute and thus did not state a prima facie case for summary judgment or shift the burden to the opposition to file an opposing separate statement. *Teselle v McLoughlin* (2009) 173 CA4th 156, 92 CR3d 696.

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§8.8 a. Inadequate Opposition Separate Statement

If the opposing party does not file a separate statement of undisputed material facts, or if the statement is inadequate, the trial court has discretion to grant the summary judgment motion. CCP §437c(b)(3). The court may not do so, however, without first determining that the moving party met its initial burden. *Thatcher v Lucky Stores, Inc.* (2000) 79 CA4th 1081, 1084, 94 CR2d 575. On the purpose and importance of the separate statement, see §6.22; on the moving party's initial burden, see §§4.24-4.33.

EXAMPLE 1: After borrower made a prima facie case for summary judgment in its moving papers, and creditor failed to file the separate statement of facts in opposition, the trial court appropriately granted summary judgment. It would not have been proper, however, to grant summary judgment based on a failure to file a separate statement if the moving party had not set forth a prima facie case for summary judgment in its moving papers. *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 415, 94 CR3d 288.

EXAMPLE 2: In an action for liability on a payment bond, plaintiff moved for summary judgment. The opposition's separate statement of disputed material facts listed only four of plaintiff's 30-plus proposed undisputed material facts and proposed no additional material facts. The trial court properly granted the motion. The substantive defects of the opposition's insufficient responsive separate statement were not a curable procedural defect; rather, the trial court properly concluded that the opposition failed to dispute any element of plaintiff's case and failed to carry the burden regarding an affirmative defense. *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 576, 88 CR3d 363.

EXAMPLE 3: The trial court properly granted landlords' summary adjudication motion after tenants failed to file an opposition separate statement of facts. The document that the tenants claimed was their separate statement failed because it contained no citations to evidence. The tenants took the time to file a sur-reply to the reply brief and could have used that opportunity to remedy their deficiency, but did not do so. *Whitehead v Habig* (2008) 163 CA4th 896, 903, 77 CR3d 679.

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§8.9 b. Failure to Submit Written Objections in Proper Format

The reply papers may challenge the opposing party's failure to submit written objections in the format required by Cal Rules of Ct 3.1354 (unless the opposing party is making arrangements for a court reporter to be present at the hearing in accordance with Cal Rules of Ct 3.1352). For format requirements, see Cal Rules of Ct 3.1354(b), discussed in §9.13.

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3. Evidentiary Challenges: Opposing Party's Evidence Is Inadmissible

§8.10 a. Object to Inadmissible Evidence

The moving party may object to any evidence in the opposition's supporting papers to the extent that it lacks sufficient foundation, is irrelevant, incompetent, hearsay, or is otherwise inadmissible. See *Schaefer v Manufacturers Bank* (1980) 104 CA3d 70, 76, 163 CR 402.

EXAMPLE 1: In a products liability action, defendants moved for summary judgment, submitting declarations that they did not manufacture or distribute the motorcycle stand at issue. In opposition, plaintiff's attorney submitted a declaration stating that she had spoken to another manufacturer, who gave her an identical motorcycle stand with instructions indicating that defendants were the manufacturer and designer. The trial court properly sustained defendants' hearsay objections and granted summary judgment. Defendants met their threshold burden as the moving party, and plaintiff's opposition did not contain sufficient admissible evidence to raise a triable issue of material fact as to whether defendants manufactured or distributed the stand. *DiCola v White Bros. Performance Prods., Inc.* (2008) 158 CA4th 666, 69 CR3d 888.

EXAMPLE 2: In an employment action alleging fraud, negligent misrepresentation, and discrimination, plaintiff's opposition to defendant's summary judgment motion relied primarily on his own declaration. The declaration, which was made outside California, failed to reference CCP §2015.5 as required. The trial court properly excluded the declaration because of its material deviation from the requirements for a declaration. *Kulshrestha v First Union Commercial Corp.* (2004) 33 C4th 601, 15 CR3d 793.

PRACTICE TIP: Do not object to every item of evidence; rather, focus on those that are legitimately disputed and relevant to determining the motion. See *Demps v San Francisco Hous. Auth.* (2007) 149 CA4th 564, 578 n6, 57 CR3d 204 (noting that too often "litigants file blunderbuss objections to virtually every item of evidence submitted," and that this "is hardly good advocacy, and it unnecessarily overburdens the trial court"). See §9.7.

EXAMPLE 3: In an employment discrimination case, defendant moved for summary judgment and plaintiff opposed. Defendant's 297-page reply separate statement included 764 objections to plaintiff's evidence and was accompanied by 153 pages of "Exhibits and Evidence in Support of Reply." The trial court overruled plaintiff's 47 objections, while sustaining 763 of defendant's objections. The court of appeal reversed, holding that the trial court's blanket ruling was error. It also faulted the moving party for filing "inappropriate" papers of "excessive volume." *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 253, 100 CR3d 296.

On evidentiary objections and strategy, see chap 9.

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§8.11 b. Evidentiary Objections Waived if Not Made at Hearing

Evidentiary objections that are not made at the hearing are waived (CCP §437c(b)(5)), as are objections to a declarant's (or affiant's) competence to testify to the matters stated in a declaration (or affidavit) or by personal knowledge (CCP §437c(d)). See §9.3. Because the court will decide the motion based on the evidence submitted by the parties (see CCP §437c(c)), it is important that the moving party serve and file written objections to any inadmissible evidence offered in support of the opposition, or carefully prepare objections to be stated on the record at the hearing.

EXAMPLE: In a sexual harassment action in which defendants were granted summary judgment, the appellate court noted that it need not disregard evidence of defendants' gender-related epithets, which plaintiff included in a declaration accompanying her opposition to defendants' summary judgment motion, because defendants did not show that they ever objected to the evidence in the trial court. *Lyle v Warner Bros. Television Prods.* (2006) 38 C4th 264, 277 n3, 42 CR3d 2.

On the importance of attacking the opposing party's evidence, see §9.1.

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Source: Civil Litigation/California Summary Judgment/8 Reply Papers/ 4. Substantive Challenges/§8.12 a. Opposition Did Not Meet Its Burden

4. Substantive Challenges

§8.12 a. Opposition Did Not Meet Its Burden

In reply, the moving party may seek to persuade the court that the opposition has failed to raise any triable issues of material fact on the elements necessary for judgment in its favor. On the parties' burdens, see chap 4. The moving party may argue, for example:

- The opposing party cannot establish an essential element of the case. If the moving party is the party without the burden of proof at trial, it may argue that the opposition cannot establish one or more elements of its case.

EXAMPLE 1: Plaintiff retailer sued defendants for negligence, alleging that defendants caused a flood that cost plaintiff lost profits by preventing it from launching an Internet sales website. Defendants moved for summary judgment, offering affirmative evidence that plaintiffs could not establish the damage element of their claim, thus shifting the burden to plaintiffs to present evidence raising a triable issue of fact as to their ability to show damage. In opposition, plaintiffs showed evidence of their state-of-the-art website and of other Internet retailers' profits. This evidence, although seemingly substantial on the surface, was insufficient to raise a triable issue as to lost profits, because it would not permit a reasonable trier of fact to find with reasonable certainty the amount of lost net profits from the unlaunched website by a preponderance of the evidence. Thus, the trial court properly granted defendants summary judgment. *Kids' Universe v In2Labs* (2002) 95 CA4th 870, 116 CR2d 158.

- The opposing party is attempting to create a triable issue of fact by presenting evidence that contradicts earlier discovery. A party cannot create an issue of fact by a declaration that contradicts the party's earlier discovery responses. See *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 112 CR 786.

EXAMPLE 2: Plaintiff sued the police department for failing to adequately protect her after she was attacked three times by her boyfriend. In her deposition, plaintiff said that she had not told officers when they arrived at her home that she wanted to leave. Defendant moved for summary judgment, contending that no special relationship was established between plaintiff and police officers, and thus there was no duty to protect. In opposition, plaintiff submitted a declaration stating that she did tell the officers that she wanted to be taken to a shelter. The trial court properly disregarded the contradictory statements in plaintiff's declaration and thus found that those statements failed to raise a triable issue of fact. "In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party." *Benavidez v San Jose Police Dep't* (1999) 71 CA4th 853, 860, 84 CR2d 157.

NOTE: Declarations that contradict earlier discovery responses will be considered in light of the entire record of the case. *Price v Wells Fargo Bank* (1989) 213 CA3d 465, 482, 261 CR 735 ("summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence"). See also *Niederer v Ferreira* (1987) 189 CA3d 1485, 234 CR 779. See §11.8.

- The opposing party contends in its statement of facts that certain material facts are disputed and this contention is not supported by admissible evidence.
- Only one reasonable inference can be drawn from the evidence, and summary judgment is proper. See *Angelus Chevrolet v State* (1981) 115 CA3d 995, 1004, 171 CR 801.

EXAMPLE 3: An invitee who was bitten by a dog sued the landlord for permitting the tenants to own a vicious dog. The landlord moved for summary judgment, contending that he had no actual knowledge of the dog's vicious tendencies and thus owed plaintiff no duty of care. In opposition, plaintiff presented evidence that the landlord had seen the dog running at another dog, barking, and jumping at the door. The trial court properly granted defendant's motion. The landlord's contention that he did not have actual knowledge of the dog's vicious tendencies shifted the burden of producing evidence to plaintiff; plaintiff's evidence, which showed that the

landlord had observed normal canine behavior, was insufficient to show that he knew the dog would attack. *Yuzon v Collins* (2004) 116 CA4th 149, 162, 10 CR3d 18.

- The conflicts in the evidence involve only nonmaterial facts, and the material facts are not in dispute. See, *e.g., Armato v Baden* (1999) 71 CA4th 885, 893, 84 CR2d 294; *Frazier, Dame, Doherty, Parrish & Hanawalt v Boccardo, Blum, Lull, Niland, Teerlink & Bell* (1977) 70 CA3d 331, 338, 138 CR 670.

For discussion of the parties' burdens, see chap 4.

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Source: Civil Litigation/California Summary Judgment/8 Reply Papers/§8.13 b. Opposition Applied Incorrect Law

§8.13 b. Opposition Applied Incorrect Law

The moving party may argue that the opposing party made inaccurate or unsupported legal points, or that the opposition applied incorrect law.

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Source: Civil Litigation/California Summary Judgment/8 Reply Papers/§8.14 D. Checklist: Initial Tasks

§8.14 D. Checklist: Initial Tasks

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- 1. Review timing: Has the reply been calendared for **5 days** before the hearing? See §8.2.
- 2. Request opposing party's electronic version of separate statement. See §8.5.
- 3. Review papers for possible procedural challenges (see §§8.6-8.9)
- A. Were the opposing papers timely filed **14 days** before the hearing and served in a manner calculated to provide service on the next business day?
- B. Did opposing party submit a separate statement in the proper format?
- C. Have you asked the court to grant your motion because the opposing party failed to filed a separate statement?
- 4. Review papers for possible evidentiary challenges (see §§8.10-8.11)
- A. Are opposing party's declarations and affidavits based on personal knowledge?
- B. Do opposing party's declarations establish that the evidence is what it is represented to be?
- C. Do opposing party's declarations and affidavits contain argumentative assertions of fact, assert legal conclusions, or refer to previous discovery controversies?
- D. Have you moved to strike any such improper matter?
- 5. Review papers for possible substantive challenges (see §§8.12-8.13)
- A. Did the opposing party meet its burden of production?
- B. Did the opposing party respond to the important legal authorities?
- C. Are the opposing party's legal authorities accurate?

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§8.15 III. DOCUMENTS TO BE FILED

The moving party is not required to file any documents with a reply memorandum. See Cal Rules Ct 3.1350. It is usually wise to respond to the opposing party's arguments in a reply memorandum, to its evidence through objections to evidence, and to its objections to evidence through a separate written response.

CAUTION: Generally, additional affirmative evidence is not submitted at this time; all of the moving party's evidence should have been submitted with the moving papers. In some instances, however, the moving party may wish to submit new evidence in reply, in the form of supplemental declarations or affidavits. The court has discretion to consider such new evidence, as long as the opposing party has notice and the opportunity to respond. See §8.21.

The format of the documents submitted in reply is similar to the format of the documents submitted earlier by the parties. The documents that may be filed with the reply are

- Reply memorandum (see §§8.16-8.17);
- Objections to evidence (see §8.19);
- Response to objections to evidence (see §8.20);
- Reply evidence (but see cautionary note above and §8.21); and
- Proposed order (see §8.22).

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IV. PREPARING REPLY PAPERS

A. Reply Memorandum

§8.16 1. Format

The format of the reply memorandum is the same as for moving papers, except that it must not exceed 10 pages. Cal Rules of Ct 3.1113(d). Other format requirements for the memorandum are stated in Cal Rules of Ct 3.1113. On format requirements, see §§6.60-6.64.

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§8.17 2. Scope of Reply

The reply should be limited to rebuttal arguments to the opposing party's papers. These arguments include the procedural, evidentiary, or substantive issues discussed in §§8.6-8.13. Generally, the reply should not include new evidence. See §8.21.

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§8.18 B. No Reply Separate Statement

There is no provision in CCP §437c for a supplemental separate statement in the reply. *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 252, 100 CR3d 296; *San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 313, 125 CR2d 499. Generally, the moving party may not rely on new evidence submitted with its reply. The court has discretion to consider new evidence submitted in the reply papers as long as the opposing party has notice and an opportunity to respond to prevent violation of the opposing party's due process rights. *San Diego Watercrafts, Inc.*, 102 CA4th at 316. See §8.21.

If the opposing party fails to object to the submission of new evidence in the reply, then the objection is waived and the court may consider the newly submitted evidence when ruling on the motion. See §8.21 and discussion in Example 3 of *Gafcon, Inc. v Ponsor & Assocs.* (2002) 98 CA4th 1388, 1426, 120 CR2d 392.

PRACTICE TIP: Sometimes after receipt of the opposing papers, counsel for the moving party comes to understand that additional evidence should be submitted to prevail on the motion. If this occurs, then counsel should immediately attempt to secure a stipulation from the opposing party for the submission of new evidence. When that request is rebuffed, then moving counsel should immediately move the court for permission to amend its original separate statement and to give the opposing party an opportunity to review and respond to the new evidence, including continuing the hearing, if necessary, so that the court can consider the newly submitted evidence.

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§8.19 C. Objections to Evidence

The format of objections to evidence submitted in a reply is the same as that of the opposing papers. On the required format for objections, see §9.13. On objections to evidence generally, see chap 9. On opposing party's objections to evidence, see §§7.37-7.40.

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Source: Civil Litigation/California Summary Judgment/8 Reply Papers/§8.20 D. Response to Objections to Evidence

§8.20 D. Response to Objections to Evidence

If the opposing party has objected to evidence, the moving party should prepare a memorandum supporting its position. On objecting to opposing evidence, see §§9.16-9.26. On methods of objecting, see §§9.11-9.15.

If objections are lengthy, consider whether to file a document entitled Objections and Motion to Strike Evidence Introduced in Opposition to Motion, including

- The page and line number of the document to which the objection is made; and
- The specific grounds for the objection. Cal Rules of Ct 3.1354.

PRACTICE TIP: It is also a good idea to number the evidentiary objections to make it easier for the court to set forth its rulings. See §9.13 for advice on how to mark evidence to aid the court in understanding the effect of the various objections.

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§8.21 E. Affirmative Evidence

The reply should not generally include any new evidence. Code of Civil Procedure §437c does not explicitly provide for submitting additional evidence or a supplemental separate statement with the reply papers. *San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 312, 125 CR2d 499. Nevertheless, the court has discretion to consider evidence not mentioned in a party's separate statement and to permit amendments to the party's submissions, provided the opponent is afforded its due process right to an adequate opportunity to address the evidence or amendments. *San Diego Watercrafts, Inc. v Wells Fargo Bank, N.A., supra.* Thus, the trial court may properly consider new evidence submitted with a reply brief as long as the opposing party has notice and an opportunity to respond. *Plenger v Alza Corp.* (1992) 11 CA4th 349, 362 n8, 13 CR2d 811.

EXAMPLE 1: In a suit by buyers of a business against the seller alleging violation of a noncompete agreement, the trial court considered a supplemental declaration submitted with the moving party's reply papers indicating that the seller solicited business in violation of the agreement. Because the court permitted the seller to testify at the hearing, it did not abuse its discretion in accepting the new evidence. *Alliant Ins. Servs., Inc. v Gaddy* (2008) 159 CA4th 1292, 1307, 72 CR3d 259. Note that *Alliant* is an injunction case, but the due process issue is similar to that in summary judgment motions.

EXAMPLE 2: In a products liability action, the trial court properly granted defendant's summary judgment motion despite an error in its moving papers, in which defendant designated the machine in question by the wrong model number. The court had discretion to permit amendments to defendant's submissions, and the court accorded the parties ample opportunity to address the new evidence. *Jones v P.S. Dev. Co.* (2008) 166 CA4th 707, 722 n7, 82 CR3d 882.

EXAMPLE 3: In a suit against an insurance company alleging, *e.g.,* that it derived illegal profit from use of in-house counsel, the insurer moved for summary judgment. In its moving papers, the insurer asserted it had complied with its legal obligations, identifying a declaration by a law firm partner indicating that it did not split fees with the insurer. In its reply, the moving party submitted an additional declaration by its own deputy general counsel, stating that it made no profit from its staff counsel. The court of appeal concluded that, in view of plaintiff's failure to challenge this additional evidence before either the trial court or the appellate court, the trial court properly considered the evidence as part of the record before it when it granted summary judgment. *Gafcon, Inc. v Ponsor & Assocs.* (2002) 98 CA4th 1388, 1426, 120 CR2d 392.

If it is necessary to submit evidence in support of the motion with the reply brief, counsel should expect the court to deny or to continue the hearing of the motion. See *Weiss v Chevron, U.S.A., Inc.* (1988) 204 CA3d 1094, 1099, 251 CR 727.

PRACTICE TIP: Because the court may strike evidence offered for the first time on reply when it violates the opposing party's right to due process of law, the moving party might choose to request that the court direct parties to prepare revised separate statements and revised or supplemental briefings, and continue the matter for further argument. See, *e.g., State ex rel Harris v PricewaterhouseCoopers LLP* (2005) 125 CA4th 1219, 1263 n28, 23 CR3d 529, rev'd on other grounds (2006) 39 C4th 1220, 48 CR3d 144 (court had discretion to review late-submitted papers and evidence if it took steps to protect opposing parties' due process rights).

The moving party should be cautious in filing reply affidavits and declarations. If filed, these documents should not create disputes about immaterial facts cited by the opposition that might demonstrate to the court that there is indeed need for trial. Reply evidence should be presented when it is apparent that it is uncontroversial and would be difficult to refute, tending to prove that there is no dispute on a triable issue of material fact or when it is directed to procedural defects in the opposition papers (*e.g.,* sufficiency of separate statement).

On preparing admissible evidence, see chap 5.

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Source: Civil Litigation/California Summary Judgment/8 Reply Papers/§8.22 F. Proposed Order

§8.22 F. Proposed Order

It is advisable to file a proposed order with the reply papers. This can get the order signed faster, because otherwise the proposed order has to be served on the opposing party and that party has **5 days** to object as to form. See Cal Rules of Ct 3.1312(a).

PRACTICE TIP: Be careful that the matters listed in a proposed order are identical to those listed in the notice of motion and in the separate statement. The court will review the technical elements of the motion first, and move from the notice to the separate statements before considering the evidence and the memorandum. A well-drafted proposed order may serve as a road map for the court.

For discussion of the format and contents of the proposed order, see §§6.60, 11.19-11.40. For sample orders, see §§14.14-14.15.

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Source: Civil Litigation/California Summary Judgment/8 Reply Papers/§8.23 G. Checklist: Preparing Reply Papers

§8.23 G. Checklist: Preparing Reply Papers

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- 1. Reply memorandum (see §§8.16-8.17)
- A. Is the reply memorandum no more than 10 pages?
- B. Is the reply memorandum limited to rebuttal of the opposing party's arguments?
- 2. No separate statement (see §8.18)
- 3. Objections to evidence (§8.19)
- A. Have you prepared written objections to evidence [and a motion to strike] identifying the page and line number of the documents to which the objection is made and the specific ground for the objection?
- B. If you have not prepared written objections to the evidence, have you made arrangements to have a court reporter for the hearing ?
- 4. Response to objections to evidence (§8.20)
- A. Have you prepared a written response to opposing party's objections to evidence?
- 5. Affirmative evidence (§8.21)
- A. Are you submitting new evidence with your reply?
- B. Is there a proper foundation for the new evidence?

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V. CHALLENGING REQUEST FOR CONTINUANCE TO OBTAIN EVIDENCE

§8.24 A. How to Challenge

The opposing party may request a continuance to obtain evidence. The request must be made by ex parte motion on or before the date the response is due, and should be supported by affidavits showing that "facts essential to justify opposition may exist but cannot, for reasons stated, then be presented." CCP §437c(h). On the requirements for requesting a continuance, see §3.34.

In challenging a continuance request, the moving party may argue that the opposing party failed to

- File a declaration stating the reasons the opposing party cannot present opposing evidence at the hearing;
- Establish that the evidence is essential to opposing the motion;
- Establish that there is reason to believe the evidence exists; or
- Explain why additional time is needed.

See, *e.g., Knapp v Doherty* (2004) 123 CA4th 76, 101, 20 CR3d 1.

EXAMPLE 1: In a medical malpractice suit in which defendant moved for summary judgment, the opposition submitted a supporting affidavit by plaintiff's counsel stating that her expert needed to review the discovery before preparing his declaration, but this assertion was not substantiated by the expert's declaration. The trial court appropriately denied the continuance; the opposition's affidavits did not explain why the discovery sought could not have been initiated sooner, and, in fact, counsel acknowledged that he intentionally delayed discovery for tactical reasons. *Cooksey v Alexakis* (2004) 123 CA4th 246, 255, 19 CR3d 810.

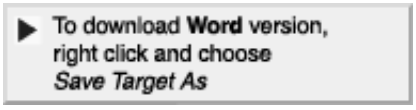
EXAMPLE 2: In an action for overtime compensation, the trial court properly denied the employee a continuance; his counsel's supporting declaration did not explain why the information in the requested documents was essential to opposing summary judgment or why additional time was needed. *Combs v Skyriver Communications, Inc.* (2008) 159 CA4th 1242, 1270, 72 CR3d 171.

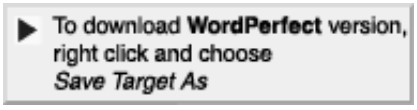
EXAMPLE 3: The trial court properly denied a continuance to submit a revised separate statement of disputed material facts to a party whose separate statement listed only four of the moving party's 30-plus proposed undisputed material facts and proposed no additional material facts. The opposition did not submit an affidavit showing that a continuance was needed to obtain facts essential to justify opposition to the motion. The substantive defects of the opposition's insufficient responsive separate statement were such that the trial court properly concluded that a continuance was not warranted. *Oldcastle Precast, Inc. v Lumbermens Mut. Cas. Co.* (2009) 170 CA4th 554, 576, 88 CR3d 363.

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Source: Civil Litigation/California Summary Judgment/8 Reply Papers/§8.25 B. Checklist: Challenge Request for Continuance

§8.25 B. Checklist: Challenge Request for Continuance





- 1. Did the opposing party file a declaration stating the reason that opposing evidence cannot be presented at the hearing?
- 2. Did the opposing party provide an estimate of the time required and steps proposed to obtain the evidence?
- 3. Did the opposing party meet its burden of production?
- 4. Did the opposing party respond to the important legal authorities?
- 5. Are the opposing party's legal authorities accurate?

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VI. DETERMINING WHETHER GROUNDS FOR SANCTIONS EXIST

§8.26 A. Bad Faith

Courts do not often award sanctions under CCP §437c(j), because bad faith or intentional delay is difficult to prove, particularly in the summary judgment context. If the moving party believes, however, that the opposition's affidavits or declarations were made in bad faith or solely for the purpose of delay, it may seek sanctions under §437c(j). The moving party should apply to the court for an order on noticed motion with an opportunity for the other party to be heard, requesting that the opposing party pay the reasonable expenses incurred by the moving party because of the opposing party's filing of the affidavits or declarations. See CCP §437c(j); *Collins v Department of Transp.* (2003) 114 CA4th 859, 864, 8 CR3d 132 (reasonable expenses allowed as sanctions under former CCP §437c(i) (now CCP §437c(j)) do not include attorney fees).

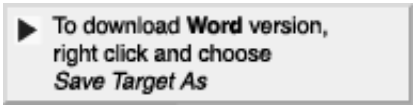
EXAMPLE: After an opposing party alleges under CCP §437c(h) that essential evidence may exist but cannot be presented at the hearing, the moving party could include declarations attached to the reply papers showing that time was ample to gather such evidence, but the opposing party was dilatory. See *Hoffman v Sports Car Club of Am.* (1986) 180 CA3d 119, 127, 225 CR 359. An itemization of the reasonable costs incurred by the moving party in preparing the declaration and other documents challenging the opposing party's position should be included in the declaration.

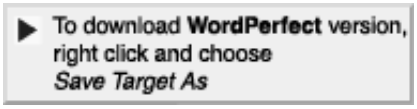
On how to bring the motion for sanctions for affidavits or declarations brought in bad faith before the court, see discussion at §11.40.

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Source: Civil Litigation/California Summary Judgment/8 Reply Papers/§8.27 B. Checklist: Determining Whether Grounds for Sanctions Exist

§8.27 B. Checklist: Determining Whether Grounds for Sanctions Exist





- 1. Is the opposing party's evidence perjured?
- 2. Is the motion based on erroneous evidence, which was corrected by the moving party?
- 3. Do the reply papers provide notice that bad faith sanctions are sought?

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9

Objections to Evidence

Stephen G. Blitch

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I. STRATEGIC CONSIDERATIONS

§9.1 A. Importance of Attacking Evidence

When deciding a motion for summary judgment, a court determines whether a triable issue of material fact exists from the evidence set out in the parties' papers, "except that to which objections have been made and sustained by the court." CCP §437c(c). "Evidentiary objections are an integral part of the summary judgment process." *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 782, 97 CR2d 140. The summary judgment statute presupposes that objections will be made to evidence submitted in support of or in opposition to the motion. If objections are not made at the hearing, they are waived. CCP §437c(b)(5). See §9.3.

PRACTICE TIP: Because objections go to the heart of the evidence on which the summary judgment motion will be decided, it is crucial that the attorney assigned to draft the objections understand the rules of evidence and their application to the various evidentiary submissions made by the opposing party. See *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 256 n6, 100 CR3d 296 (dicta suggesting that experienced attorneys should handle evidentiary objections).

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§9.2 1. Produce Evidence to Support or Defeat Motion

To prevail at the hearing, the moving party must produce evidence to show the nonexistence of any triable issue of material fact. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854, 107 CR2d 841. The opposing party must then produce evidence showing at least one triable issue of material fact to defeat a motion for summary judgment. See CCP §437c(b)(3). On developing and proffering evidence, see chap 5.

If the opposing party does not counter the moving party's affidavits or declarations, the moving party's evidence will be accepted as true. See *Melorich Builders, Inc. v Superior Court* (1984) 160 CA3d 931, 934, 207 CR 47. If, however, the moving party does not submit evidence to meet its burden of production, then the burden does not shift to the opposing party and the motion must be denied despite a lack of opposing declarations. *Garibay v Hemmat* (2008) 161 CA4th 735, 743, 74 CR3d 715. On burdens, see chap 4.

PRACTICE TIP: Many judges reviewing the materials filed in support of motions for summary judgment (as well as their research attorneys and law clerks) say that the first document they read is the Separate Statement of Undisputed Facts. Each material fact set forth in the separate statement must be supported by evidence. CCP §437c(b)(1). See §6.28. Opposing parties who examine the Separate Statement first will be rewarded with an early look at any defects in the evidentiary showing the moving party has tried to make. These potential defects in the evidence include evidence that is objectionable under any applicable section of the California Evidence Code, including provisions on hearsay, relevance, foundational objections, and privilege.

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§9.3 2. Raise Objections or Waive Them

Objections on every available ground must be made or waived, just as at trial. Very few judges will initiate objections, just as at trial. Evidentiary objections that are not made at the hearing are waived (CCP §437c(b)(5)), as are objections to declarations (and affidavits) or a declarant's personal knowledge or competence to testify (CCP §437c(d)).

WARNING: Failure to object will be taken as agreement that the evidence is relevant and admissible, meaning that counsel admits, on behalf of his or her client(s), that the opposing party has made a truthful and evidentiary showing as to the fact(s) in question.

PRACTICE TIP: In opposing a motion for summary judgment, keep in mind that most judges are well aware of the substantial risk of reversal of a summary judgment on appeal. Three appellate justices will be starting over, in a de novo review, if the motion is granted and the losing party appeals under CCP §437c(m)(1). Appellate intervention is far less likely when the motion is denied because the denial may be challenged only by a peremptory writ under CCP §437c(m)(1). A well-placed evidentiary objection may be just what a trial judge is looking for to justify denial of summary judgment. If available, such an objection should be a central element of the opposition.

On how to object, see §§9.11-9.15. On possible objections to consider when reviewing the opposing party's evidence, see §§9.16-9.26.

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§9.4 3. Obtain Trial Court's Ruling on Objections

A trial court has a duty to consider all evidentiary objections and to rule on their merits. *Vineyard Springs Estates, LLC v Superior Court (Wyatt)* (2004) 120 CA4th 633, 642, 15 CR3d 587; *Sambrano v City of San Diego* (2001) 94 CA4th 225, 234, 114 CR2d 151. See CCP §437c(c), (q). If a trial court fails to rule on evidentiary objections, then the objections are ordinarily deemed waived on appeal, and the appellate court will consider all evidence submitted, including that to which objections have been made. See *Sharon P. v Arman Ltd.* (1999) 21 C4th 1181, 1186 n1, 91 CR2d 35, disapproved on another ground in *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854 n19, 107 CR2d 841. See also *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 670 n1, 25 CR2d 137; *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 783, 97 CR2d 140. See §9.5.

PRACTICE TIP: Obtain rulings on at least the key objections central to the client's case. If a trial court does not rule on evidentiary objections before ruling on the motion, then emphasize to the court its duty to rule on the objections. If the court grants the motion without having ruled on the objections, then send a letter to the court, reminding the judge that all evidence will come in on appeal and potentially undermine the court's ruling on the motion. If the court still fails to rule on the objections, then consider taking a writ to compel the judge to rule. The Third Appellate District has ruled that a writ of mandate may be issued to compel a trial court to rule on evidentiary objections and to reconsider its ruling on the motion after making the evidentiary rulings. See *Vineyard Springs Estates, LLC v Superior Court (Wyatt)* (2004) 120 CA4th 633, 642, 15 CR3d 587.

JUDICIAL PERSPECTIVE: One risk in submitting high numbers of objections is that counsel may overwhelm the court and shift its focus from the most important issues and objections in the case. Concentrate on making key objections that make a difference in the case, as opposed to loading up on multiple objections. As a guide on objections, go for quality rather than quantity.

PRACTICE TIP: The court may rule orally on objections from the bench during the hearing. As long as the rulings are on the record, they can be reviewed on appeal. Ask the court to rule on each objection so that the record is clear that counsel is not waiving an objection should the court fail to rule on it.

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Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.5 a. Express Ruling on Each Objection

§9.5 a. Express Ruling on Each Objection

One case, *Biljac Assocs. v First Interstate Bank* (1990) 218 CA3d 1410, 1419, 267 CR 819, has held that a trial court may refuse to rule expressly on each and every objection, and instead could simply state that it would disregard inadmissible or incompetent evidence in ruling on the motion. *Biljac* was disapproved by the same court that decided it (see *Demps v San Francisco Hous. Auth.* (2007) 149 CA4th 564, 566, 57 CR3d 204 (First District, Division Two)), and other appellate districts have also rejected it (see *Sambrano v City of San Diego* (2001) 94 CA4th 225, 234, 114 CR2d 151 (Fourth District, Division One); *Swat-Fame, Inc., v Goldstein* (2002) 101 CA4th 613, 623, 124 CR2d 556, disapproved on another ground in *Zamos v Stroud* (2004) 32 C4th 958, 973, 12 CR3d 54 (Second District, Division Seven)).

WARNING: Review is currently pending in *Reid v Google, Inc.* (review granted Jan. 30, 2008, S158965; superseded opinion at 155 CA4th 1342, 66 CR3d 744), which followed *Biljac* in holding that the trial court was not required to rule expressly on each and every objection when considering the admissibility of statistical evidence of age discrimination. 155 CA4th at 1356.

PRACTICE TIP: If the objecting party accepts a tentative ruling without a hearing, or fails to object at the hearing, the court may not have expressly ruled on evidentiary objections, and the rule that objections not expressly ruled on are deemed waived may be applied. Thus, if a ruling on an objection is important to the case, the objecting party should ask for an express ruling on that objection, and follow through in argument at the hearing. It may also be a good idea to ask the court to provide a written ruling on the objection or to incorporate the ruling into its written order. See CCP §437c(g).

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Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.6 b. Exception: Fruitless Act After Repeated Requests

§9.6 b. Exception: Fruitless Act After Repeated Requests

One clear exception to the rule that deems objections waived if not ruled on is when it would have been a fruitless or idle act to interpose repeated requests for rulings. When this occurs, written evidentiary objections may be deemed preserved for appellate review. *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 784, 97 CR2d 140 (defense counsel twice orally raised issue in court of securing ruling on previously filed written evidentiary objections; third oral request for rulings would have been fruitless).

PRACTICE TIP: In view of the uncertainty as to when objections should be made under CCP §437c, it may be wiser for an objecting party to file written objections *and* renew them or incorporate them by reference orally at the hearing.

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Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.7 B. Case Strategy

§9.7 B. Case Strategy

The more experienced counsel is in dealing with evidentiary issues (at trial, for example), the easier it will be to spot the objectionable evidence offered at the summary judgment stage. Less experienced counsel should conduct a more painstaking review of each item of offered evidence, to be sure counsel has overlooked no opportunity for relief.

PRACTICE TIP: At all experience levels, have available a complete list of possible objections. One source of available objections, with case citations and practical advice for exercising each of them, is California Trial Objections (Cal CEB Annual), which includes a laminated Checklist of Objections with notations as to statutory or case authority.

CAUTION: Counsel should refrain from filing every single possible objection to each item of evidence. The court in *Demps v San Francisco Hous. Auth.* (2007) 149 CA4th 564, 578 n6, 57 CR3d 204, noted that litigants who file objections to almost all evidence overburden the court. Rather than use a scorched earth approach for objections, focus on the most important pieces of evidence and offer objections with the best potential for eliminating or curtailing the effect of that evidence.

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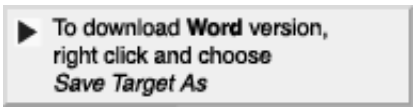
Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.8 1. Identify Potential Evidentiary Objections Early

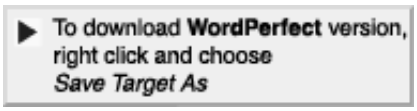
§9.8 1. Identify Potential Evidentiary Objections Early

Preparing for evidentiary objections should begin long before the motion is brought. In most cases, for example, parties will take key depositions before either side brings a motion. If the client's case is at risk for the bringing of a motion against it, counsel must be sure his or her witnesses are prepared to offer enough testimony on material issues to raise triable issues of fact.

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§9.9 2. Analyze Case Issues Before Discovery





Counsel's pre-deposition analysis should include the following questions if any witness has evidence bearing on the "undisputed fact(s)" essential to an expected motion:

- 1. What are the "undisputed material fact(s)" an adversary will seek to establish to support a motion against counsel's client?
- 2. Does the witness's version of events support counsel's position that material facts remain in dispute, and is the witness's testimony admissible?
- 3. What other testimonial, documentary, or other tangible evidence exists to support counsel's position, and, if shown to counsel's witness, will this evidence assist the witness (or refresh the witness's recollection) on the issue?

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Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.10 3. Prepare Witnesses in Light of Case Issues

§9.10 3. Prepare Witnesses in Light of Case Issues

Once counsel has completed the analysis in §9.9, counsel should prepare the witness to testify with particular attention to the issue(s) in question.

PRACTICE TIP: If counsel is reasonably certain that an adversary intends to bring the motion, then counsel may wish to discourage that effort by encouraging his or her witness to volunteer the key testimony, or by eliciting the testimony through counsel's own direct examination at the deposition. Also, if the witness can volunteer the subject area at a first deposition, counsel may be able to avoid a second deposition of the same witness.

If a witness is to be a declarant in opposition to the motion, a second deposition is inevitable if the subject area was not covered in the initial deposition session. See CCP §437c(h).

On preparing and advising witnesses when taking and defending depositions, see California Civil Discovery Practice, chap 6 (4th ed Cal CEB 2006).

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§9.11 II. METHODS OF OBJECTING

The procedure for making objections and ensuring the existence of a proper record is provided in Cal Rules of Ct 3.1352 and 3.1354. See *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 782, 97 CR2d 140. Objections may be submitted in writing before the hearing (see §§9.12-9.13) or made orally at hearing (see §9.15).

PRACTICE TIP: Written objections allow the court sufficient time to review the evidence offered and objections made. This is especially important in large cases with complicated facts or complex claims. Because the court's decision is based on evidence (or lack thereof), the best practice is to submit written objections so the court can consider the objections before rendering a tentative decision.

JUDICIAL PERSPECTIVE: By submitting objections in writing before the hearing, you give the court time to make rulings based on consideration of objections from all parties. One risk in submitting oral objections is that the court may not have enough time to consider them to the same extent as written objections.

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A. Written Objections

§9.12 1. Timing

Written objections must be served and filed at the same time the objecting party serves and files its opposition or reply papers. On a showing of good cause, the court may allow the party to file its objections at a different time. Cal Rules of Ct 3.1354(a).

On when a party must file its opposition or reply papers, see chap 3.

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Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.13 2. Format

§9.13 2. Format

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The objecting party must serve and file written objections separately from the other papers in support of or in opposition to the motion. Although the objecting party may reference objections in the right column of the separate statement, the party may not restate or reargue the objections in the separate statement. Cal Rules of Ct 3.1354(b).

In formatting the written objections, an objecting party must number each objection consecutively and (Cal Rules of Ct 3.1354(b)(1)-(4))

- Identify the name of the document in which the specific objectionable material is located;
- State the exhibit, title, page, and line number of the objectionable material;
- Quote or set forth the objectionable statement or material; and
- State the grounds for each objection to that statement or material.

The Rules of Court specify two alternate formats for written objections; counsel must follow one for its written objections. Cal Rules of Ct 3.1354(b).

EXAMPLE 1: The first permissible format specified by Cal Rules of Ct 3.1354(b) appears as follows:

Objections to Jackson Declaration

Objection Number 1

"Johnson told me that no widgets were ever received." (Jackson declaration, page 3, lines 7-8.)

Grounds for Objection 1: Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).

Objection Number 2

"A lot of people find widgets to be very useful." (Jackson declaration, page 17, line 5.)

Grounds for Objection 2: Irrelevant (Evid. Code, §§ 210, 350-351).

EXAMPLE 2: The second permissible format specified by Cal Rules of Ct 3.1354(b) appears as follows:

Objections to Jackson Declaration

Material Objected to:	Grounds for Objection:
Jackson declaration, page 3, lines 7-8: "Johnson told me that no widgets were ever received."	Hearsay (Evid. Code, §1200); lack of personal knowledge (Evid. Code, § 702(a)).
Jackson declaration, page 17, line 5: "A lot of people find widgets to be very useful."	Irrelevant (Evid. Code, §§ 210, 350-351).

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Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.14 3. Proposed Order

§9.14 3. Proposed Order

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When a party submits written objections, it must also submit a proposed order. The proposed order must include a place for the court to indicate its ruling on each objection (sustained or overruled) and a place for the judge's signature. The Rules of Court specify two alternate formats for a proposed order on the written objections; counsel must submit a proposed order following one of the two formats. Cal Rules of Ct 3.1354(c).

EXAMPLE 1: The first permissible format specified by Cal Rules of Ct 3.1354(c) appears as follows:

Objections to Jackson Declaration

Objection Number 1

"Johnson told me that no widgets were ever received." (Jackson declaration, page 3, lines 7-8.)

Grounds for Objection 1: Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).

Court's Ruling on Objection 1:	**Sustained: _____** **Overruled: _____**

Objection Number 2

"A lot of people find widgets to be very useful." (Jackson declaration, page 17, line 5.)

Grounds for Objection 2: Irrelevant (Evid. Code, §§ 210, 350-351).

Court's Ruling on Objection 2:	**Sustained: _____** **Overruled: _____**

EXAMPLE 2: The second permissible format specified by Cal Rules of Ct 3.1354(c) appears as follows:

Objections to Jackson Declaration

Material Objected to:	Grounds for Objection:	Ruling on Objection
1. Jackson declaration, page 3, lines 7-8: "Johnson told me that no widgets were ever received."	Hearsay (Evid. Code, § 1200); lack of personal knowledge (Evid. Code, § 702(a)).	Sustained: _____ Overruled: _____
2. Jackson declaration, page 17, line 5: "A lot of people find widgets to be very useful."	Irrelevant (Evid. Code, §§210, 350-351).	Sustained: _____ Overruled: _____

Date: _____ **_____**

Judge

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Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.15 B. Oral Objections

§9.15 B. Oral Objections

As an alternative to filing written objections, a party may raise its objections orally at the summary judgment hearing. See CCP §437c(b)(5). The objecting party must arrange for a court reporter to attend the hearing to record the objections for the record. Cal Rules of Ct 3.1352.

PRACTICE TIP: Presenting written objections before the hearing is almost always preferable to making oral objections. Because the court will usually reach a tentative ruling before the hearing, written objections are the best method to ensure that the objections will be given full consideration. Although the statute does not distinguish between written and oral objections, oral objections may be given less weight because the court may not have sufficient time or means to study the basis for the objection. If oral objections must be made, however, prepare them before the hearing and read them into the record.

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Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.16 III. OBJECTING TO OPPOSING EVIDENCE

§9.16 III. OBJECTING TO OPPOSING EVIDENCE

Motions for summary judgment and summary adjudication of issues may be supported by the following evidence (CCP §437c(b)(1); see §§5.8-5.57):

- Affidavits;
- Declarations;
- Admissions;
- Answers to interrogatories;
- Depositions; and
- Matters of which judicial notice may be taken.

Counsel should be alert to the fact that different sources of evidence may give rise to differing objections. For example, a declaration may be objectionable based on form (*e.g.,* failure to declare that the declaration is submitted under California law) and substance (*e.g.,* declaration relied on inadmissible double hearsay). The discovery process may result in the revelation of admissible and inadmissible evidence. For example, deposition testimony may be objectionable based on lack of relevance, and an irrelevance objection may be made in the summary judgment proceeding despite not being raised during deposition. A failure to object at deposition on the ground of privilege or work product, however, may result in the waiver of the objection and use of that evidence in a summary judgment proceeding.

PRACTICE TIP: Review all the evidence submitted in opposition to the client's case and evaluate whether a valid ground exists for excluding it, then decide whether and how to object to it. When several objections can be made to the same evidence, evaluate them and organize the response so that the objections that are most specific and important to the complete exclusion of the objectionable material are stated first and supported by appropriate authority and argument, followed by additional grounds for objection, including those that may not completely exclude the evidence, but may limit its use in the proceeding.

See chap 5 on preparation of evidence in support of or in opposition to the motion. On strategies of deciding whether to object to evidence, see California Trial Objections, chap 4 (Cal CEB Annual). On strategies in the selection and use of the various discovery devices, see California Civil Discovery Practice (4th ed Cal CEB 2006).

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A. Common Objections

§9.17 1. Attacking Form and Sufficiency of the Evidence

The opposing party should object if the form or sufficiency of evidence supporting the motion is inadequate. CCP §437c(c). Some objections to consider include relevance, incompetence, hearsay, and insufficient foundation. See §§5.58-5.75.

EXAMPLE 1: In a medical malpractice action, defendant's sole evidentiary basis for his summary judgment motion was an expert medical witness declaration in which the expert attempted to testify to facts of the procedure in issue based on his review of plaintiffs' hospital and medical records. Defendant did not offer the records into evidence, nor did he submit his own declaration concerning the facts of the procedure. Plaintiffs objected to the expert's declaration based on lack of foundation, personal knowledge, authentication, and hearsay, among other objections. The appellate court held that without the records and testimony authenticating them, there was no factual basis for the expert's opinion. As a result, the expert's declaration had no evidentiary foundation, and thus no evidentiary value. Because defendant offered no other evidentiary basis for his motion, he failed to carry his burden of production and his motion was denied. *Garibay v Hemmat* (2008) 161 CA4th 735, 741, 74 CR3d 715.

EXAMPLE 2: In an employment termination action based on fraud, misrepresentation, and discrimination, defendant employer moved for summary judgment. In opposition, plaintiff submitted his own written declaration, which was executed in Ohio, but did not specify that it was made under California law, as required by CCP §2015.5. The supreme court held that the declaration's failure to specify that it was made under California law rendered it defective, and thus inadmissible evidence. *Kulshrestha v First Union Commercial Corp.* (2004) 33 C4th 601, 608, 15 CR3d 793.

EXAMPLE 3: In a wrongful death and products liability action based on an accident allegedly due to a defective motorcycle side stand, one of the issues in contention was whether defendants manufactured and distributed the defective side stand. In opposition to defendants' motion for summary judgment, one of plaintiff's attorneys submitted a declaration in which she referenced a package label and instruction sheet in an attempt to use them to prove that the part was, in fact, manufactured and distributed by defendants. On appeal, the court held that those assertions in the declaration were inadmissible hearsay when offered in that manner in this case. *DiCola v White Bros. Performance Prods., Inc.* (2008) 158 CA4th 666, 679, 69 CR3d 888.

On other objections based on form and sufficiency of the evidence, see California Trial Objections (Cal CEB Annual). On the law and issues associated with form and sufficiency of the evidence, see Jefferson's California Evidence Benchbook, chaps 24-25 (4th ed CJA-CEB 2009).

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§9.18 2. Attacking Expert's Qualifications

To meet their burdens of production and persuasion (see chap 4), parties regularly submit expert declarations in summary judgment proceedings. One way to attack an expert witness declaration is to object to the person's qualifications as an expert. To challenge the qualifications of an expert, a party must lodge an objection to the declaration and then the trial court must determine the witness's competency as a matter of fact.

Qualification to give expert opinion testimony is a relative matter. Under Evid C §720(a), a person is qualified as an expert witness if he or she has special knowledge, skill, experience, training, or education about the subject of the proposed testimony. That standard is liberally applied. See, *e.g., Mann v Cracchiolo* (1985) 38 C3d 18, 36, 210 CR 762 (expert need only possess sufficient knowledge of field; degree of knowledge goes to weight of evidence).

EXAMPLE: In *Avivi v Centro Medico Urgente Med. Ctr.* (2008) 159 CA4th 463, 470, 71 CR3d 707, the trial court excluded plaintiff's medical expert's declaration because the expert, an Israeli orthopedist with nearly three decades of experience and knowledge of American treatment of fractures, did not explicitly state that he was familiar with the standard of care in southern California. On appeal, the court held that the trial court had excluded the declaration based on an erroneous test for expert qualifications. The court found that the correct test for qualification of an expert on the standard of care in an ordinary medical malpractice action is knowledge of similar circumstances, not location.

PRACTICE TIP: In most cases, an expert can be easily qualified. Counsel's time may be better spent attacking the expert's opinion rather than the expert's qualifications. See §9.19.

On qualifications to testify as an expert, see Jefferson's California Evidence Benchbook §§30.16-30.25 (4th ed CJA-CEB 2009). See also §5.26. On objections to expert and other witness opinions, see California Trial Objections §§20.6-20.22 (Cal CEB Annual). On use of expert witnesses in summary judgment proceedings, see California Expert Witness Guide, chap 16 (2d ed Cal CEB 1991).

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Source: Civil Litigation/California Summary Judgment/9 Objections to Evidence/§9.19 3. Attacking Expert's Opinion

§9.19 3. Attacking Expert's Opinion

An expert's opinion may be attacked on several grounds. Under Evid C §801(a), an expert opinion is admissible if the subject matter is sufficiently beyond common experience that the expert's opinion would assist the trier of fact. Depending on the subject matter involved, it may be possible to argue that the trier of fact is able to draw its own conclusions from the facts, and thus expert testimony is not necessary.

EXAMPLE 1: In an employment action based on retaliatory discharge, the appellate court held that an expert witness's testimony as to whether certain facts in the case were evidence of retaliatory motive was inadmissible under Evid C §801. The court found that the trier of fact was able to determine for itself whether the evidence supported a finding of retaliation and that the expert's testimony did not assist them in that. *Kotla v Regents of Univ. of Cal.* (2004) 115 CA4th 283, 291, 8 CR3d 898.

Another potential ground for attacking an expert's opinion is that the opinion is based on improper matters. Under Evid C §801(b), an expert's opinion must be based on matters that are observed by the expert, personally known by the expert, or made known to the expert before or at trial, and of a type reasonably relied on by experts in forming an opinion on the subject.

EXAMPLE 2: In a medical malpractice action, defendant's sole evidentiary basis for his summary judgment motion was an expert medical witness declaration in which the expert attempted to testify to facts of the procedure in issue based on his review of plaintiffs' medical records. Defendant did not offer the medical records, nor did he submit his own declaration as to the facts of the procedure. Plaintiffs objected to the declaration based on lack of foundation, personal knowledge, and authentication, and hearsay, among other grounds. The appellate court held that without the medical records and testimony authenticating them, the expert's declaration had no evidentiary foundation, and thus no evidentiary value. Because defendant offered no other evidentiary basis for his motion, he failed to carry his burden of production and the motion was denied. *Garibay v Hemmat* (2008) 161 CA4th 735, 741, 74 CR3d 715.

Objecting to an expert's opinion on the ground that the opinion is on an ultimate issue in the case is not a valid objection. Evid C §805. The opinion may, however, be objectionable on other grounds, such as an expert opinion on a question of law. *Towns v Davidson* (2007) 147 CA4th 461, 472, 54 CR3d 568 (expert offered only legal conclusions).

PRACTICE TIP: When attacking the opinions contained in an expert's declaration, keep in mind that a court will construe a declaration based in part on which party submitted it. A declaration submitted by the moving party in support of summary judgment must be detailed and reasoned because the moving party bears the burden of persuasion that no triable issue of material fact exists and that the party is entitled to judgment as a matter of law. A declaration submitted by the opposing party need only raise the existence of a triable issue of fact, not prove the opposition's case. *Jennifer C. v Los Angeles Unified Sch. Dist.* (2008) 168 CA4th 1320, 1332, 86 CR3d 274; *Powell v Kleinman* (2007) 151 CA4th 112, 125, 59 CR3d 618.

On opinion testimony by expert witnesses, see Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009). See also §§5.25-5.30. On objecting to improper opinion testimony, see California Trial Objections, chap 20 (Cal CEB Annual).

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§9.20 4. Attacking Lay Opinion

A lay witness is permitted to offer opinion testimony when the opinion is rationally based on the witness's perception, helpful to a clear understanding of the witness's testimony, or otherwise permitted by law. Evid C §§702, 800. Lay opinion is permitted on certain subjects, such as speed, distance, and value of the witness's own property. A lay witness's opinion may be excluded if it is not based on the witness's perception of the facts. Evid C §702.

On lay opinion evidence, see §5.24.

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§9.21 5. Attacking Speculative Evidence

If a witness does not have personal knowledge of the facts or is not qualified to give an opinion, then the witness's testimony is considered speculative. See Evid C §§702, 800(a). A court is not bound by an expert opinion that is speculative, conjectural, or based on an incorrect legal theory. *Saelzler v Advanced Group 400* (2001) 25 C4th 763, 775, 107 CR2d 617. See §5.28.

EXAMPLE 1: In *Lockheed Litig. Cases* (2004) 115 CA4th 558, 10 CR3d 34, plaintiff's expert witness offered an opinion that defendant's chemicals caused cancer. The opinion was based solely on a study of cancer rates in people exposed to a wide range of chemicals, including ones not manufactured by the defendant. The court held that the expert's opinion was speculative, and thus inadmissible.

EXAMPLE 2: In a wrongful death action based on a decedent's asbestos-related lung cancer, plaintiffs' decedent testified in deposition before his death that he had no knowledge of exposure to asbestos products manufactured by defendants. In opposition to defendants' summary judgment motion, plaintiffs submitted an expert's declaration and supplemental declaration in which the expert opined that the decedent was likely exposed to significant levels of airborne asbestos while working at a site in which defendants' products were used, but the expert failed to connect defendants' products to the airborne asbestos. The court found that the expert's declarations were speculative. See *McGonnell v Kaiser Gypsum Co.* (2002) 98 CA4th 1098, 1106, 120 CR2d 23.

PRACTICE TIP: Always review opinion evidence offered by opposing experts for possible speculation, especially in the areas of duty and causation.

On objections based on speculation, see California Trial Objections, chap 16 (Cal CEB Annual).

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§9.22 6. Attacking Business and Official Records

The business and official records exceptions to the hearsay rule permit a party to introduce into evidence written records of business or official proceedings as long as the records were made in the regular course of business, at or near the time of the act, condition, or event, and the sources of information, as well as the method and time of preparation, indicate trustworthiness. Evid C §§1272 (business records), 1280 (official records). Although the records themselves may qualify under an exception to the hearsay rule, the contents of the records may be subject to other objections, such as irrelevancy, privilege, lack of personal knowledge, and secondary evidence.

EXAMPLE: Accident reports made to the police under Veh C §§20012-20013 are confidential and not permitted to be used as evidence in any civil or criminal proceedings, except to show that a report was made as required by law.

PRACTICE TIP: Because business and official records are writings, they may be subject to other hearsay objections, such as lack of personal knowledge or privilege. Just because a record may be admissible under the business or official records exception to the hearsay rule does not mean that all statements contained in the record are admissible. Carefully review all records to make certain that statements contained in the record are not objectionable for another reason.

On hearsay objections generally, see §§5.71-5.75; California Trial Objections, chap 19 (Cal CEB Annual). On business records and official records, see §§5.74-5.75; Jefferson's California Evidence Benchbook, chaps 4-5 (4th ed CJA-CEB 2009).

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§9.23 7. Attacking Secondary Evidence

The secondary evidence rule allows proof of the content of a writing by otherwise admissible secondary evidence. Evid C §1521(a), (d). This rule applies to evidence offered to prove the content of a writing, not to prove some other fact. Secondary evidence may be excluded in two situations: (1) when a genuine dispute exists as to the content of the writing occurs and justice requires exclusion; or (2) when admission of secondary evidence would be unfair. Evid C §1521(a)(1)-(2). On use of secondary evidence generally, see *Dart Indus., Inc. v Commercial Union Ins. Co.* (2002) 28 C4th 1059, 1068, 124 CR2d 142.

EXAMPLE 1: In an action for cancellation of a trust deed executed in violation of the terms of a family trust, the trial court admitted into evidence an unsigned copy of a Trust Split Document. The court ruled that the copy was admissible because the parties did not dispute the contents of the document; they disputed whether the trustee signed the document. Had one party disputed the contents of the document, then the copy would have been inadmissible. See *Penny v Wilson* (2004) 123 CA4th 596, 602, 20 CR3d 212.

By the terms of the statute, secondary evidence must comply with other rules of evidence, including authentication and the hearsay rule. Even if the secondary evidence cannot be excluded under Evid C §1521, counsel should review the evidence carefully to ascertain whether it can be excluded under any other evidentiary rule.

EXAMPLE 2: In an action to recover unpaid charges, a water agency sought summary judgment or, alternatively, summary adjudication. In support of its motion the agency submitted a declaration from its general manager that stated that defendant was billed for the water charges and that defendant had failed to pay the charges as billed. The declaration included a summary of the charges incurred, based on the amounts billed to defendant plus interest and a usage fee. The declarant attached to his declaration an exhibit that purported to show the computation of the amounts owed. Defendant filed several objections to the exhibit, including hearsay, the secondary evidence rule, and lack of authentication. The trial court overruled the objections and held that the agency could submit a summary calculation of the amount owed under Evid C §1521. On appeal, the court held that although the original bills might have been admissible as business or official records over a hearsay objection with a proper foundation and authentication, the summary of the bills in the declaration was inadmissible hearsay. The court noted that the agency could have introduced secondary evidence of the charges owed had the agency shown that the amount of charges owed fell within an exception to the hearsay rule, but the agency did not do so here. See *Pajaro Valley Water Mgmt. Agency v McGrath* (2005) 128 CA4th 1093, 1106, 27 CR3d 741.

On the secondary evidence rule see §§5.62-5.70; Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009). On objecting to secondary evidence see California Trial Objections, chap 24 (Cal CEB Annual).

PRACTICE TIP: Review secondary evidence for potential hearsay and other relevant objections, and be alert to potential double and triple hearsay, especially in declarations that contain a summary of information drawn from other documents in the case. In addition, look for issues related to authentication and lack of foundation based on personal knowledge or improper opinion. See §§9.19-9.21.

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B. Ineffective Objections

§9.24 1. Attacking Moving Party's Credibility

The opposing party cannot simply attack the moving party's credibility. The moving party's motion for summary judgment "may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment." CCP §437c(e). See §11.15. If the opposing papers merely assert that a jury trial is the opponent's right and do not contain any evidence on the issues raised in the motion for summary judgment, that opposition is insufficient to defeat the motion. See *Shepherd v Jones* (1982) 136 CA3d 1049, 1062, 186 CR 708 (opposition to moving party's declarations alleging reliance on advice of counsel did not challenge facts asserted or allege additional facts; rather, opposition simply asserted that issue could not be decided in summary judgment proceeding).

On the showing necessary for moving papers, see chap 6; on the showing necessary for opposition papers, see chap 7.

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§9.25 2. Evidence of State of Mind

In some instances, however, the opposing party cannot reasonably be expected to produce controverting evidence. For example, if the issue is the moving party's state of mind, controverting evidence is difficult or impossible to gather. Under such circumstances, the court has the discretion to deny summary judgment so that the trier of fact can judge the moving party's credibility. CCP §437c(e). See *Viner v Sweet* (2004) 117 CA4th 1218, 1230, 12 CR3d 533 (CCP §437c(e) authorizes trial court discretion to deny summary judgment motion when moving party's burden is to prove witness's state of mind and only evidence submitted is testimony from that witness). See §11.14.

EXAMPLE: In an action by a debtor's creditor against the debtor's mortgage lenders based on fraudulent transfer, the lenders submitted declarations in support of a summary judgment motion that made a prima facie showing that intent was lacking. The creditor did not submit points and authorities in opposition or a separate statement. On appeal, the court held that the trial court properly exercised its discretion to grant summary judgment based on the uncontroverted declarations that the creditor failed to rebut. See *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 417, 94 CR3d 288.

PRACTICE TIP: Because the trial court retains discretion on this issue, be alert to when the issue arises and act to contest evidence such as declarations as to state of mind and intent. Failure to rebut such evidence may be interpreted by the trial court as a sign that no controverting evidence exists.

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§9.26 C. Commonly Overlooked Objections

Many trial lawyers agree that the most under-utilized objection at trial is that the offered evidence (including testimony) is irrelevant. Under Evid C §350, "[n]o evidence is admissible except relevant evidence." The same can be said for evidence offered in support of motions for summary judgment. The concept of relevance in the context of a motion for summary judgment can be quite broad, encompassing, *e.g.,* expert opinion testimony, new or novel scientific techniques, or prior and subsequent events. The definition of relevant evidence is found in Evid C §210, which says that evidence is relevant if it has "*any* tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (emphasis added). The trial court is vested with wide discretion in determining relevance. *People v Crittenden* (1994) 9 C4th 83, 132, 36 CR2d 474; *People v Babbitt* (1988) 45 C3d 660, 681, 248 CR 69.

In a jury trial, the concept of relevance is tempered by the court's ability to apply Evid C §352 to exclude evidence when

> its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

In opposing summary judgment, however, this section 352 "fallback" objection is unavailable to parties. Counsel must establish instead that the offered evidence provides *no* reasonable support for the fact the adversary wishes to show.

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10

Hearing and Oral Argument

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§10.1 I. INTRODUCTION

After the parties have filed their moving, opposition, and reply papers (see chaps 6-8), challenged any deficiencies in the evidence (see chap 9), and addressed all legal challenges to the substantive law, the last opportunity each side has to convince the court whether or not to grant a motion for summary judgment or summary adjudication is at the hearing, on oral argument.

Many courts have a procedure by which they advise the parties of their tentative ruling and provide the opportunity for the party aggrieved by the ruling to contest it at a hearing. See §§10.5-10.11. Before the hearing, the parties must prepare themselves well, either to solidify the court's ruling or to convince the court to change it. See §§10.12-10.18. In preparing for the hearing, each party's burden of persuasion should determine its arguments. See §§10.19-10.23. It is crucial that the parties use effective oral advocacy skills at the hearing, including making appropriate evidentiary objections to preserve issues for appeal. See §§10.24-10.28.

JUDICIAL PERSPECTIVE: At the hearing during oral argument, remember to make any evidentiary objections not previously made in writing in the opposition or reply papers submitted to the court. In addition, be sure to ask the court for its rulings on any objections that are important to the case so that those objections are not deemed waived. See §§9.4-9.6.

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§10.2 A. Hearing Requirement

Most cases hold that a hearing is required for summary judgment motions. In *Brannon v Superior Court* (2004) 114 CA4th 1203, 8 CR3d 491, the court held that a trial court may not properly determine a summary judgment motion without permitting an opportunity for oral argument. In so holding, it expressly disapproved its district's prior contrary ruling in *Sweat v Hollister* (1995) 37 CA4th 603, 43 CR2d 399. The *Brannon* court examined CCP §437c, the summary judgment statute, and found that although it does not expressly state that a party to a summary judgment motion is entitled to an oral hearing, it does refer in several places to the requirement of a "hearing" or to a requirement that the motion be "heard." See CCP §437c(a)-(b). The court found that many of these references are to the narrow meaning of the word "hearing," *e.g.,* an "oral" proceeding. Similarly, the court noted that the California Rules of Court frequently refer to a "hearing" in the narrow sense of an "oral" proceeding. See, *e.g.,* Cal Rules of Ct 3.1304, 3.1306, 3.1310. This statutory construction was also used in *Mediterranean Constr. Co. v State Farm Fire & Cas. Co.* (1998) 66 CA4th 257, 262, 77 CR2d 781, which discussed the policy reasons generally favoring oral argument, including providing "litigants their only opportunity to orally argue their case and to respond to the court's inquiries through the give-and-take of questioning" and enhancing "the public visibility and accountability of the judicial process." 66 CA4th at 264. See also *Gwartz v Superior Court* (1999) 71 CA4th 480, 83 CR2d 865 (trial court's order denying summary judgment motion without hearing was vacated and remanded).

CAUTION: There is conflicting dictum on the issue of whether a litigant has the right to an oral hearing on a summary judgment motion (see *Jovine v FHP, Inc.* (1998) 64 CA4th 1506, 1525 n23, 76 CR2d 322 ("party has no absolute right to oral argument on a motion for summary judgment")), but no recent contrary ruling on the issue. The California Supreme Court noted the differing conclusions in *Sweat* and *Mediterranean,* but expressly declined to "consider the validity" of either decision. *Lewis v Superior Court* (1999) 19 C4th 1232, 1248 n10, 82 CR2d 85.

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Source: Civil Litigation/California Summary Judgment/10 Hearing and Oral Argument/§10.3 B. What Constitutes a Hearing

§10.3 B. What Constitutes a Hearing

A "hearing" means an oral hearing at which counsel has "the opportunity to persuade the court and respond to its inquiries." *Mediterranean Constr. Co. v State Farm Fire & Cas. Co.* (1998) 66 CA4th 257, 260, 77 CR2d 781. A hearing on summary judgment involves the contemporaneous presence (in person or electronically) of the parties and a judge. 66 CA4th at 260. A hearing may not be simply "posting the ruling on a locked courtroom door or telephoning litigants with an ex cathedra decision" (66 CA4th at 260), but otherwise courts have "extensive discretion" on how a summary judgment hearing is conducted, including limiting the time and subject matter of the argument and adopting tentative ruling procedures (see §10.5). *Brannon v Superior Court* (2004) 114 CA4th 1203, 1211, 8 CR3d 491; *Mediterranean Constr. Co.,* 66 CA4th at 265.

NOTE: Courts have broad discretion to determine that a party waived the right to oral argument by failing to invoke the procedure in a timely and proper manner. *Brannon v Superior Court, supra*. Similarly, in the Ninth Circuit, district courts may promulgate local rules requiring a party to request oral argument on a summary judgment motion or have it considered waived (except if the refusal to hear oral argument would unfairly prejudice a party). *Mahon v Credit Bureau, Inc.* (9th Cir 1999) 171 F3d 1197.

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§10.4 C. Appellate Review of Denial of Hearing

If the trial court refuses to allow for oral argument on summary judgment, the aggrieved party may seek review of that decision by petition for a peremptory writ. *Mediterranean Constr. Co. v State Farm Fire & Cas. Co.* (1998) 66 CA4th 257, 267 n12, 77 CR2d 781. In *Sentry Ins. Co. v Superior Court* (1989) 207 CA3d 526, 530, 255 CR 13, the trial court refused to hear the petitioner's timely filed motion for summary judgment within 30 days of a continued trial date. Although the court of appeal sympathized with trial courts' problems "in calendaring and hearing the many motions for summary judgment," it cautioned that "the solution to these problems cannot rest in a refusal to hear timely motions."

On challenging a trial court's decision by writ review, see California Civil Writ Practice, chap 11 (4th ed Cal CEB 2008); Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide February 2009).

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§10.5 II. TENTATIVE RULING

Most superior courts (or certain departments within a particular superior court) offer a tentative ruling procedure that allows the court, before the hearing, to inform the parties of a tentative decision based on its review of the submitted papers. Cal Rules of Ct 3.1308. See, *e.g.,* Riverside Ct R 2.0016; San Francisco Ct R 8.3.

PRACTICE TIP: The local rules for a particular superior court can generally be viewed at and downloaded from the superior court's website or at www.courtinfo.ca.gov/rules/localrules.htm.

A court that follows a tentative ruling procedure must state that in its local rules. Cal Rules of Ct 3.1308(c).

PRACTICE TIP: If the court does not have a tentative ruling procedure, ask the courtroom clerk or bailiff about the particular judge's procedures. Judges will often make a tentative ruling available before the hearing, *e.g.,* from the courtroom clerk or from a list posted outside the courtroom.

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§10.6 A. Obtain Tentative Ruling

The local rules of a court that follows a tentative ruling procedure must specify (Cal Rules of Ct 3.1308(c)):

- The telephone number or website for obtaining the tentative rulings; and
- The time by which the rulings will be available.

See, *e.g.,* Riverside Ct R 2.0016; Sacramento Ct R 3.04(A).

NOTE: Instead of providing a tentative ruling, the local rules may permit the court to direct the parties to appear for oral argument and may specify the issues on which the court requests the parties to provide further argument. See, *e.g.,* Alameda Ct R 3.30(c) (providing that "whenever a tentative ruling has not been issued, the parties are to appear at the hearing").

On the impact of a tentative ruling on the need to obtain rulings on evidence, see §9.5.

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§10.7 B. Contest Tentative Ruling

When the tentative ruling is against a party, that party may contest the tentative ruling by requesting a hearing. The local or departmental rules may specify procedures by which counsel must contest the ruling, *e.g.,* through the court's website or by leaving a voicemail message with the department in which the hearing will take place after notice to all parties. See, *e.g.,* Contra Costa Ct R 7(C)(2) (counsel can call department rendering decision to request argument and specify issues to be argued); Marin Ct R 1.6(B) (rules for when party wants to present oral argument or request modification of tentative ruling). Alternatively, the party against which the court ruled may concede the ruling and allow it to become the court's order. See §10.9.

PRACTICE TIP: Generally, a party should contest the tentative ruling if

- Oral argument may change the court's decision;
- The record needs to be clarified; or
- The grounds for the court's decision are unclear from its tentative ruling.

It is important for the prevailing party to understand, and the court to articulate, the factual and legal basis for the tentative ruling to prepare the order. See §11.19.

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§10.8 1. Contesting Party Must Comply With Court Rules

A party who wishes to oppose the tentative ruling must comply with all of the court's requirements, *e.g.,* by timely notifying the court and other counsel of intention to appear and argue. Failure to do so waives that party's opportunity to argue.

EXAMPLE 1: Under Marin Ct R 1.6(B), if a party wants to present oral argument or request modification of the tentative ruling, he or she must call the court and all opposing counsel or parties by 4:00 p.m. of the court day before the scheduled hearing and briefly identify the issues to be argued; it is not necessary to speak directly with opposing counsel.

EXAMPLE 2: San Francisco Ct R 8.3(D) does not explicitly require that a party seeking to argue against a tentative ruling actually speak to opposing counsel, but it does state that a party may not argue at the hearing if the opposing party is not notified and does not appear.

JUDICIAL PERSPECTIVE: Not all courts require notice. If notice is required by a local court rule and counsel has inadvertently failed to contact the court and the other side to contest the tentative ruling, then counsel should immediately notify opposing counsel and request a waiver of the notice requirement. If opposing counsel refuses the request, then counsel should appear at the hearing and make a showing to the court as to the reasons for its inadvertence in notifying the court and opposing counsel. Counsel should then ask the court to continue the hearing to allow for proper notice under the local rules.

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§10.9 2. Uncontested Tentative Ruling Becomes Court Order

Failure to contest a tentative ruling will cause it to become the court's order. See, *e.g.,* San Francisco Ct R 8.3(E) (if no party appears, "the tentative ruling will be adopted"). If the tentative ruling granted the motion, it will result in judgment being entered against a party. See, *e.g.,* Sacramento Ct R 3.04(B) (unless contested, "the tentative ruling shall become the ruling of the court").

PRACTICE TIP: The failure to contest a tentative ruling does not waive the right to appeal the resulting court order. In addition, a party may challenge the court's order by motion for reconsideration, if appropriate. Unless there is no basis to oppose the tentative ruling, there is no downside to contesting it so long as counsel can make a reasonable argument to support its position. On challenging a ruling on a summary judgment or summary adjudication motion, see chap 12.

CAUTION: The acceptance of a tentative ruling without a hearing may result in the court not expressly ruling on evidentiary objections. See §§9.5, 10.27.

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C. Effect of Tentative Ruling on Plaintiff's Ability to Voluntarily Dismiss

§10.10 1. On Summary Judgment Motion

A plaintiff may voluntarily dismiss an action *before* the court issues its tentative ruling on a summary judgment motion (see *Gogri v Jack in the Box Inc.* (2008) 166 CA4th 255, 264, 82 CR3d 629), but once the court issues an adverse tentative ruling on a summary judgment motion and the hearing is commenced and continued under CCP §437c(h) to allow the plaintiff to gather previously unavailable opposition evidence, the plaintiff may not voluntarily dismiss without prejudice (*Mary Morgan, Inc. v Melzark* (1996) 49 CA4th 765, 771, 57 CR2d 4). See CCP §581(c) (plaintiff may dismiss complaint, or any cause of action, in its entirety, or as to any defendant(s), with or without prejudice before actual commencement of trial).

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§10.11 2. On Summary Adjudication Motion

Unlike a summary judgment, a summary adjudication under CCP §437c(f) does not resolve all the issues in the case, and as such is not considered a "trial" within the meaning of CCP §581(c). Thus, a tentative ruling granting summary adjudication does not affect a plaintiff's ability to voluntarily dismiss the complaint or any of its causes of action as to any defendant(s). See *Cal-Vada Aircraft, Inc. v Superior Court* (1986) 179 CA3d 435, 445, 224 CR 809. If, however, the summary adjudication motion disposes of an issue of law that leads to the final determination of the case, the plaintiff cannot thereafter voluntarily dismiss. 179 CA3d at 443.

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§10.12 III. PREPARING FOR HEARING

A hearing on a motion for summary judgment or summary adjudication may occur on request by counsel following the tentative ruling. See, *e.g.,* Contra Costa Ct R 7(C)(2) (counsel can call department rendering decision to request argument and specify issues to be argued). If neither party requests the hearing, local rules may nonetheless direct the parties to appear for oral argument. See, *e.g.,* Alameda Ct R 3.30(c) (providing that "whenever a tentative ruling has not been issued, the parties are to appear at the hearing").

PRACTICE TIP: Whenever possible, file written objections to evidence before the hearing under Cal Rules of Ct 3.1354. Failure to do so deprives the court of counsel's view of the proffered evidence when the court is reviewing the case before the hearing, which could negatively impact the outcome. Some courts strongly encourage or require parties to file written objections. See §9.11.

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Source: Civil Litigation/California Summary Judgment/10 Hearing and Oral Argument/§10.13 A. Opportunities Presented by Hearing

§10.13 A. Opportunities Presented by Hearing

A hearing on a motion for summary judgment or summary adjudication presents an opportunity to

- Simplify the case;
- Focus the court on critical issues that support the party's position;
- Respond to the court's concerns; and
- Recast arguments in light of the court's tentative ruling.

To take full advantage of these opportunities, counsel should review the court's tentative ruling, all memorandums, and any cases decided or statutes enacted or amended since the last briefing with a focus on addressing the court's concerns, comments, or questions and raising matters not already covered.

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§10.14 B. Prepare for Hearing When Tentative Ruling Is in Favor of Client

The party favored by the court's tentative ruling should review the ruling and attempt to anticipate the opposing party's arguments against the ruling. This should involve reviewing the memorandums, evidence, and case law directed toward any issue critical to the ruling, and developing a responsive strategy for such issues.

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§10.15 1. Ruling Is Only Partially in Favor of Client

A tentative ruling may be only partially in favor of the client. In such instances, counsel should prepare for the hearing from the perspective of both the successful and the unsuccessful party. It is important not to become complacent with a generally favorable ruling, because opposing counsel may be able to use the negative aspects of the ruling to its advantage.

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§10.16 2. Request Sanctions

If it appears that any party's affidavits or declarations were made in bad faith or solely for the purpose of delay, it may be appropriate to request an order for sanctions. Under CCP §437c(j), if the court determines that affidavits were presented in bad faith or solely for purposes of delay, it must order the party presenting the affidavits to pay the other party its "reasonable expenses" caused by the affidavits. Reasonable expenses do not include attorney fees. *Collins v Department of Transp.* (2003) 114 CA4th 859, 864, 8 CR3d 132 (decided under former CCP §437c(i), now CCP §437c(j)). Compare *Collins* with *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1176, 230 CR 289 (sanctions, including attorney fees, awarded against party who submitted affidavits opposing summary judgment in bad faith based on CCP §128.5).

Before sanctions can be imposed, the party requesting them, or the court on its own motion, must give notice and an opportunity to be heard. CCP §437c(j). On sanctions, see §11.40.

PRACTICE TIP: The court may be hesitant to impose sanctions, and it is justified in denying a request for sanctions for failure to give proper notice of the sanction request. To avoid an objection based on lack of notice, it may be best not to seek monetary sanctions at the time of the hearing on the motion for summary judgment. Instead, wait to request sanctions until after the court rules on the motion and then decide whether to take the extra step of requesting sanctions. Consider whether to obtain a transcript of the hearing because the transcript may reflect the court's disfavor that the lawsuit or motion was filed.

JUDICIAL PERSPECTIVE: Sanctions can be easily denied for failure to give proper notice, so if you are considering requesting sanctions, be sure to provide the proper notice as required.

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§10.17 C. Prepare for Hearing When Tentative Ruling Is Against Client

Because the court has indicated that it is persuaded by the other side, a party preparing to contest the tentative ruling should be thoroughly prepared and well organized at the hearing. With respect to any critical point, statements to the court should be carefully crafted and rehearsed so that counsel appears confident and is comfortable with arguing the issues. Such preparation also allows counsel to focus on the court's questions and concerns and address them more effectively.

JUDICIAL PERSPECTIVE: It may be hard to convince a court to change its tentative ruling; nevertheless, it is possible to do so, especially if the court is leaning towards granting the motion. If you choose to challenge the tentative ruling, then at the hearing on the motion, you should focus on the evidence that shows a triable issue of fact and the best arguments for that position. Don't repeat the same arguments from the opposing papers, but instead, argue to the court why the evidence demonstrates a triable issue of material fact.

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§10.18 D. Prepare for Hearing When There Is No Tentative Ruling

To prepare for oral argument when there is no tentative ruling, counsel should prepare to argue the case, beginning with the points that are most important to the case. Using the court's questions and comments as a guide as the hearing progresses, counsel should focus on those issues that the trial court indicates are key to his or her determination.

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Source: Civil Litigation/California Summary Judgment/10 Hearing and Oral Argument/§10.19 E. Tailor Arguments to Meet Burdens of Production and Persuasion

§10.19 E. Tailor Arguments to Meet Burdens of Production and Persuasion

When preparing arguments for the hearing, it is important to consider the applicable burdens of persuasion and production and ensure that all arguments are tailored to meeting those burdens. The applicable burden informs the argument; each party must argue both that (1) it has met its burden, and (2) the opposing party has not met its burden. On the respective burdens on the parties, see chap 4.

NOTE: When the opposing party files a cross-motion for summary judgment or summary adjudication to be heard at the same time as the moving party's motion, the fact that both parties have moved for summary judgment does not alter their respective burdens or conclusively establish the absence of a triable issue of fact. The trial court must decide their motions independently. *Trailer Train Co. v State Bd. of Equalization* (1986) 180 CA3d 565, 580 n10, 225 CR 717. See California Civil Procedure Before Trial §36.86 (4th ed Cal CEB 2004).

JUDICIAL PERSPECTIVE: If possible, in situations in which the parties are considering filing cross-motions for summary judgment, consider whether it would be more efficient to stipulate to the facts and then ask the court to decide the questions of law, either through a motion for judgment on the pleadings or by way of a bench trial. This would allow the parties to obtain a complete resolution of the matter without the extra time and costs involved in filing and opposing summary judgment motions.

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1. Moving Party's Substantive Burden

§10.20 a. When Moving Party Is Plaintiff

If the plaintiff is the moving party, its substantive burden is to persuade the court that it can establish each element of its case by the quantum of proof required. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. Thus, the moving plaintiff's argument at the hearing must focus on establishing each element of its case.

PRACTICE TIP: By the time of the hearing, the moving-party plaintiff has seen and responded to the defendant's opposition, challenged any deficiencies in the evidence, and addressed the defendant's legal challenges to the substantive law. The moving-party plaintiff should view the hearing as its last opportunity to simplify its message to the court that, despite any dispute raised by the defendant's evidence, it is more likely than not that the plaintiff has proved each element of its case. 25 C4th at 850.

On the plaintiff's burden as moving party, see §§4.24-4.28.

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§10.21 b. When Moving Party Is Defendant

A defendant who moves for summary judgment has the burden of persuasion that the evidence would "require a reasonable trier of fact not to find any underlying material fact more likely than not." *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 851, 107 CR2d 841. Thus, the moving defendant's argument at the hearing should be focused on showing that the plaintiff cannot establish one or more elements of the cause of action. CCP §437c(p)(2). See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 853, 107 CR2d 841; *Carrera v Maurice J. Sopp & Son* (2009) 177 CA4th 366, 376, 99 CR3d 268.

PRACTICE TIP: By the time of the hearing, the moving-party defendant has seen and responded to the plaintiff's opposition, challenged any deficiencies in the evidence, and addressed the plaintiff's legal challenges to the substantive law. Thus, the hearing is the moving-party defendant's last opportunity to convince the court that any dispute raised by the plaintiff's showing does not outweigh the defendant's showing.

On the defendant's burden as moving party, see §§4.30-4.32.

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2. Opposing Party's Substantive Burden

§10.22 a. When Moving Party Has Not Met Burden

The moving party's papers must be sufficient on their own to entitle that party to summary judgment; the opposing party is not required to file affidavits and declarations to defeat the motion unless the moving party has provided facts sufficient to establish every element necessary to sustain a judgment. See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 849, 107 CR2d 841. Thus, the opposing party's argument at the hearing should highlight the deficiencies in the moving party's papers.

PRACTICE TIP: Not presenting evidence in opposition to the motion is risky from a tactical viewpoint because, when counteraffidavits or declarations are not filed, the court must accept as true for purposes of the summary judgment motion those facts in the moving party's affidavits or declarations, and the court may not agree that the moving party failed to meet the burden and may order summary judgment without having had the opportunity to consider opposing evidence. See, *e.g., Niederer v Ferreira* (1987) 189 CA3d 1485, 1498, 234 CR 779 (defendant submitted no declarations or affidavits in opposition to ultimately successful summary judgment motion). But see *Versa Technols., Inc. v Superior Court* (1978) 78 CA3d 237, 240, 142 CR 570 (when manufacturer's identity is at issue in products liability case, plaintiff opposing summary judgment motion must offer evidence showing "good-faith belief that the party is the actual manufacturer of the product involved").

On the opposing party's burden when the moving party has not met its burden, see §4.36.

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§10.23 b. When Moving Party Has Met Burden

When the moving party has met the burden of production (see §4.6), the opposing party has the substantive burden of presenting sufficient admissible evidence to establish that there is at least one triable issue of material fact on at least one of the elements necessary for judgment for the moving party. CCP §437c(p). See *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. Thus, the opposing party's argument at the hearing should emphasize the existence of triable issue(s) and explain why the evidence in opposition to the motion is at least as compelling as that of the moving party.

PRACTICE TIP: By the time of the hearing, the opposing party has had an opportunity to make its prima facie case of a triable issue of fact and has reviewed the moving party's reply to the evidence. Because the opposing party cannot prepare a written response to the reply brief, the hearing is its last opportunity to re-focus on its strongest arguments and specifically address any issues raised by the court.

On the opposing party's burden when the moving party has met its burden, see §§4.34-4.35.

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Source: Civil Litigation/California Summary Judgment/10 Hearing and Oral Argument/§10.24 IV. ADVOCATING AT HEARING

§10.24 IV. ADVOCATING AT HEARING

At the hearing, counsel should listen carefully to and address the court's concerns, comments, or questions, and discuss any matter not already covered in the legal memorandums.

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Source: Civil Litigation/California Summary Judgment/10 Hearing and Oral Argument/§10.25 A. Effective Oral Advocacy

§10.25 A. Effective Oral Advocacy

Oral advocacy is more art than science. The best oral arguments are those in which the court and counsel engage in a dialogue about the issues. Counsel should listen to and answer any questions asked by the court and should not be so intent on presenting a prepared argument that he or she fails to hear what the judge is asking. Usually, the court's questions reflect its concerns, so they should be answered clearly and directly.

JUDICIAL PERSPECTIVE: Don't draft or read from a script at the hearing. Be prepared to focus on a few critical points at the oral argument based on the issues raised in the papers. Listen carefully to the court's questions and answer them directly.

On oral argument skills, see California Civil Appellate Practice §§16.29-16.33 (3d ed Cal CEB 1996).

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Source: Civil Litigation/California Summary Judgment/10 Hearing and Oral Argument/§10.26 B. Evidentiary Objections at Hearing

§10.26 B. Evidentiary Objections at Hearing

Counsel may make evidentiary objections orally at the hearing. See CCP §437c(b)(5), (d)). If counsel intends to do so, however, he or she must arrange to have a court reporter present at the hearing. Cal Rules of Ct 3.1352(2). See §9.15.

PRACTICE TIP: Notify the court reporter as soon as it becomes clear that evidentiary objections will be made at the hearing. In the absence of a court reporter, you risk not having a clear record for later appellate review, should that become necessary.

Evidentiary objections not made at the hearing are deemed waived. CCP §437c(b)(5). Similarly, objections to declarations based on failure to comply with CCP §437c(d) must be made at the hearing or will be deemed waived. CCP §437c(d). See §§9.3-9.6.

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C. Preserve Issues for Appellate Review

§10.27 1. Ask for Express Ruling on Evidentiary Objections

If a party makes evidentiary objections (see §10.26), but the trial court does not expressly rule on them, the objections are ordinarily deemed waived and are not preserved on appeal. See, *e.g., Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 670 n1, 25 CR2d 137; *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 783, 97 CR2d 140. But see *Parkview Villas Ass'n v State Farm Fire & Cas. Co.* (2005) 133 CA4th 1197, 1217, 35 CR3d 411 (exception exists when objecting party has filed written objections and expressly asked court to rule on objections at hearing and it appears futile to make further request). When a ruling on an objection is important to the case, counsel should ask for, and actively pursue, an express and/or written ruling at the hearing. On obtaining a ruling on objections and preserving them for appeal, see §§9.3-9.6.

PRACTICE TIP: Check local rules or with the court clerk for any requirements relating to proposed orders submitted before the hearing. See §9.14 on the format of a proposed order on objections that a party must submit with written objections, as required under Cal Rules of Ct 3.1354(c).

JUDICIAL PERSPECTIVE: On the key evidentiary objections, press the court for rulings. By submitting objections in writing before the hearing, counsel gives the court time to make rulings based on consideration of objections from all parties. One risk in submitting high numbers of objections is that counsel may overwhelm the court and shift its focus from the most important issues and objections in the case. Concentrate on making key objections that make a difference in the case, as opposed to loading up on multiple objections.

CAUTION: The acceptance of a tentative ruling without a hearing (see §10.9) may result in the court not expressly ruling on evidentiary objections. See §9.5.

On waiver of objections after a party requests rulings, see §§9.3-9.6, 12.30. See also California Civil Appellate Practice §2A.15 (3d ed Cal CEB 1996).

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§10.28 2. Ask Court to Specify Findings for Order

When denying a motion for summary judgment based on the existence of a triable issue as to one or more material facts, the court must, by written or oral order, specify the material fact(s) raised by the motion. CCP §437c(g). The court must specifically refer to the evidence proffered in support of and in opposition to the motion that indicates that a triable controversy exists.

When granting a motion for summary judgment on the ground that there is no triable issue of material fact, the court must, by written or oral order, specify the reasons for its determination. CCP §437c(g). The order must specifically refer to the evidence proffered in support of and in opposition to the motion indicating that no triable issue exists. The court must record its determination by court reporter or written order. On decision and order after hearing, see chap 11.

PRACTICE TIP: Ask the judge to specify the findings on which the order is based. See *Carnes v Superior Court* (2005) 126 CA4th 688, 692, 23 CR3d 915 (although it is appropriate for counsel to prepare order, it is a "total abdication of judicial responsibility" for court to grant motion for summary judgment and then, without specifying any reasons for doing so, to direct prevailing party to prepare order including findings necessary to support order).

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11

Decision and Order

I. INTRODUCTION §11.1

II. RULING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION
- A. Statutory Test §11.2
  - 1. Court's Three-Step Analysis §11.3
  - 2. When Facts Essential to Motion Exist But Cannot Be Presented §11.4
  - 3. Supplemental Declarations and Late Papers §11.5
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§11.1 I. INTRODUCTION

After the papers have been filed (see chaps 6-8) and a hearing has been held (see chap 10), if requested, the trial court rules on a motion for summary judgment or summary adjudication. In ruling on the motion, the court must apply the test set out in CCP §437c(c). See §§11.2-11.5. The court also makes related evidentiary rulings. See §§11.6-11.18.

Once the court makes its ruling, it may ask the prevailing party to prepare the proposed order. See §§11.19-11.20. On the contents of the order, see §§11.21-11.36. The order may also instruct a party to pay contractual attorney fees and/or sanctions, if appropriate. See §§11.37-11.40. The court's decision becomes final and subject to challenge by way of subsequent motion in the trial court, or by appellate writ application or appeal when the order is filed. On challenging the order after hearing, see chap 12.

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II. RULING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

§11.2 A. Statutory Test

A motion for summary judgment must be granted if all the moving and opposing papers submitted "show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CCP §437c(c); *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 850, 107 CR2d 841. Thus, if the evidence would permit a trier of fact to find for a nonmoving plaintiff under the standard of proof applicable at trial, then summary judgment must be denied, even if the trial court believes that the nonmovant would probably lose at trial.

A similar test applies to each ruling sought by a motion for summary adjudication (see CCP §437c(f)(1)), to

- Eliminate any cause of action, claim for punitive damages, or affirmative defense lacking merit;
- Establish a cause of action to which there is no defense; or
- Establish that one or more defendants does or does not owe a duty to specified plaintiffs.

The court's role is neither to predict the outcome at trial nor to weigh the evidence as the trier of fact. The court's role is simply to decide whether the admissible evidence *permits* the trier of fact to find in favor of the nonmoving party.

On the differences between summary judgment and summary adjudication, see §§2.13-2.29.

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Source: Civil Litigation/California Summary Judgment/11 Decision and Order/§11.3 1. Court's Three-Step Analysis

§11.3 1. Court's Three-Step Analysis

In ruling on a motion for summary judgment or summary adjudication, the trial court applies the following three-step analysis:

- Identify the issues framed by the pleadings;
- Decide whether the facts shown in the moving papers warrant judgment for the moving party and negate the opposing party's claims; and
- Decide whether the opposing party has established the existence of any triable material fact.

WRI Opportunity Loans II, LLC v Cooper (2007) 154 CA4th 525, 531, 65 CR3d 205, citing *Bostrom v County of San Bernardino* (1995) 35 CA4th 1654, 1662, 42 CR2d 669.

PRACTICE TIP: It is particularly important for a moving defendant to identify the issues framed by the pleadings because a summary judgment motion must respond to the pleadings' allegations by establishing a complete defense or the absence of any factual basis for any of the plaintiff's theories. On moving papers, see chap 6.

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§11.4 2. When Facts Essential to Motion Exist But Cannot Be Presented

If the affidavits submitted in opposition to a summary judgment or summary adjudication motion show that facts essential to justify the opposition may exist but cannot then be presented to the court, the court must deny the motion or order a continuance to permit the party time to obtain affidavits or take discovery. CCP §437c(h). See §7.19. The decision whether to grant a continuance is within the court's discretion, but "the interests at stake are too high to sanction the denial of a continuance without good reason." *Frazee v Seely* (2002) 95 CA4th 627, 634, 115 CR2d 780 (court abused its discretion by failing to grant request for continuance). See *Andrews v Mobile Aire Estates* (2005) 125 CA4th 578, 596, 22 CR3d 832 (trial court acted within its discretion in refusing continuance to conduct additional discovery to oppose summary judgment).

JUDICIAL PERSPECTIVE: In this situation, the best practice for opposing counsel is to appear ex parte as soon as the moving papers are received, rather than wait until the date the opposition is due, although CCP §437c does permit the continuance application to be made any time until or on the date the opposition is due. A court may be less skeptical of a request for additional time to take discovery or obtain affidavits if the request is made right after receipt of the moving papers. A court will deny a late request for a continuance. See *Ambrose v Michelin N. Am., Inc.* (2005) 134 CA4th 1350, 1353, 37 CR3d 1 (court properly denied continuance request made at hearing as untimely when opposing party failed to request continuance in opposing papers).

On continuances, see §§3.34-3.46.

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§11.5 3. Supplemental Declarations and Late Papers

Before ruling on a summary judgment or summary adjudication motion, a court has the discretion to consider papers filed late and to afford relief under CCP §473(b) for a party's "mistake, inadvertence, surprise, or excusable neglect." But see *Ambrose v Michelin N. Am., Inc.* (2005) 134 CA4th 1350, 1354, 37 CR3d 1 (late request for continuance due to other deadlines and concurrent obligations is not excusable neglect under §473).

CAUTION: A court is well within its discretion to refuse to consider any late filed and served papers. Do not rely on §473(b) relief in lieu of filing and serving papers on time.

If the court believes that an untimely paper prejudices the other party, it may continue a hearing on the motion and make any other appropriate orders, including an order that the responsible party pay expenses arising from the postponement. CCP §§594a, 1024; *Kapitanski v Von's Grocery Co.* (1983) 146 CA3d 29, 32, 193 CR 839. On continuances, see §§3.34-3.46.

NOTE: A party may not file late papers with the court after the matter has been submitted for a ruling, except on a noticed motion to reopen the matter. *Alvak Enters. v Phillips* (1959) 167 CA2d 69, 334 P2d 148.

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§11.6 B. Consideration of Proffered Evidence

When ruling on a summary judgment or summary adjudication motion, a court must consider all of the evidence in the papers, except that to which objections have been made and sustained by the court. CCP §437c(c). Evidentiary objections may be made either in writing or orally at the hearing on the motion (see §10.26), and objections not made are deemed waived. See CCP §437c(b)(5), (d), discussed in §9.3. In reviewing evidentiary objections, the trial court must be guided and controlled by legal principles. *Fasuyi v Permatex, Inc.* (2008) 167 CA4th 681, 695, 84 CR3d 351. On appeal, the trial court is granted deference on its evidentiary rulings; the standard for review is abuse of discretion. See §12.24. A conclusory ruling on evidentiary objections without consideration of the individual objections lodged is an abuse of discretion. *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 255, 100 CR3d 296.

On preparing and proffering evidence, see chap 5. On evidentiary objections, including tips for raising objections and securing rulings on them, see chap 9. On appellate review of evidentiary decisions, see §§12.24-12.30.

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§11.7 1. Court Must Construe Evidence in Favor of Party Opposing Motion

To safeguard the opposing party's right to trial on the merits, all doubts on the propriety of granting a summary judgment or summary adjudication motion must be resolved against the moving party. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 843, 107 CR2d 841. See *Stoltenberg v Newman* (2009) 179 CA4th 287, 290 n2, 101 CR3d 606, citing *Aguilar v Atlantic Richfield Co., supra* (all evidence and all inferences reasonably drawn from it must be viewed in light most favorable to opposing party). When the court examines the sufficiency of the evidence, the declarations or affidavits of the moving party are strictly construed and those of the opposition are liberally construed. *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 21, 112 CR 786; *Grant-Burton v Covenant Care, Inc.* (2002) 99 CA4th 1361, 1369, 122 CR2d 204, citing *Jackson v County of Los Angeles* (1997) 60 CA4th 171, 178, 70 CR2d 96; *Government Employees Ins. Co. v Superior Court* (2000) 79 CA4th 95, 93 CR2d 820. See §5.8.

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§11.8 a. Exception: When Opposing Party Repudiates Earlier Admissions

The rule requiring liberal construction of the opposition's evidence (see §11.7) does not apply if the opposing party attempts to create a conflict in the evidence by repudiating earlier admissions.

EXAMPLE 1: The trial court properly disregarded the opposing party's self-serving declarations contradicting credible discovery admissions and purporting to impeach the party's own prior sworn testimony. *Archdale v American Int'l Specialty Lines Ins. Co.* (2007) 154 CA4th 449, 473, 64 CR3d 632.

EXAMPLE 2: The trial court properly rejected plaintiff's attempt to avoid summary judgment by repudiating in an opposing affidavit certain statements made at her deposition and by crossing out her original answers in the deposition transcript, replacing them with ones conforming to her later "recollection" of events. *Shapero v Fliegel* (1987) 191 CA3d 842, 849, 236 CR 696.

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§11.9 b. Exception: When Moving Party Establishes Defense With Opposing Party's Admissions

The rule requiring liberal construction of the opposition's evidence (see §11.7) loses its efficacy when a defendant can establish his defense with the plaintiff's admissions sufficient to pass the strict construction test imposed on the moving party, because "the credibility of the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or evasive." *State Farm Mut. Auto. Ins. Co. v Eastman* (1984) 158 CA3d 562, 573, 204 CR 827. But see *Scalf v D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1522, 27 CR3d 826 (for summary judgment purposes, deposition answers are "simply evidence," and are not incontrovertible judicial admissions, such as concessions in pleading or answers to requests for admissions).

Apparent contradictions between an affidavit filed in support of summary adjudication and earlier testimony do not preclude consideration of the affidavit if the contradiction is satisfactorily explained in the affidavit and the explanation is corroborated by the evidence. See *Niederer v Ferreira* (1987) 189 CA3d 1485, 1503, 234 CR 779 (affiant's unfamiliarity with concept of assignment caused her, at her deposition, to erroneously deny that assignment had been made). This is an exception to the normal rule that the court does not weigh evidence in deciding the motion. See §§11.2, 12.24.

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2. Court May Draw Inferences From Evidence Presented

§11.10 a. Inferences Must Be "Reasonably Deducible"

In ruling on a summary judgment motion, the court's consideration of evidence is not limited to the face of the documents proffered by the parties; rather, evidence in support of summary judgment also includes inferences "reasonably deducible" from the papers submitted. CCP §437c(c). See *Waschek v DMV* (1997) 59 CA4th 640, 646, 69 CR2d 296 (to be "reasonably deducible," inferences may not be derived solely from speculation or conjecture); *O'Neil v Dake* (1985) 169 CA3d 1038, 215 CR 732 (same). See also *Maxwell v Colburn* (1980) 105 CA3d 180, 185, 163 CR 912 (fact that plaintiff's counsel did not urge trial court to draw certain specific inferences of negligence does not relieve court from duty to take those inferences into account). On burdens and inferences, see chap 4. On preparing declarations, see §§5.8-5.31.

EXAMPLE: The trial court properly refused to draw inferences "from thin air," and required that the plaintiff seeking to prove an essential element of her case by circumstantial evidence show that the "inferences favorable to her are more reasonable or probable than those against her." *Leslie G. v Perry & Assocs.* (1996) 43 CA4th 472, 483, 50 CR2d 785.

PRACTICE TIP: Inferences precluding summary judgment sometimes arise from the moving party's own declarations. See, *e.g., Maxwell v Colburn, supra* (trial court erred in granting summary judgment because reasonable inferences of defendant's negligence could be drawn from defendant's declarations). Thus, carefully review all possible evidence in light of these inferences.

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§11.11 b. Conflicting Inferences Cannot Be Weighed Against Each Other

The trial court cannot weigh the nonmoving party's evidence or inferences as if it were sitting as the trier of fact. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 856, 107 CR2d 841; *Saylin v California Ins. Guar. Ass'n* (1986) 179 CA3d 256, 224 CR 493. Instead, a court must view all evidence in a light most favorable to the nonmovant, and draw all reasonable inferences in favor of the nonmovant. *Aguilar,* 25 C4th at 843. When inferences are contradicted by other inferences, a triable issue of fact may be revealed precluding summary judgment. CCP §437c(c); *Alvis v County of Ventura* (2009) 178 CA4th 536, 547, 100 CR3d 494 (court must draw all reasonable inferences from evidence in papers except when such inferences are contradicted by other inferences or evidence that raise triable issue of fact); *Burke v Superior Court* (1982) 128 CA3d 661, 665, 180 CR 537. Equally conflicting evidence requires denial of summary judgment. *McIntosh v Mills* (2004) 121 CA4th 333, 338, 17 CR3d 66; *Kids' Universe v In2Labs* (2002) 95 CA4th 870, 881, 116 CR2d 158.

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3. Uncontroverted Evidence

§11.12 a. Court Must Accept as True

Subject to certain exceptions (see §§11.13-11.14), if the opposing party does not present controverting evidence, the court must accept the facts stated in the moving party's declarations as true for purposes of ruling on the summary judgment motion, as long as the declarant could competently testify about those facts based on personal knowledge. *Leo F. Piazza Paving Co. v Foundation Constructors, Inc.* (1981) 128 CA3d 583, 177 CR 268. See CCP §437c(e).

EXAMPLE: Because plaintiff did not controvert defendants' declarations in support of their motion for summary judgment, the trial court properly accepted them as true for purposes of the motion and, based on those uncontroverted declarations, correctly determined that no triable issue of fact remained because defendants' prima facie showing was not rebutted by plaintiff. *Kojababian v Genuine Home Loans, Inc.* (2009) 174 CA4th 408, 417, 94 CR3d 288.

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§11.13 (1) When Only Proof of Fact Is Declaration of Sole Witness

A court may deny summary judgment when the only proof of a material fact supporting the motion is the declaration of the only witness to that fact. CCP §437c(e). See *Overland Plumbing, Inc. v Transamerica Ins. Co.* (1981) 119 CA3d 476, 483, 174 CR 1 (trial court did not abuse its discretion by failing to reject declarations of sole witness to facts for reasons of credibility). See §§4.20, 5.12.

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§11.14 (2) When Fact Is Individual's State of Mind Established by Affirmation Only

A court may deny summary judgment when an uncontroverted material fact is an individual's state of mind (or lack thereof) and that fact is sought to be established only by the individual's affirmation of it. CCP §437c(e). See §§4.20, 5.11.

EXAMPLE 1: The attorney defendant decided not to raise an issue because, in his professional and reasonable judgment, the claim lacked merit. The reasonableness of the claim rested on defendant's declaration describing his mental process in reaching his conclusion. The trial court did not abuse its discretion by disbelieving defendant's statement and exercising its authority under §437c(e). *Meighan v Shore* (1995) 34 CA4th 1025, 1046, 40 CR2d 744.

EXAMPLE 2: In a case in which there was a question about whether defendants had established as a matter of law that defendants did not intend to cause, or recklessly disregard the probability of causing, emotional distress, the court properly applied the exception in §437c(e) for state of mind established in affirmation and found it to be dispositive of the question of intent. *KOVR-TV, Inc. v Superior Court* (1995) 31 CA4th 1023, 1031, 37 CR2d 431.

CAUTION: Section 437c(e) does not stand for the proposition that disbelief of an individual is sufficient to support an inference that the individual's true state of mind was different from what he or she said it was. Rather, when the moving party must prove an individual's state of mind to prevail on summary judgment and the only evidence presented is testimony from that individual, §437c(e) "simply authorizes the trial court to deny the motion as if no evidence at all had been presented as to that required element." *Viner v Sweet* (2004) 117 CA4th 1218, 1230, 12 CR3d 533.

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§11.15 b. Court May Not Make Credibility Determinations

If the moving party is entitled to prevail on the evidence presented, the court may not deny summary judgment on the ground that the declarant's credibility has not been tested by cross-examination. CCP §437c(e). See *AARTS Prods., Inc. v Crocker Nat'l Bank* (1986) 179 CA3d 1061, 1065, 225 CR 203 (court generally cannot resolve questions about declarant's credibility in summary judgment proceeding unless admissions against interest justify disregard of any dissimulation).

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Source: Civil Litigation/California Summary Judgment/11 Decision and Order/§11.16 4. Court Discretion to Consider Evidence Not Presented in Moving Party's Separate Statement

§11.16 4. Court Discretion to Consider Evidence Not Presented in Moving Party's Separate Statement

The trial court has discretion to consider evidence not referenced in the separate statement in ruling on a summary judgment or summary adjudication motion, but, in exercising this discretion, the court should consider due process implications. *San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 315, 125 CR2d 499. See *Fenn v Sherriff* (2003) 109 CA4th 1466, 1480, 1 CR3d 185 (applying factors set out in *San Diego Watercrafts, Inc.* and declining to exercise discretion to look beyond separate statement in reviewing summary judgment).

CAUTION: Under the so-called "golden rule," facts not contained in the separate statement do "not exist"; thus, the separate statement must contain all facts necessary to grant or deny the summary judgment or summary adjudication motion. *United Community Church v Garcin* (1991) 231 CA3d 327, 337, 282 CR 368. Courts are divided on whether this rule remains viable, with many cases "soundly reject[ing]" it. *State ex rel Harris v PricewaterhouseCoopers LLP* (2005) 125 CA4th 1219, 1262 n28, 23 CR3d 529, rev'd on other grounds (2006) 39 C4th 1220, 48 CR3d 144 (golden rule is rejected because it ignores summary judgment statute's reliance on court's discretion). See *King v United Parcel Serv., Inc.* (2007) 152 CA4th 426, 437, 60 CR3d 359 ("golden rule" is rigid rule of exclusion "contrary to the express terms of the summary judgment statute").

JUDICIAL PERSPECTIVE: Many courts use the golden rule as an alternative basis for a decision, in addition to other grounds, when granting the motion and not as the only basis for their decision.

On preparing the moving party's separate statement, see §§6.21-6.35. On new information in the reply brief, see §8.18.

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§11.17 a. When Evidence Is in Evidentiary Materials Filed With Separate Statement

There is a split of authority on what happens if a fact necessary to support or defeat the motion is not contained in the separate statement but may be found in the evidentiary materials filed with the separate statement. One position is that as long as the evidentiary showing is present somewhere, it is irrelevant where in the documents it may be located. *Kulesa v Castleberry* (1996) 47 CA4th 103, 112, 54 CR2d 669. The opposing position is that reliance on facts not contained in the separate statement would render the statutory requirement of a separate statement a nullity. *Fleet v CBS, Inc.* (1996) 50 CA4th 1911, 1916 n3, 58 CR2d 645; *North Coast Bus. Park v Nielsen Const Co.* (1993) 17 CA4th 22, 31, 21 CR2d 104.

The court in *San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 316, 125 CR2d 499, reconciled these conflicting positions by holding that, when evidence is not referenced in the separate statement and is "hidden in voluminous papers," the trial court may consider such evidence, but summary judgment should not be reversed based on the court's failure to do so.

PRACTICE TIP: From the standpoint of preserving the appellate record, carefully prepare the separate statement to ensure that all material facts are set out and there are clear references to all evidentiary support. Similarly, opposing counsel should be certain the responsive separate statement sets out sufficient facts and evidence to demonstrate a triable issue of material fact. Failure to do so creates the risk that the record on appeal will be insufficient to support or attack the trial court's decision. On preparing the separate statement, see §§6.21-6.35 (moving party) and 7.23-7.29 (opposing party).

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§11.18 b. When Evidence Is First Submitted With Moving Party's Reply

A trial court may properly consider new evidence submitted with a reply brief as long as the opposing party has notice and an opportunity to respond to the new material. *Wall Street Network, Ltd. v New York Times Co.* (2008) 164 CA4th 1171, 1183, 80 CR3d 6; *San Diego Watercrafts, Inc. v Wells Fargo Bank* (2002) 102 CA4th 308, 315, 125 CR2d 499. See §§8.18, 8.21.

If new evidence is submitted with the reply, the trial court has discretion to continue the hearing and provide the opposing party with an opportunity to amend its opposition papers in light of the newly submitted evidence.

EXAMPLE: In a vicarious liability and negligence action, the trial court was not precluded from considering "crucial" evidence in the reply, even though it was not initially included in defendant's summary judgment motion. *Weiss v Chevron, U.S.A., Inc.* (1988) 204 CA3d 1094, 1098, 251 CR 727 (unqualified reference in CCP §437c(b) to "the papers" before the court, without limitation to documents submitted with original motion, supports reasonable inference that court should consider all admissible evidence of which opposing party had notice and opportunity to respond).

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III. COURT ORDER ON MOTION FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION

A. Preparation and Approval of Court Order

§11.19 1. Prevailing Party Usually Prepares Order

The court usually directs the prevailing party to submit a proposed order for court approval. In fact, it is an abuse of discretion for the trial court to direct the losing party to prepare the formal order, because it is the prevailing party who has an interest in preparing an adequate order to protect the favorable trial court ruling. *Beatrice Cos. v Superior Court* (1986) 182 CA3d 525, 527, 227 CR 316.

JUDICIAL PERSPECTIVE: When a court grants a summary judgment motion, it is a good practice for the prevailing party to offer at the hearing to prepare the order, unless the court takes the matter under submission. In some courts the final ruling contained in the minutes obviates the need for a formal order.

CAUTION: Although a court may shift the burden of preparing the formal order onto the prevailing counsel (see *Tera Pharmaceuticals, Inc. v Superior Court* (1985) 170 CA3d 530, 532, 215 CR 923), the court may not abdicate its responsibility to specify the findings necessary to support its order. *Carnes v Superior Court* (2005) 126 CA4th 688, 692, 23 CR3d 915 (disapproving court's grant of motion without specifying findings and reason for its decision). See §11.21.

If the prevailing party fails to prepare or submit a proposed order, any other party may do so. Cal Rules of Ct 3.1312(c).

For a sample proposed order granting summary judgment, see §14.14.

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Source: Civil Litigation/California Summary Judgment/11 Decision and Order/§11.20 2. Timing

§11.20 2. Timing

If a proposed order was not prepared and submitted before the hearing, and the opposing party has not waived notice or the court ordered otherwise, the prevailing party must prepare and serve the order on the opposing party within **5 days** after the ruling. The opposing party has **5 days** to object to the order as to form. Cal Rules of Ct 3.1312(a).

CAUTION: The provisions of CCP §1013 for extending time limits when service of papers is by mail are inapplicable to the time limits in Cal Rules of Ct 3.1312(a).

After the opposing party objects, or the time for objections expires, the prevailing party must promptly transmit the proposed order to the court with a summary of any responses from the opposing party or a statement that it received no response. Cal Rules of Ct 3.1312(b).

NOTE: These timing rules do not apply when the motion was unopposed and the prevailing party submitted a proposed order with its moving papers, unless otherwise ordered by the court. Cal Rules of Ct 3.1312(d).

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B. Contents of Court Order

1. When Summary Judgment Motion Is Granted

§11.21 a. Court Must Specify Reasons and Evidence

When summary judgment is granted, the court must specify the reasons for its determination by "written or oral order." CCP §437c(g). See *Barton v Elexsys Int'l, Inc.* (1998) 62 CA4th 1182, 1194, 73 CR2d 212 (finding that trial court's oral statement at hearing was sufficient).

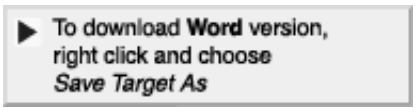
PRACTICE TIP: If the order is made orally at the hearing, it must be recorded by a court reporter. CCP §437c(g).

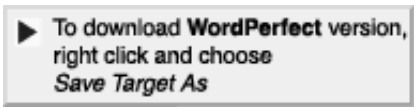
The order must also specifically refer to the evidence in support of and, if applicable, in opposition to the motion showing that no triable issue exists. CCP §437c(g). See *Vineyard Springs Estates, LLC v Superior Court (Wyatt)* (2004) 120 CA4th 633, 642, 15 CR3d 587 (trial court cannot faithfully carry out mandate of §437c(g) without considering all objections to proffered evidence and ruling on their merits); *Sacks v FSR Brokerage, Inc.* (1992) 7 CA4th 950, 960, 9 CR2d 306 (trial court's order failed to specifically refer to evidence proffered, but summary judgment upheld because court also granted motion on ground that defendant failed to offer contrary evidence or arguments in opposition (see CCP §437c(b)).

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Source: Civil Litigation/California Summary Judgment/11 Decision and Order/§11.22 (1) Checklist: Contents of Proposed Order Granting Motion

§11.22 (1) Checklist: Contents of Proposed Order Granting Motion





The proposed order should include (CCP §437c(g)):

- 1. The reason for the grant of summary judgment, *e.g.,* that
- A. A complete defense to the action exists, the action has no merit, or there is no defense to the action;
- B. No triable issue of fact exists, and the moving party is entitled to judgment as a matter of law; or
- C. The opposing party is being sanctioned, *e.g.,* for failure to file a separate statement. See CCP §437c(b)(3); *Buehler v Alpha Beta Co.* (1990) 224 CA3d 729, 734, 274 CR 14.
- 2. If the motion is granted because there is no triable issue of fact, specific reference to evidence proffered in support of and/or in opposition to the motion indicating no triable issue exists.

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§11.23 (2) Effect of Failure to Provide Sufficient Statement of Reasons

A court's failure to provide a sufficient statement of reasons is not automatic grounds for reversal, because it is the ruling's validity that is reviewable, not the grounds for it. *Ace Am. Ins. Co. v Walker* (2004) 121 CA4th 1017, 1027, 18 CR3d 1. See *W. F. Hayward Co. v Transamerica Ins. Co.* (1993) 16 CA4th 1101, 1110, 20 CR2d 468 (to be sufficient, statement of reasons must allow for meaningful appellate review).

In some cases, the lack of a statement of reasons may be a ground for reversal, particularly if the issues litigated through summary judgment were complex, the facts supported both the moving and opposing parties, and the court decided credibility issues. *Santa Barbara Pistachio Ranch v Chowchilla Water Dist.* (2001) 88 CA4th 439, 448, 105 CR2d 856. See *Geddes v Superior Court* (2005) 126 CA4th 417, 23 CR3d 857 (in prior unpublished opinion, court of appeal reversed grant of summary judgment on grounds that "trial court failed to provide a statement of reasons and supporting evidence as required by [CCP §437c(g)]").

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§11.24 b. Court Does Not Make Findings of Fact

When summary judgment is granted, the court does not make factual findings because there has not been a trial on the facts. See *Business Title Corp. v Division of Labor Law Enforcement* (1976) 17 C3d 878, 882 n3, 132 CR 454 (findings of fact "have no place in summary judgment procedure"); *Perry v Farley Bros. Moving & Storage* (1970) 6 CA3d 884, 889, 86 CR 397 (on hearing summary judgment motion, court is without power to make findings of fact).

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Source: Civil Litigation/California Summary Judgment/11 Decision and Order/§11.25 c. Order Should Include Direction That Judgment Be Entered

§11.25 c. Order Should Include Direction That Judgment Be Entered

The order should include a direction that judgment be entered for the prevailing party, specifying any affirmative relief.

PRACTICE TIP: Prepare and submit a proposed judgment to the court with the proposed order. Be sure to comply with any local court rules.

For samples of proposed orders and judgments, see §§14.14-14.15, 14.17-14.20.

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2. When Summary Judgment Motion Is Denied

§11.26 a. Court Must Specify Reasons and Evidence

When a court denies summary judgment on the ground that there is a triable issue as to one or more material facts, it must, by written or oral order (CCP §437c(g)),

- Specify the material fact(s); and
- Specifically refer to the evidence proffered in support of and in opposition to the determination that a triable controversy exists.

The specificity requirement compels the trial court to focus its attention on the legal and factual issues before concluding that disputed factual issues exist, thus precluding summary judgment. *Greater Irvine Credit Union v Superior Court* (1986) 186 CA3d 1189, 1191, 231 CR 296 (court's order fell "far short" of required specificity). A general statement that the liability of the moving party is at issue does not assist the appellate court in reviewing the denial order. *Beatrice Cos. v Superior Court* (1986) 182 CA3d 525, 527, 227 CR 316.

EXAMPLE 1: A formal order stating that "[d]efendant's motion for summary judgment is hereby denied on the grounds that there exists a triable issue of fact as to the liability of defendant" inadequately specified the material facts and the evidence. *Beatrice Co. v Superior Court, supra*.

EXAMPLE 2: A court's cursory and unspecific ruling, stating simply "I am not convinced. The court is going to deny the motion [based on facts stated in] counsel's moving papers," was in error. *Payless Drug Store v Superior Court* (1993) 20 CA4th 277, 24 CR2d 506.

The specificity requirement does not apply, however, if summary judgment is denied on the ground that the moving party failed to meet the burden of proof or for procedural reasons (*e.g.,* failure to comply with applicable local rules).

PRACTICE TIP: Opposing counsel should carefully prepare the order on denial of the motion, making sure to specify at least one triable issue that is backed up by references to the evidence as presented in the moving and opposing papers. The order need not specify every disputed issue. CCP §437c(g). See §11.28.

The court must record its determination by court reporter or written order. CCP §437c(g). An appellate court may use this record to decide whether the trial court applied the statute properly.

For a sample form order denying summary judgment, see §14.20.

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Source: Civil Litigation/California Summary Judgment/11 Decision and Order/§11.27 (1) Checklist: Contents of Proposed Order Denying Motion

§11.27 (1) Checklist: Contents of Proposed Order Denying Motion

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If summary judgment is denied, the opposing party prepares an order that:

- 1. Specifies one or more material facts for which there exists a triable controversy;
- 2. Refers specifically to evidence offered in support of and in opposition to the motion indicating that a triable controversy exists (*e.g.,* if evidence is located in a deposition transcript, cite to page and line number of transcript);
- 3. States the court's reasons for any other determination, *e.g.,*
- A. The moving party failed to sustain burden of persuasion or production, or
- B. A procedural defect existed (CCP §437c(g)); and
- 4. Allows recovery of reasonable costs incurred as a result of the motion if the court determines that the affidavits or declarations were submitted in bad faith. See CCP §437c(j).

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§11.28 (2) Effect of Failure to Specify Disputed Factual Issues

Issues not specified in the order are not foreclosed at trial. That is, disputed issues specified in the order denying summary judgment are not necessarily the only issues in the case left to be decided at trial. The court is not required by the statute to list all disputed factual issues in the order, only "one or more" such issues. CCP §437c(g).

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§11.29 b. Appellate Court Must Vacate Defective Orders

A reviewing court must vacate orders denying summary judgment that fail to comply with CCP §437c(g). See *Young v Superior Court* (1986) 179 CA3d 28, 33, 224 CR 405 (court vacated order denying summary judgment because order failed to refer specifically to evidence proffered in support of and in opposition to motion indicating that triable controversy existed). In *Tera Pharmaceuticals, Inc. v Superior Court* (1985) 170 CA3d 530, 215 CR 923, the court of appeal issued a writ of mandate requiring the trial court to reconsider its denial of summary judgment made without specifying the disputed issues completely or describing the conflicting evidence for each triable issue of fact. See also *Payless Drug Store v Superior Court* (1993) 20 CA4th 277, 24 CR2d 506 (court issued writ of mandate directing trial court to make appropriate order under CCP §437c(g) and *Tera Pharmaceuticals, Inc. v Superior Court, supra*).

PRACTICE TIP: Review the requirements of §437c(g) carefully before preparing the order for the court's signature. See §§11.26-11.28.

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3. When Summary Adjudication Motion Is Granted

§11.30 a. Order Must Specify Matter Adjudicated and Reasons for Granting Motion

In an order granting summary adjudication, a court must specify its reasons and refer to the evidence, just as it would in an order granting or denying summary judgment. CCP §437c(g). See §§11.21, 11.26.

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§11.31 b. Checklist: Contents of Proposed Order Granting Summary Adjudication

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If summary adjudication is granted, the prevailing party should prepare a proposed order (or modify the previously submitted order) that includes:

- 1. Identification of the matter about which summary adjudication is granted (*i.e.,* the cause of action, affirmative defense, claim for damages, or issue of duty).
- 2. Reasons for the grant of summary adjudication, *e.g.,* that:
- A. An affirmative defense to one cause of action has merit, or a claim for punitive damages has none;
- B. There is no triable issue of material fact as to the validity of a defense or a punitive damages claim, and the moving party is entitled to summary adjudication as a matter of law; or
- C. The opposing party is being sanctioned, *e.g.,* for failure to file a separate statement. See CCP §437c(b)(3); *Buehler v Alpha Beta Co.* (1990) 224 CA3d 729, 734, 274 CR 14.

Because moving for summary adjudication is to "proceed in all procedural respects as a matter for summary judgment" (CCP §437c(f)(2)), the sanction specified in CCP §437c(b) for failure to comply with the separate statement requirements on a motion for summary judgment (denial of motion) also applies to motions for summary adjudication. See §11.16.

PRACTICE TIP: The statute expressly forbids comment to the jury at trial about the grant or denial of a motion for summary adjudication. See CCP §437c(n)(3). The prevailing party may wish to include that prohibition in the order as a precaution against improper comment.

For a sample proposed order granting summary adjudication, see §14.15.

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Source: Civil Litigation/California Summary Judgment/11 Decision and Order/§11.32 c. Checklist: Contents of Order When Motion Granted for Lack of Triable Issue Should Specify Evidence

§11.32 c. Checklist: Contents of Order When Motion Granted for Lack of Triable Issue Should Specify Evidence

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If a motion for summary adjudication is granted because there is no triable issue of fact, the proposed order should include:

- 1. Specific reference to evidence proffered in support of the motion that indicates no triable issue exists; and/or
- 2. Specific reference in opposition to the motion that indicates no triable issue exists; and
- 3. Direction that final judgment be entered as to the adjudicated matter (see CCP §437c(k)).

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§11.33 d. Costs Imposed as Sanctions

If appropriate, the proposed order granting summary adjudication may require the opposing party to pay the moving party any reasonable costs incurred because he or she submitted opposing affidavits or declarations in bad faith or solely for delay. CCP §437c(j). Reasonable costs do not include attorney fees under CCP §437c(j), absent contract or other statute. *Collins v Department of Transp.* (2003) 114 CA4th 859, 864, 8 CR3d 132. On sanctions for bad faith, see §11.40.

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4. When Summary Adjudication Motion Is Denied

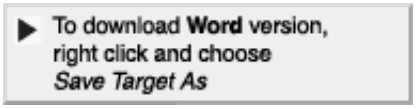
§11.34 a. Court Must State Reasons and Evidence

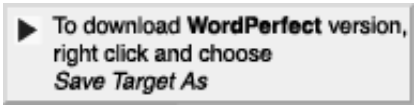
The statement in CCP §437c(g) that "[t]he court shall also state its reasons for any other determination" may be read as requiring a court denying summary adjudication to make the same kind of specification of material facts as to which there is a triable issue and the same kind of reference to supporting and opposing evidence that §437c(g) explicitly requires when the court denies summary judgment. See §11.26.

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Source: Civil Litigation/California Summary Judgment/11 Decision and Order/§11.35 b. Checklist: Contents of Proposed Order Denying Summary Adjudication

§11.35 b. Checklist: Contents of Proposed Order Denying Summary Adjudication





The proposed order should:

- 1. Specify each cause of action, affirmative defense, claim for damages, and issue of duty as to which there exists a material, triable controversy; and
- 2. Refer specifically to the evidence that establishes a triable issue of fact on each of those (CCP §437c(f)).

PRACTICE TIP: The statute expressly forbids comment to the jury at trial about the grant or denial of a motion for summary adjudication. See CCP §437c(n)(3). The prevailing party may wish to include that prohibition in the order as a precaution against improper comment.

For a sample proposed order denying summary adjudication, see §14.17.

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§11.36 c. Costs Imposed as Sanctions

If appropriate, the proposed order denying summary adjudication may require the moving party to pay the opposing party any reasonable costs incurred if the court determines that the moving party submitted affidavits or declarations in bad faith or solely for delay. CCP §437c(j). Reasonable costs do not include attorney fees under CCP §437c(j), absent contract or other statute. *Collins v Department of Transp.* (2003) 114 CA4th 859, 864, 8 CR3d 132. On sanctions for bad faith, see §11.40.

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C. Obtaining Attorney Fees and Sanctions

§11.37 1. Contractual Attorney Fees

If a contract provides for attorney fees to enforce the contract, the prevailing party is entitled to attorney fees whether or not he or she is the party specified in the contract. See *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614 (CC §1717 requires that any contractual provision for attorney fees to "prevailing party" must be applied mutually, even if contract specifies that only one party may recover fees); *FDIC v Dintino* (2008) 167 CA4th 333, 358, 84 CR3d 38 (defendant was prevailing party because he prevailed on only contract-based cause of action).

On contractual attorney fee awards, see California Attorney Fee Awards, chap 4 (3d ed Cal CEB 2010).

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Source: Civil Litigation/California Summary Judgment/11 Decision and Order/§11.38 a. Prevailing Party Defined

§11.38 a. Prevailing Party Defined

Special rules apply to the definition of "prevailing party" on a summary judgment motion and its appeal. In *Presley of S. Cal. v Whelan* (1983) 146 CA3d 959, 196 CR 1, the plaintiff sued for breach of a contract containing an attorney fees clause. The defendant obtained summary judgment, but it was reversed and the plaintiff requested an award of attorney fees expended on appeal. The trial court awarded the plaintiff fees while trial of the matter was still pending. In reversing, the court of appeal found no prevailing party, because the winner in the underlying action was yet to be determined. The court held that, despite CC §1717, attorney fees

- Cannot be awarded to a party who wins appellate reversal of a summary judgment while the litigation is continuing;
- Can be awarded to a plaintiff who succeeds in reversing summary judgment on appeal and then proceeds to win final judgment (as long as there is a contract under CC §1717 entitling the plaintiff to attorney fees on appeal); and
- Can be awarded to a defendant who ultimately prevails, as provided by contract, but a plaintiff who succeeded earlier in reversing summary judgment is not entitled to any right of offset.

NOTE: The *Presley* court reasoned that to allow an offset would discourage the efficient resolution of litigation by use of motions for summary judgment and would require the court to review all interim procedural rulings in the case. 146 CA3d at 963. An offset would be allowed, however, for the expense of frivolous motions made by the prevailing party before conclusion of the suit under CCP §128.7. See California Civil Procedure Before Trial §1.6 (4th ed Cal CEB 2004).

On the prevailing party concept, see California Attorney Fee Awards, chap 2 (3d ed Cal CEB 2010).

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§11.39 b. Procedure for Obtaining Contractual Attorney Fees

Attorney fees need not be pleaded, and no trial is necessary to establish them; they may be recovered by motion served and filed in accordance with Cal Rules of Ct 3.1702. Under Rule 3.1702, a motion to claim attorney fees must be filed within the time for filing a notice of appeal under Cal Rules of Ct 8.104 and 8.108 (*i.e.,* within the earlier of **60 days** after the clerk's service of the notice of entry of judgment, extended by **30 days** when a motion for new trial is denied, or within **180 days** after entry of judgment), for services up to and including the rendition of judgment in the trial court.

The parties may stipulate to an extension of time under Cal Rules of Ct 3.1702(b)(2) until

- **60 days** after expiration of the time to file a notice of appeal; or
- If a notice of appeal is filed, the expiration of time to file a memorandum of costs under Cal Rules of Ct 8.278(c) (*i.e.,* within **40 days** after the clerk of the reviewing court mails notice of issuance of the remittitur).

A motion to have the court determine attorney fees on appeal must be heard within the time to file a memorandum of costs. Cal Rules of Ct 3.1702(c).

On motions to recover attorney fees, see California Trial Practice: Civil Procedure During Trial, chap 26 (3d ed Cal CEB 1995); California Civil Appellate Practice, chap 20 (3d ed Cal CEB 1996).

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§11.40 2. Sanctions for Bad Faith Affidavits

Under CCP §437c(j), if the court determines that affidavits were presented in bad faith or solely for purposes of delay, it must order the party presenting the affidavits to pay the other party its "reasonable expenses" caused by the filing of the affidavits. See *Collins v Department of Transp.* (2003) 114 CA4th 859, 864, 8 CR3d 132 (reasonable expenses allowed as sanctions under former CCP §437c(i) (now CCP §437c(j)) do not include attorney fees). Compare *Collins* with *Winick Corp. v County Sanitation Dist. No. 2* (1986) 185 CA3d 1170, 1176, 230 CR 289 (sanctions, including attorney fees, awarded against party who submitted affidavits opposing summary judgment in bad faith based on CCP §128.5).

NOTE: Because CCP §437c(j) is based on Fed R Civ P 56(g), applicable federal cases are persuasive authority for California courts; however, federal courts have been reluctant to find bad faith. See, *e.g., Sonobond Corp. v Uthe Technol., Inc.* (ND Cal 1970) 314 F Supp 878.

Before sanctions can be imposed, the party requesting them, or the court on its own motion, must give notice and an opportunity to be heard. CCP §437c(j).

PRACTICE TIP: It is rare for courts to award sanctions under §437c(j), because bad faith or intentional delay is difficult to prove. The determination of whether declarations are presented in bad faith frequently cannot be made until after the summary judgment motion has been denied and a trial is conducted in which the evidence reveals the bad faith of the party presenting them. See, *e.g.*, *Summers v City of Cathedral City* (1990) 225 CA3d 1047, 1070, 275 CR 594 (trial court did not abuse its discretion in denying defendant's motion for sanctions under CCP §128.5 to compensate it for having been forced to defend against what it argued was frivolous lawsuit). Given the difficulty of winning sanction motions and the already overcrowded motion calendars, counsel may choose not to pursue sanctions except in extreme cases.

JUDICIAL PERSPECTIVE: Many courts are hesitant to grant sanctions except in the clearest of cases.

On requesting sanctions, see §10.16.

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12

Challenging the Decision

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B. Appellate Court Review §12.53

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.1 I. INTRODUCTION

§12.1 I. INTRODUCTION

After losing the trial court's ruling on a motion for summary judgment or adjudication, a party must decide whether to challenge the decision. The losing party may challenge the decision by means of various trial court procedures, or by appellate review via writ or appeal.

This chapter discusses these options, including tactical considerations. There are checklists throughout the chapter that contain diagnostic questions counsel should review to decide whether and how to challenge the court's ruling. Charts at the end of the chapter visually set out the options following a grant or denial of summary judgment or summary adjudication. See §§12.52-12.53.

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II. WHEN SUMMARY JUDGMENT IS GRANTED

§12.2 A. Trial Court Motions

When a summary judgment motion is granted, the opposing party may challenge the grant directly in the trial court by the following motions:

- Motion for reconsideration (see §§12.3-12.6);
- Motion for a new trial (see §§12.8-12.10);
- Motion for relief under CCP §473 (see §§12.11-12.14); or
- Motion or separate action to set aside the judgment due to extrinsic fraud or mistake (see §§12.15-12.17).

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§12.3 1. Motion for Reconsideration

Before the judgment is entered, any party affected by an order of the trial court granting summary judgment may seek reconsideration of that order under CCP §1008. On motion procedures, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

CAUTION: If a motion for reconsideration is not made in good faith or is made for an improper purpose (see CCP §128.7), the court may order the moving party to pay the opposing party's reasonable expenses. CCP §1008(d). See Civ Proc Before Trial §1.6.

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.4 a. Timing

§12.4 a. Timing

A motion for reconsideration must be made within **10 days** after service on the moving party of the written notice of entry of the order. CCP §1008(a).

NOTE: Actual knowledge of the order is not required; constructive notice of the order is enough to trigger the **10-day** limitation period. *In re Imperial Ins. Co.* (1984) 157 CA3d 290, 299, 203 CR 664 (constructive knowledge through giving notice to party's attorney found to be sufficient).

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§12.5 b. Grounds

A motion for reconsideration under CCP §1008(a) must show (*New York Times Co. v Superior Court* (2005) 135 CA4th 206, 212, 37 CR3d 338)

- New or different facts, circumstances, or law; and
- A reason why such facts, circumstances, or law could not have been presented originally.

See *Mink v Superior Court* (1992) 2 CA4th 1338, 1342, 4 CR2d 195, citing *Blue Mountain Dev. Co. v Carville* (1982) 132 CA3d 1005, 1013, 183 CR 594, overruled by statute as stated in *Ford Motor Co. v Superior Court* (1995) 35 C4th 997, 1003 n5, 41 CR2d 627.

JUDICIAL PERSPECTIVE: A motion for reconsideration should only be brought if new or different facts or law truly exist. A better way to proceed in the absence of those grounds would be a motion for new trial. See §§12.8-12.10.

Essentially, the moving party has the same burden as a party seeking a new trial on the ground of newly discovered evidence. See §§12.8-12.10.

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§12.6 c. Entry of Judgment Is Implied Denial of Motion

A motion for reconsideration does not survive a subsequently entered judgment, *i.e.,* once the court enters judgment, it cannot decide a motion for reconsideration. The entry of judgment is an implied denial of any pending motion for reconsideration. *Nave v Taggart* (1995) 34 CA4th 1173, 40 CR2d 714.

CAUTION: A court has discretion, however, to treat a motion for reconsideration as one for a new trial. See *Sole Energy Co. v Petrominerals Corp*. (2005) 128 CA4th 187, 193, 26 CR3d 790 ("The principle that a trial court may consider a motion regardless of the label placed on it by a party is consistent with the court's inherent authority to manage and control its docket"). On new trial motions, see §§12.8-12.10.

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§12.7 d. Court May Reconsider Its Ruling Sua Sponte

Even if a party does not move for reconsideration, the trial court has inherent power to reconsider its ruling on a summary judgment motion irrespective of the constraints of CCP §1008 (see §12.3). *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249; *Abassi v Welke* (2004) 118 CA4th 1353, 1359, 14 CR3d 336 (court may reconsider ruling on motion for summary judgment sua sponte and request that parties resubmit motion that court had previously denied). But see *Schachter v Citigroup, Inc.* (2005) 126 CA4th 726, 23 CR3d 920 (court's inherent power to correct its own rulings does not excuse party from complying with requirements of CCP §437c(f)(2) when seeking reconsideration of summary judgment ruling).

If the trial court exercises its own inherent power to reconsider the ruling, it is not bound by the **10-day** rule in CCP §1008 (see §12.4), and may instead reconsider at any time. See *Abassi v Welke* (2004) 118 CA4th 1353, 1359, 14 CR3d 336. Similarly, a trial court exercising its own inherent power to reconsider its ruling granting summary judgment is not bound by the "change in law" requirement (see §12.5). See *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249.

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§12.8 2. Motion for New Trial

A decision granting a motion for summary judgment may be challenged by a motion for a new trial. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 858, 107 CR2d 841; *Doe v United Air Lines, Inc.* (2008) 160 CA4th 1500, 1504, 73 CR3d 541; *Cassady v Morgan, Lewis & Bockius LLP* (2006) 145 CA4th 220, 229, 51 CR3d 527. A new trial motion is available even though, strictly speaking, "summary judgment … is a determination that there shall be no trial at all." *Aguilar v Atlantic Richfield Co., supra*. See *Carney v Simmonds* (1957) 49 C2d 84, 90, 315 P2d 305 ("trial" occurs even when only issues of law are determined; court approved new trial procedure after judgments without conventional trial). See also *Hendershot v Superior Court* (1993) 20 CA4th 860, 864, 24 CR2d 645 (former law that limited new trial motions to cases in which issue of fact had been adjudicated has been "repudiated," and "the remedy is now quite broad").

There are several advantages to filing a new trial motion over one for reconsideration, including the broader grounds for a new trial motion (see §12.10), which allow the court to have a second look in close cases. In addition, if any evidence could not be gathered in time for the opposition, and the court denied a motion for continuance under CCP §437c(h), a new trial motion gives the court a chance to reconsider that decision and gets the evidence in the record so that the appellate court can consider it.

PRACTICE TIP: If a new trial is granted, ensure that the order stating the reasons for the court's decision meets the specificity requirements of CCP §657 and the cases interpreting it.

On motions for new trial, see California Trial Practice: Civil Procedure During Trial §§25.22-25.71 (3d ed Cal CEB 1995).

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.9 a. Timing

§12.9 a. Timing

A motion for a new trial may be made either (CCP §659):

- After the court's decision and before entry of judgment; or
- Within **15 days** after the date of the clerk's mailing of notice of entry of judgment under CCP §664.5, or service on him or her by any party of written notice of entry of judgment, or within **180 days** after entry of judgment, whichever is earliest.

See *Olson v County of Sacramento* (1969) 274 CA2d 316, 323, 79 CR 140 (motion for new trial filed on day before judgment was filed found to be timely).

CAUTION: The moving party must serve and file its supporting memorandum within **10 days** after filing notice of intention to move for a new trial. Cal Rules of Ct 3.1600(a). The failure to do so may result in denial of the new trial motion without a hearing on the merits. Cal Rules of Ct 3.1600(b).

NOTE: Moving for new trial automatically extends the time for appealing from the summary judgment. See Cal Rules of Ct 8.108(b).

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.10 b. Grounds

§12.10 b. Grounds

The grounds for a new trial set out in CCP §657 are broader than those for filing a motion for reconsideration (see §12.5); a new trial motion requires identification of either newly discovered evidence *or* a legal error in the proceeding, whereas a motion for reconsideration can only be made on the grounds of new facts or law.

When the basis for a new trial motion is newly discovered evidence, counsel must show that the evidence could not have been discovered with reasonable diligence and produced at or before the hearing on the summary judgment motion. See CCP §657(4). If the motion is properly denied for failure to make this showing, the newly discovered evidence raised cannot be considered on appeal to defeat the judgment. *Jacobs v Retail Clerks Union* (1975) 49 CA3d 959, 123 CR 309.

EXAMPLE 1: In a case against an airline alleging sexual assault of a minor, the trial court, which had granted the airline's summary judgment motion, erred in ordering a new trial based on the declaration from a clinical psychologist who opined that the minor had suffered bodily injury within the meaning of the Warsaw Convention, because the evidence was neither newly discovered nor produced with reasonable diligence. *Doe v United Air Lines, Inc.* (2008) 160 CA4th 1500, 73 CR3d 541.

EXAMPLE 2: In a medical malpractice case, the trial court granted defendant doctor's summary judgment motion, finding that plaintiff's expert declaration failed to raise a triable issue with respect to causation. The trial court then granted plaintiff's new trial motion based on "the equities" and the policy favoring "resolutions [on] the merits." *Tortorella v Castro* (2006) 140 CA4th 1, 3, 43 CR3d 853. Although the court of appeal found that this rationale did "not fit within the statutory framework," it nevertheless affirmed, because a "new trial order will be upheld if correct on any ground" (140 CA4th at 9), and here a new trial was warranted because the trial court improperly granted summary judgment.

EXAMPLE 3: In a case in which new evidence was obtained during a deposition, the trial court erroneously denied the new trial motion for lack of diligence in acquiring the new facts, because judicial notice of the court's file established as a matter of law that plaintiffs exercised reasonable diligence in pursuing discovery by noticing the deposition within 7 months of filing the complaint and less than 4 months after the answer was filed. *Scott v Farrar* (1983) 139 CA3d 462, 468, 188 CR 823.

PRACTICE TIP: Counsel for the party moving for new trial should point out to the court that the degree of diligence in discovery required in preparation for trial is higher than that required of a party opposing a summary judgment motion, because such motions come relatively early in the litigation, with time constraints often rendering a higher degree of diligence impossible. *Scott v Farrar, supra.*

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3. Motion to Vacate Under CCP §473

§12.11 a. Discretionary Relief

A court may grant relief from summary judgment under the discretionary relief provision of CCP §473(b). *English v IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 149, 114 CR2d 93; *Mink v Superior Court* (1992) 2 CA4th 1338, 1342, 4 CR2d 195.

On motions for discretionary relief under CCP §473, see California Civil Procedure Before Trial §§38.79-38.82 (4th ed Cal CEB 2004).

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.12 (1) Timing

§12.12 (1) Timing

Under CCP §473(b), a party must seek relief from a summary judgment within a reasonable time, not to exceed **6 months** after its entry.

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.13 (2) Grounds

§12.13 (2) Grounds

Discretionary relief under CCP §473(b) is available for a party's "mistake, inadvertence, surprise, or excusable neglect." Relief under CCP §473(b) may be available if, for legally acceptable reasons, the party seeking relief failed, *e.g.,* to make the showing required to prevail at the hearing. See *Kapitanski v Von's Grocery Co.* (1983) 146 CA3d 29, 33, 193 CR 839 (relief granted after trial court refused to consider plaintiff's untimely declarations opposing defendant's summary judgment motion when plaintiff retained counsel just one day before filing date).

For examples of excusable and inexcusable neglect, see California Civil Procedure Before Trial §38.82 (4th ed Cal CEB 2004); 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§151-172 (5th ed 2008).

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§12.14 b. Mandatory Relief

Under CCP §473(b), the court must grant relief from default or a default judgment for attorney neglect, even inexcusable neglect, when application for relief is

- Made within **6 months** after entry of judgment;
- In proper form; and
- Accompanied by "an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect."

In *Avila v Chua* (1997) 57 CA4th 860, 867, 67 CR2d 373, the Second District Court of Appeal held that the mandatory provision of CCP §473(b) applied to summary judgment if the party lost the motion due to an attorney's failure to timely file documents, finding that the summary judgment motion was analogous to a "default judgment." 57 CA4th at 868. The default analogy of *Avila v Chua* was rejected in *English v IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 149, 114 CR2d 93*,* by the Third District Court of Appeal, which found that "default" in CCP §473(b) could not be interpreted to encompass a summary judgment. Recent cases have followed the holding of *English* and held that the mandatory relief provision does not apply to summary judgments. See *Hossain v Hossain* (2007) 157 CA4th 454, 458, 69 CR3d 356 (Second District Court of Appeal); *Huh v Wang* (2007) 158 CA4th 1406, 1414, 71 CR3d 65 (Sixth District Court of Appeal); *Prieto v Loyola Marymount Univ.* (2005) 132 CA4th 290, 295, 33 CR3d 639 (Second District Court of Appeal).

On motions for mandatory relief under CCP §473, see California Civil Procedure Before Trial §§38.83-38.84 (4th ed Cal CEB 2004); 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§192-205 (5th ed 2008).

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.15 4. Motion or Separate Action to Set Aside Judgment for Extrinsic Fraud or Mistake

§12.15 4. Motion or Separate Action to Set Aside Judgment for Extrinsic Fraud or Mistake

A judgment or order may be set aside on a showing of extrinsic fraud or mistake that prevented a party from having a fair hearing, if the party's diligence and the existence of a meritorious case are established.

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.16 a. Timing

§12.16 a. Timing

The final judgment of a court with jurisdiction over persons and subject matter can be attacked based on extrinsic fraud or mistake any time after the time for appeal or other direct attack has expired. See *Westphal v Westphal* (1942) 20 C2d 393, 397, 126 P2d 105. The relief may be requested by motion or in a separate action whenever the fraud or mistake is discovered. See 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§215-221 (5th ed 2008).

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§12.17 b. Grounds

Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his or her claim or defense to the court. *Westphal v Westphal* (1942) 20 C2d 393, 397, 126 P2d 105. See 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §236 (5th ed 2008).

EXAMPLE: In a case in which defendant reasonably assumed that its insurer would defend and followed instructions to mail any summons and complaint to the insurer, the trial court properly concluded that the failure of these documents to arrive was neither defendant's nor the insurer's fault and thus defendant's failure to timely answer was due to excusable extrinsic mistake. *Weitz v Yankosky* (1966) 63 C2d 849, 856, 48 CR 620.

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B. Appellate Court Review

§12.18 1. Appeal From Final Judgment Only

An order granting a motion for summary judgment is a nonappealable interim order (see CCP §904.1(a)(1); 9 Witkin, California Procedure, *Appeal* §95 (5th ed 2008)), but an appeal does lie from the judgment entered on that order. CCP §437c(m); *Fraser-Yamor Agency, Inc. v County of Del Norte* (1977) 68 CA3d 201, 207, 137 CR 118. See *Saben, Earlix & Assocs. v Fillet* (2005) 134 CA4th 1024, 1030, 36 CR3d 610 (trial court entered order granting summary judgment, but it never entered summary judgment; thus, there was no appealable judgment or order to trigger time limit for filing attorney fee motion under former Cal Rules of Ct 870.2(b)(1) (now Cal Rules of Ct 3.1702)).

CAUTION: Filing a notice of appeal from the order granting summary judgment will render the appeal premature. Counsel must be sure that there is a judgment before moving forward on the appeal. On filing a premature notice of appeal and how to correct the error, see California Civil Appellate Practice §§7.38-7.43 (3d ed Cal CEB 1996).

JUDICIAL PERSPECTIVE: Don't count on the appellate court to fix this mistake. Obtain a judgment after the order is entered and file an appeal from the judgment, not the order.

On the appealability of orders and judgments, see Civ App Prac, chap 3.

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§12.19 a. What Constitutes a "Final" Judgment

By statutory definition (see CCP §577), a judgment is the "final determination of the rights of the parties." *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149. Thus, a summary judgment in favor of a plaintiff/cross-defendant on the cross-complaint is not final until the claims raised by the complaint against the defendant/cross-complainant are resolved. Similarly, summary judgment against the plaintiff on fewer than all causes of action against one defendant is not final. See, *e.g., Lopes v Capital Co.* (1961) 192 CA2d 759, 763, 13 CR 787. But see *Etienne v DKM Enters.* (1982) 136 CA3d 487, 489, 186 CR 321 (because order granting partial summary judgment disposed of all causes of action involving one of plaintiffs, it "better serves the interests of justice" to deem order granting partial summary judgment to that plaintiff as appealable).

A judgment may be final even when fewer than all causes of action have been resolved, however, if, *e.g.,*

- Unresolved issues have been abandoned (see *Chesney v Gresham* (1976) 64 CA3d 120, 131, 134 CR 238;
- Undetermined causes of action have been dismissed;
- A stipulation has disposed of all remaining issues between the two parties (see, *e.g., Marsh v Home Fed. Sav. & Loan Ass'n* (1977) 66 CA3d 674, 676 n1, 136 CR 180);
- The appellate court has amended the judgment in the interests of justice to provide a final and appealable disposition of all the contentions of the parties (see, *e.g., Fraser-Yamor Agency, Inc. v County of Del Norte* (1977) 68 CA3d 201, 208, 137 CR 118).

On appealable, final judgments, see 9 Witkin, California Procedure, *Appeal* §§96, 109 (5th ed 2008).

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§12.20 b. When Order Granting Judgment Is Construed as "Final" Judgment

Despite the plain rule that an order granting summary judgment is not appealable (see §12.18), there are instances in which courts have construed such an order as a "final judgment," or treated an appeal from a nonappealable order as an appeal from a subsequent judgment, to allow an appeal to go forward. See *Nystrom v First Nat'l Bank* (1978) 81 CA3d 759, 762, 146 CR 711 (court of appeal treated order granting summary judgment as appealable final judgment).

EXAMPLE 1: In a defamation case, plaintiff purported to appeal from the trial court's nonappealable minute order granting defendant summary judgment, but the court of appeal treated it as an appeal from the subsequent judgment. *Aguilar v Universal City Studios, Inc.* (1985) 174 CA3d 384, 387 n1, 219 CR 891. See also *Tong v Jocson* (1977) 76 CA3d 603, 604, 142 CR 726 (court exercised its power to review nonappealable minute order granting summary judgment because it was expedient to do so).

EXAMPLE 2: The court of appeal amended the order granting summary judgment to make it an appealable judgment and construed the notice of appeal as applying to the judgment. *Dover v Sadowinski* (1983) 147 CA3d 113, 115, 194 CR 866.

In other instances, courts have chosen to treat a notice of appeal from an order granting summary judgment as a writ petition. See, *e.g., Jacobs-Zorne v Superior Court* (1996) 46 CA4th 1064, 1072, 54 CR2d 385.

WARNING: Despite the instances in which courts have been somewhat flexible in construing a "final judgment," counsel should appeal from the proper event, *i.e.,* the final judgment, or risk dismissal. See *Modica v Merin* (1991) 234 CA3d 1072, 285 CR 673 (appeal from order granting summary judgment dismissed).

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.21 2. When to File Notice of Appeal

§12.21 2. When to File Notice of Appeal

An attorney who wants to appeal from the grant of a summary judgment must file a notice of appeal on or before the earliest of (Cal Rules of Ct 8.104(a)(1)-(3))

- **60 days** after the superior court clerk serves the party filing the notice of appeal a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date that either was served;
- **60 days** after the party filing the notice of appeal serves or is served by a party with a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or
- **180 days** after entry of judgment.

PRACTICE TIP: Service of a notice of appeal may be made by any permitted method, including electronic service. See Cal Rules of Ct 8.104(a)(4).

For purposes of Cal Rules of Ct 8.104, the date of entry of an appealable order is the date it is entered in the permanent minutes unless the minute order directs that a written order be prepared, in which case the entry date is the date the signed order is filed. Cal Rules of Ct 8.104(d)(2). For appealable orders not entered into the permanent minutes, the entry date is the date the signed order is filed. Cal Rules of Ct 8.104(d)(3).

NOTE: A written order prepared under Cal Rules of Ct 3.1312 or similar local rule is not considered an order prepared by direction of a minute order. Cal Rules of Ct 8.104(d)(2).

WARNING: The time period for filing a notice of appeal is jurisdictional. The appellate court must dismiss an appeal that is filed after the expiration of the notice period.

On the time for filing the notice of appeal, see California Civil Appellate Practice §§7.25-7.43 (3d ed Cal CEB 1996).

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§12.22 3. Scope of Review

The general rules relating to the scope of appellate review usually apply to summary judgment. For example, an argument or theory will generally not be considered if it is raised for the first time on appeal, unless it is a question of law to be applied to undisputed facts. See, *e.g., DiCola v White Bros. Performance Prods., Inc.* (2008) 158 CA4th 666, 676, 69 CR3d 888; *American Continental Ins. Co. v C & Z Timber Co.* (1987) 195 CA3d 1271, 1281, 241 CR 466.

In addition, theories not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal (see, *e.g., National Indem. Co. v Manley* (1975) 53 CA3d 126, 133, 125 CR 513), and issues raised and then abandoned in the trial court cannot be considered on appeal. See *Chesney v Gresham* (1976) 64 CA3d 120, 131, 134 CR 238 (some allegations in plaintiff's complaint might be construed as effort to plead actual fraud, but there was no suggestion of actual fraud in other papers submitted in opposition to defendant's summary judgment motion; thus, court of appeal found that plaintiff waived the issue).

NOTE: There is an important exception to ordinary appellate rules in that an appellate court may not reverse summary judgment with directions to the trial court to enter judgment for the other party unless a cross-motion for summary judgment was made from which that party has taken an appeal. See *Dvorin v Appellate Dep't of Superior Court* (1975) 15 C3d 648, 650, 125 CR 771 ("On appeal from summary judgment, an appellate court lacks jurisdiction to reverse with instruction to enter judgment for the opposing party if the latter failed to move for summary judgment"). To permit such a judgment would deny the original moving party the right to allege or produce additional facts justifying a trial of factual issues. 15 C3d at 651.

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§12.23 4. Standard of Review

On appeal from an order granting summary judgment, the appellate court determines de novo whether a triable issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law. See CCP §437c(c); *Merrill v Navegar, Inc.* (2001) 26 C4th 465, 476, 110 CR2d 370; *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 254, 100 CR3d 296; *Van v Target Corp.* (2007) 155 CA4th 1375, 1382, 66 CR3d 497. The appellate court reviews the trial court's ruling, not its rationale. *Silva v Lucky Stores, Inc.* (1998) 65 CA4th 256, 261, 76 CR2d 382.

NOTE: It does not follow from the fact that summary judgments are reviewed de novo that the parties may stipulate that a summary judgment would have been granted, when none has been made and when case law, statutes, and court rules provide otherwise, and then seek review of the so stipulated "judgment." *Magana Cathcart McCarthy v CB Richard Ellis, Inc.* (2009) 174 CA4th 106, 122, 94 CR3d 109.

The court of appeal considers all evidence the parties have offered in connection with the motion "except that to which objections have been made and sustained." *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 334, 100 CR2d 352, citing *Artiglio v Corning Inc.* (1998) 18 C4th 604, 612, 76 CR2d 479.

NOTE: In *Mamou v Trendwest Resorts, Inc.* (2008) 165 CA4th 686, 711, 81 CR3d 406, the court of appeal noted that *Guz* has been erroneously interpreted as requiring the appellate court to give conclusive effect to the trial court's treatment of the evidence. If a court admits patently inadmissible evidence over a proper objection, the appellate court must disregard the evidence.

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§12.24 5. Review of Evidence

Although as a general rule an appellate court reviews a trial court's decision to grant summary judgment de novo (see §12.23), the court of appeal reviews the trial court's rulings on evidentiary objections for abuse of discretion. *Walker v Countrywide Home Loans, Inc.* (2002) 98 CA4th 1158, 1168, 121 CR2d 79. But see *City of S. Pasadena v Department of Transp.* (1994) 29 CA4th 1280, 1288, 35 CR2d 113 (incorrect to use abuse of discretion standard outside of review of discretionary decision to deny summary judgment under CCP §437c(e)).

In reviewing the evidence presented in bringing and opposing the summary judgment motion, the appellate court (*Herberg v California Inst. of the Arts* (2002) 101 CA4th 142, 148, 124 CR2d 1)

- Strictly construes the moving party's evidence;
- Liberally construes the opposing party's evidence; and
- Accepts as undisputed only the portions of the moving party's evidence that are uncontradicted.

"Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial." *Scalf v D.B. Log Homes, Inc.* (2005) 128 CA4th 1510, 1519, 27 CR3d 826, quoting *Binder v Aetna Life Ins. Co.* (1999) 75 CA4th 832, 839, 89 CR2d 540. Any doubts about the propriety of summary judgment are generally resolved against granting the motion, because that allows the future development of the case and avoids errors. It is presumed on appeal that a judge has not relied on "irrelevant or incompetent evidence." *Sambrano v City of San Diego* (2001) 94 CA4th 225, 235, 114 CR2d 151, quoting *Biljac Assocs. v First Interstate Bank* (1990) 218 CA3d 1410, 1419, 267 CR 819. See §§9.5, 12.30 on the continued viability of *Biljac*.

On development of evidence for a summary judgment motion, see chap 5. On objecting to evidence presented in a summary judgment motion, see chap 9.

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§12.25 a. Facts Limited to Those in Separate Statements

On review of a motion for summary judgment, the relevant facts are limited to those in the parties' statements of undisputed facts that are supported by affidavits and declarations, to the extent those facts have evidentiary support. See CCP §437c(b); *West v Sundown Little League, Inc.* (2002) 96 CA4th 351, 362, 116 CR2d 849. Facts not contained in the separate statements do not exist. *Lewis v County of Sacramento* (2001) 93 CA4th 107, 112, 113 CR2d 90.

On the moving party's separate statement, see §§6.21-6.35; on the opposing party's separate statement, see §§7.23-7.29.

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b. Waiver of Evidentiary Objections

§12.26 (1) Failure to Appeal Trial Court's Ruling Sustaining Objections

When reviewing a motion for summary judgment, an appellate court may not consider evidence to which objections have been made and properly sustained. *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 334, 100 CR2d 352. If an opposing party does not challenge a trial court's ruling that sustains a moving party's objections to evidence offered in opposition to the summary judgment motion, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived." *Lopez v Baca* (2002) 98 CA4th 1008, 1014, 120 CR2d 281. See §9.3.

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§12.27 (2) Failure to Object to Admission in Trial Court

If a party does not make an objection in the trial court, the evidence is admitted in evidence and becomes part of the record on appeal. *Alexander v Codemasters Group Ltd.* (2002) 104 CA4th 129, 140, 127 CR2d 145, citing *Haskell v Carli* (1987) 195 CA3d 124, 129, 240 CR 439. Failure to object, even to otherwise inadmissible evidence, waives the defect. CCP §437c(b)(5) (evidentiary objections not made at summary judgment hearing are deemed waived); Evid C §353(a) (to preserve right to challenge erroneously received evidence, litigant must make timely objection). See §9.3.

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§12.28 (3) Failure to Obtain Express Ruling by Trial Court

If a party files evidentiary objections, but the trial court does not expressly rule on them, the objections are waived and are not preserved on appeal. *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 670 n1, 25 CR2d 137 (objected-to evidence is considered admitted and becomes part of record on appeal). See CCP §437c(b)(5), (c). If, however, it would have been a fruitless or idle act to continually interpose repeated requests for rulings, written evidentiary objections may be deemed preserved for appellate review. *City of Long Beach v Farmers & Merchants Bank* (2000) 81 CA4th 780, 784, 97 CR2d 140. See §§9.4-9.6.

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§12.29 (a) Implied Overruling of Objections Not Specifically Sustained

If the trial court states that it considered only admissible evidence in ruling on the summary judgment motion, the appellate court considers that statement to be an implied overruling of any objection not specifically sustained. *Laird v Capital Cities/ABC, Inc.* (1998) 68 CA4th 727, 736, 80 CR2d 454. See *Alexander v Codemasters Group Ltd.* (2002) 104 CA4th 129, 140, 127 CR2d 145 (applying *Laird,* court of appeal found that trial court's oral and written statements that it would consider only admissible evidence impliedly overruled defendant's evidentiary objections except to extent that objections were specifically sustained by trial court).

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.30 (b) Objections May Be Preserved if Not Expressly Ruled on

§12.30 (b) Objections May Be Preserved if Not Expressly Ruled on

In *Biljac Assocs. v First Interstate Bank* (1990) 218 CA3d 1410, 267 CR 819, the First District Court of Appeal held that, under CCP §437c, a trial court is not required to make formal rulings on evidentiary objections, and, if the court does not expressly rule on evidentiary objections, the objections are preserved on appeal. This holding, however, has been criticized by other districts (see *Sambrano v City of San Diego* (2001) 94 CA4th 225, 114 CR2d 151) as well as by a later First District opinion (*Demps v San Francisco Hous. Auth.* (2007) 149 CA4th 564, 57 CR3d 204). See also *Swat-Fame, Inc. v Goldstein* (2002) 101 CA4th 613, 623, 124 CR2d 556 (similarly criticizing *Biljac*), disapproved on another ground in *Zamos v Stroud* (2004) 32 C4th 958, 973, 12 CR3d 54.

CAUTION: With a wealth of authority supporting the position adopted by the supreme court in *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 670 n1, 25 CR2d 137, that objections not expressly ruled on by the trial court are waived and are not preserved on appeal (see §12.28), there has been concern about the continued validity of the *Biljac* opinion. The California Supreme Court granted review in *Reid v Google, Inc.* (review granted Jan. 30, 2008, S158965; superseded opinion at 155 CA4th 1342, 66 CR3d 744). In *Reid,* the Sixth District Court of Appeal followed *Biljac* when considering the admissibility of statistical evidence of age discrimination; the supreme court granted review on this issue. Counsel should check on *Reid*'s status and, until the supreme court decides *Reid,* be cautious whenever a court indicates reliance on that portion of *Biljac*. See §§9.4-9.6.

On waiver of objections after a party requests rulings, see California Civil Appellate Practice §2A.15 (3d ed Cal CEB 1996).

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§12.31 6. Supplemental Briefing

Under CCP §437c(m)(2), before the reviewing court may affirm an order granting summary judgment on a ground not relied on by the trial court, it must give the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include the argument that additional evidence on the new ground exists, but the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based on the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue.

NOTE: If the court does not allow supplemental briefing, a rehearing must be ordered on any party's timely petition. CCP §437c(m)(2).

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§12.32 C. Checklist for Opposing Party if Summary Judgment Is Granted

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- 1. Are there new or different facts justifying a motion for reconsideration under CCP §1008(a)? See §§12.3-12.6.
- A. Has the **10-day** limitation period after the order was made or known expired?
- B. Is there a legally sufficient explanation of why these facts were not presented earlier?
- 2. Is there a basis for requesting a new trial under CCP §657? See §§12.8-12.10.
- A. Has the limitation period for filing the motion expired?
- B. Is there newly discovered evidence or error or law?
- 3. Is there a basis to seek relief under CCP §473? See §§12.11-12.14.
- A. Has the motion been made within a reasonable time not exceeding **6 months** after judgment's entry?
- B. Is there evidence of "mistake, inadvertence, surprise, or excusable neglect"?
- 4. Is there a basis to set aside the judgment by motion or separate action in the trial court on the ground of extrinsic fraud or mistake? See §§12.15-12.17.
- 5. Is there a basis for review by appeal after final judgment is entered? See §§12.18-12.22.

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§12.33 III. WHEN SUMMARY ADJUDICATION IS GRANTED

After a motion for summary adjudication has been granted, the cause or causes of action within the action, affirmative defense(s), claim for damages, or issue(s) of duty adjudicated are "deemed to be established," and the action proceeds only for the issues "remaining." CCP §437c(n)(1). The granting of a motion for summary adjudication may be challenged by certain trial court procedures (see §§12.34-12.35), and by writ of mandate in the appellate court (see §12.36).

NOTE: An order granting summary adjudication is generally not appealable (see §12.37).

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A. Trial Court Procedures

§12.34 1. Motion for Reconsideration

A party may seek reconsideration of an order granting summary adjudication within **10 days** after service of the written notice of entry of the order. CCP §1008.

EXAMPLE: The trial court denied a motion for reconsideration of its order granting summary adjudication when all parties believed plaintiffs' claims were barred by the statute of limitations. Plaintiffs discovered after the ruling that the statute had not run because of an intervening weekend and court holiday. The court of appeal held that, as a matter of law, the new facts presented were sufficient to require the trial court to reconsider its ruling on the summary adjudication motion and ultimately to revoke its prior order. *Mink v Superior Court* (1992) 2 CA4th 1338, 1343, 4 CR2d 195.

NOTE: Even if a party does not move for reconsideration, the trial court has inherent power to reconsider its ruling on an adjudication motion irrespective of the constraints of CCP §1008. *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249. See §12.7.

The same rules for motions for reconsideration of an order granting summary judgment apply. See §§12.3-12.6.

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.35 2. Motion for Relief Under CCP §473

§12.35 2. Motion for Relief Under CCP §473

Within **6 months** after an order grants summary adjudication, the opposing party may move for mandatory or discretionary relief under CCP §473(b) on the grounds of "mistake, inadvertence, surprise, or excusable neglect." See *Mink v Superior Court* (1992) 2 CA4th 1338, 1344, 4 CR2d 195 (counsel's mistake in failing to discover that statute of limitations had not run because of intervening weekend and court holiday was excusable mistake entitling petitioners to relief).

PRACTICE TIP: Review the original papers opposing the motion to determine whether §473(b) grounds exist.

The same rules for motions for relief under §473(b) following the granting of summary judgment apply. See §§12.11-12.14.

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B. Appellate Court Review

§12.36 1. Petition for Peremptory Writ of Mandate

An order granting summary adjudication is immediately reviewable only by petition for a peremptory writ of mandate. CCP §437c(m). In *Fisherman's Wharf Bay Cruise Corp. v Superior Court* (2003) 114 CA4th 309, 7 CR3d 628, the court of appeal explained the reasons for considering the merits of a writ petition contesting an order granting summary adjudication: (1) An erroneous ruling created a likelihood of the necessity of two trials rather than one, allowing some causes of action to go forward while omitting significant legal issues that arose out of the same facts and that quite likely should be tried together; and (2) the issues raised in the petition were questions of law, making their immediate resolution on writ review appropriate. 114 CA4th at 319. Although mandate does not lie to control the exercise of trial court discretion, on a motion for summary adjudication, a trial court has no discretion to exercise. "If the trial court errs, it has made an error of law, which automatically constitutes an abuse of discretion." 114 CA4th at 319. See also *Marron v Superior Court* (2003) 108 CA4th 1049, 1056, 134 CR2d 358 (finding irreparable injury if second trial were required).

The writ petition must be filed within **20 days** after service on the petitioning party of a written notice of entry of order; the trial court may extend this time period for up to an additional **10 days** on a showing of good cause. CCP §437c(m)(1). The time period is increased by **5 days** if the petition is served by mail within California, **10 days** if elsewhere in the United States, and **20 days** if outside the country. Service by fax, express mail, or overnight delivery increases the time by **2 court days**.

PRACTICE TIP: Unless the petitioner is certain of the date of mailing, fax, or express mail, it is safest to calendar the date to file the writ petition from the date of the order. CCP §437c(m)(1).

On writ review of order under CCP §437c, see California Civil Writ Practice §§16.66-16.77 (4th ed Cal CEB 2008). See also Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide February 2009).

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§12.37 2. Appeal From Final Judgment Only

An order granting a motion for summary adjudication is a preliminary nonappealable order; appeal must be taken from the final judgment ultimately entered in the case. *Etienne v DKM Enters.* (1982) 136 CA3d 487, 489, 186 CR 321. If, however, the order granting summary adjudication disposes of all causes of action for one party, the disposition is final for that party who, after judgment is entered, may seek review on appeal. *Etienne v DKM Enters., supra*. But see *Don Jose's Restaurant, Inc. v Truck Ins. Exch.* (1997) 53 CA4th 115, 61 CR2d 370 (no appealable judgment when trial court dismissed two causes of action following summary adjudication and parties stipulated to dismissal of remaining causes of action without prejudice and with waiver of statutes of limitations, effectively permitting parties to litigate remaining causes of action in event trial court's dismissal was affirmed). See CCP §§578-579. See also 9 Witkin, California Procedure, *Appeal* §96 (5th ed 2008).

The rules on appeal from a judgment on an order granting summary adjudication are the same as those on a judgment following the grant of summary judgment. See §§12.21-12.31.

On the appealability of orders and judgments, see California Civil Appellate Practice, chap 3 (3d ed Cal CEB 1996).

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§12.38 C. Checklist for Opposing Party if Summary Adjudication Is Granted

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- 1. Are there new or different facts justifying a motion for reconsideration under CCP §1008(a)? See §12.34.
- A. Has the **10-day** limitation period after the order was made or known expired?
- B. Is there a legally sufficient explanation of why these facts were not presented earlier?
- 2. Is there a basis to seek relief under CCP §473 on grounds of mistake, inadvertence, surprise, or excusable neglect, *e.g.,* inability to make a strong showing for legally excusable reasons? See §12.35.
- 3. Is there a basis for review by petition for peremptory writ of mandate? See §12.36.
- 4. Is there a basis for review by appeal after final judgment is entered following trial? See §12.37.

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IV. WHEN SUMMARY JUDGMENT OR ADJUDICATION IS DENIED

A. Trial Court Motions

§12.39 1. Motion for Reconsideration

The moving party whose motion for summary judgment or summary adjudication was denied may move for reconsideration, just like the opposing party after the motion is granted (see §§12.3-12.6, 12.34).

CAUTION: Moving for reconsideration is not a prerequisite for a writ petition and does not toll the period for petitioning for writ under CCP §437c(m)(1). *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1259, 7 CR3d 151. On the deadline for filing a writ petition, see §12.48.

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§12.40 a. Timing

A motion for reconsideration must be made within **10 days** after service on the moving party of the written notice of entry of the order. CCP §1008(a).

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§12.41 b. Grounds for Reconsideration

A motion for reconsideration under CCP §1008(a) must show (*New York Times Co. v Superior Court* (2005) 135 CA4th 206, 212, 37 CR3d 338)

- New or different facts, circumstances, or law; and
- A reason why such facts, circumstances, or law could not have been presented originally.

See also CCP §1008(b); *Gilberd v AC Transit* (1995) 32 CA4th 1494, 38 CR2d 626.

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§12.42 c. Court May Reconsider Its Ruling Sua Sponte

In addition to the parties' motions for reconsideration under CCP §1008(a), courts have inherent authority, on their own motion, to reevaluate their own interim rulings at any time before entry of judgment, and can reconsider a previously denied motion for summary judgment or adjudication sua sponte despite the absence of new facts or law. *Le Francois v Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249; *Abassi v Welke* (2004) 118 CA4th 1353, 1359, 14 CR3d 336. But see *Schachter v Citigroup, Inc.* (2005) 126 CA4th 726, 23 CR3d 920 (court's inherent power to correct its own rulings does not excuse party from complying with requirements of CCP §437c(f)(2)).

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§12.43 2. Renewal of Summary Judgment or Summary Adjudication Motion

After expiration of the **10-day** period to move for reconsideration (see §12.40), a party "may make a subsequent application for the same order upon new or different facts, circumstances, or law." CCP §1008(b). Such a motion does not seek reconsideration of the earlier motion but, instead, is simply a new motion permitted by the existence of new law or facts; in effect, it renews the earlier motion by submission of a new motion raising the same issues. *UAS Mgmt., Inc. v Mater Misericordiae Hosp.* (2008) 169 CA4th 357, 367, 87 CR3d 81.

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§12.44 a. Timing

The moving party may renew a summary judgment motion or a motion for summary adjudication in the trial court at any time not prohibited by the statute on a showing of different facts. CCP §1008(b); *Graham v Hansen* (1982) 128 CA3d 965, 971, 180 CR 604. As a new summary judgment motion, however, it must comply with the requirements of CCP §437c, including the requirement that the motion provide **75 days'** notice. See *UAS Mgmt., Inc. v Mater Misericordiae Hosp.* (2008) 169 CA4th 357, 368, 87 CR3d 81 (renewed motion for summary judgment failed to provide requisite 75 days' notice and court lacked authority to shorten notice period over plaintiff's objection). On timing for service of a summary judgment motion, see §3.16.

PRACTICE TIP: Because renewed motions for summary judgment or summary adjudication are not subject to the **10-day** limit under CCP §1008(a) (see §12.40), it may be a better strategy to make another motion for summary judgment or adjudication, or both, at a later time rather than apply for reconsideration. On limitations in filing a second motion for summary judgment or summary adjudication, see §§2.18, 12.45.

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§12.45 b. Grounds for Renewal

A party may not move for summary judgment based on issues asserted in a prior unsuccessful summary adjudication motion without showing newly discovered facts or circumstances or a "change of law." CCP §437c(f)(2). See *Patterson v Sacramento City Unified Sch. Dist.* (2007) 155 CA4th 821, 827, 66 CR3d 337 ("change in law" does not include later-enacted statute unless it has retroactive application).

EXAMPLE 1: A second motion for summary judgment, although before a different judge, was identical in all respects to the one previously denied, and thus the trial court exceeded its jurisdiction by entertaining that renewed motion. *Kerns v CSE Ins. Group* (2003) 106 CA4th 368, 372, 130 CR2d 754 (trial courts have jurisdiction to reconsider their own interim orders sua sponte, but procedural prerequisites of CCP §1008 are jurisdictional as applied to actions of parties).

EXAMPLE 2: The defendant's second motion for summary judgment or summary adjudication was barred because it was based on the same facts and law as the first motion, even though the second motion was made before a new judge after the case was transferred. *Bagley v TRW, Inc.* (1999) 73 CA4th 1092, 86 CR2d 909.

NOTE: Filing a renewed motion is not a prerequisite for a writ and does not toll the period for petitioning for writ under CCP §437c(m)(1). *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1259, 7 CR3d 151. On seeking writ review, see §12.47.

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§12.46 3. Subsequent Motion for Summary Judgment Based on Same Evidence

If the court denies summary adjudication regarding certain causes of action, the party who successfully opposed summary adjudication may later move for summary judgment based on the same evidence it presented in response to the summary adjudication motion. The rule of judicial estoppel is inapplicable against a party who successfully opposes a summary judgment or adjudication motion and then moves for summary judgment based on the same evidence, because that party has neither taken inconsistent positions nor disrupted the orderly administration of justice. *Kitty-Anne Music Co. v Swan* (2003) 112 CA4th 30, 34, 4 CR3d 796.

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B. Appellate Court Review

§12.47 1. Petition for Peremptory Writ

An order denying a motion for summary judgment or summary adjudication may be reviewed by way of a petition for writ of mandate. CCP §437c(m); *Hill Bros. Chem. Co. v Superior Court* (2004) 123 CA4th 1001, 20 CR3d 530. See *Mallett v Superior Court* (1992) 6 CA4th 1853, 1863, 8 CR2d 829 (pretrial writ review is only speedy remedy available to review denial of summary judgment motion). In practice, however, writ review on the merits is not easy to obtain when summary judgment has been denied. See, *e.g., Lompoc Unified Sch. Dist. v Superior Court* (1993) 20 CA4th 1688, 1692, 26 CR2d 122 (courts "reluctant" to review denials of summary judgment by writ). But see *State Dep't of Health Servs. v Superior Court* (2003) 31 C4th 1026, 1036, 6 CR3d 441 (reversing appellate court's denial of writ of mandate to overturn order denying summary judgment, allowing defendant to raise defense to action under Fair Employment and Housing Act); *Kentucky Fried Chicken, Inc. v Superior Court* (1997) 14 C4th 814, 830, 59 CR2d 756 (reversing appellate court's denial of writ of mandate to overturn order denying summary judgment; as matter of law, defendant owed no duty to plaintiff); *MEGA Life & Health Ins. Co. v Superior Court* (2009) 172 CA4th 1522, 1534, 92 CR3d 399 (granting writ petition challenging denial of summary adjudication on fraud cause of action); *California Hwy. Patrol v Superior Court* (2008) 162 CA4th 1144, 76 CR3d 578 (ruling that CHP owed no statutory duty to plaintiff and issuing writ of mandate directing trial court to enter summary judgment for CHP).

JUDICIAL PERSPECTIVE: Writ review on the merits is not easy to obtain. Despite the case cited above, the likelihood of success on obtaining appellate review is greater in cases in which the trial court granted summary judgment than in those cases in which the court denied summary judgment. The appellate courts scrutinize grants very closely because a grant results in a decision on the merits, whereas a denial results in a trial on the merits.

When the trial court's erroneous denial of the motion will result in trial on nonactionable claims, a writ of mandate will issue. *West Shield Investigations & Sec. Consultants v Superior Court* (2000) 82 CA4th 935, 946, 98 CR2d 612. In limited situations, an appellate court may issue a peremptory writ in the first instance, without issuance of an alternative writ or order to show cause, and without providing an opportunity for oral argument. *Lewis v Superior Court* (1999) 19 C4th 1232, 82 CR2d 85; *Fontaine v Superior Court* (2009) 175 CA4th 830, 841, 96 CR3d 607.

On writ review of order under CCP §437c, see California Civil Writ Practice §§16.66-16.77 (4th ed Cal CEB 2008). See also Handling Civil Writs in the Courts of Appeal (Cal CEB Action Guide February 2009).

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.48 a. Timing

§12.48 a. Timing

The peremptory writ petition must be filed within **20 days** after service on the petitioning party of a written notice of entry of order; the trial court may extend this time period for up to an additional **10 days** on a showing of good cause. CCP §437c(m)(1). See *Abadjian v Superior Court* (1985) 168 CA3d 363, 369, 214 CR 234 (time limitation for seeking appellate review by writ is jurisdictional; failure to file writ petition within time limit or extended time limit is fatal). See also *Eldridge v Superior Court* (1989) 208 CA3d 1350, 1352, 256 CR 724 (deadline to file writ petition is usually calculated from postmark of date clerk mailed endorsed-filed copy of order; applying former 10-day rule). The time period is increased by **5 days** if the petition is served by mail within California, **10 days** if elsewhere in the United States, and **20 days** if outside the country. Service by fax, express mail, or overnight delivery increases the time by **2 court days**. CCP §437c(m)(1).

PRACTICE TIP: Unless the petitioner is certain of the date of mailing, fax, or express mail, it is safest to calendar the date to file the writ petition from the date of the order.

CAUTION: The time limit for filing a writ petition after the court has denied a motion for summary judgment is not extended by filing a motion for reconsideration. *Bensimon v Superior Court* (2003) 113 CA4th 1257, 1259, 7 CR3d 151. On motions for reconsideration following denial of summary motions, see §§12.39-12.41.

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§12.49 b. Grounds

Although CCP §437c(m) authorizes a party to petition for a peremptory writ on denial of a motion for summary judgment, such applications are not routinely granted whenever error of any kind is found. *Continental Ins. Co. v Superior Court* (1985) 165 CA3d 1069, 1072, 212 CR 140. An exception to this general rule exists when the trial court's order fails to comply with CCP §437c(f)-(g), *i.e.,* fails to specify (1) issues that are without substantial controversy and material facts; (2) issues raised by the motion concerning which there exists a material, triable controversy; and (3) conflicting evidence on each of the triable issues. See, *e.g., Greater Irvine Credit Union v Superior Court* (1986) 186 CA3d 1189, 231 CR 296 (granting writ petition because court's order fell "far short of the specificity required by [§437c(f)-(g)]," by failing to identify conflicts in evidence that give rise to triable issues of fact); *Continental Ins. Co. v Superior Court, supra* (granting writ petition and highlighting some patently insufficient orders).

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§12.50 2. Appeal From Final Judgment After Trial Only

An order denying a motion for summary judgment or summary adjudication is not an appealable order (see CCP §904.1); it is an interlocutory order that may be reviewed only on direct appeal from a final judgment entered after a trial. CCP §906; *FDIC v Dintino* (2008) 167 CA4th 333, 343, 84 CR3d 38.

In *Dintino,* the court held that, although a party may seek immediate writ review of an order denying summary adjudication (see §12.47), it nonetheless may choose to wait to challenge that order by appeal following a final judgment after trial. The court expressly declined to follow the holding in *Sierra Craft, Inc. v Magnum Enters., Inc.* (1998) 64 CA4th 1252, 1256, 75 CR2d 681, that denial of summary judgment is reviewable only by timely writ petition and not by appeal. The court in *Gackstetter v Frawley* (2006) 135 CA4th 1257, 38 CR3d 333, held that an appeal following a trial was permissible because:

- The writ procedure under CCP §437c(m)(1) contains the permissive word "may"; and
- The summary judgment motion by the defendant, who subsequently lost at trial, should have been granted as a matter of law, thus demonstrating an exception to the rule that denial of summary judgment is harmless error.

The rules on appeal from a judgment on an order denying summary judgment or summary adjudication are the same as those on a judgment following the grant of summary judgment. See §§12.21-12.31.

PRACTICE TIP: Most orders granting summary judgment and summary adjudication do not fare well on appeal and are often reversed. See *Hawkins v Wilton* (2006) 144 CA4th 936, 949, 51 CR3d 1 (§437c is "complicated," with "little flexibility in [its] procedural imperatives," and the issues raised by summary judgment and adjudication motions are purely legal; thus, "failure to comply with any one of its myriad requirements is likely to be fatal to the offending party"). For an illustration of how carefully appellate courts scrutinize summary proceedings to find a triable issue of fact that the trial court overlooked, see 6 Witkin, California Procedure, *Proceedings Without Trial* §265 (5th ed 2008).

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.51 C. Checklist for Moving Party if Summary Judgment or Adjudication Is Denied

§12.51 C. Checklist for Moving Party if Summary Judgment or Adjudication Is Denied

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- 1. Does an alleged different state of facts or change of law exist that would justify a motion for reconsideration under CCP §1008(a) in the trial court? See §§12.39-12.41.
- A. Has the **10-day** limitation period after the order was made or known expired?
- B. Is there a legally sufficient explanation why these facts were not presented earlier?
- 2. If they do not exist now, can new facts be developed to fill gaps in the moving party's evidence so the motion may be renewed later under CCP §1008(b)? See §§12.43-12.45.
- 3. Is there a basis for a writ to review the order denying summary judgment or summary adjudication? See §§12.47-12.49.
- A. Does the order identify at least one triable issue of fact?
- B. Does the order refer to the evidence showing that the fact identified is disputed?
- C. Does the order identify any other basis for the denial (*e.g.,* inability to obtain controverting evidence)?
- 4. Should consideration be given to appealing the order denying the motion after final judgment is entered in the case?

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/ V. CHARTS: CHALLENGES TO GRANTING OR DENIAL OF MOTIONS FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION/§12.52 A. Chart: Trial Court Procedures

V. CHARTS: CHALLENGES TO GRANTING OR DENIAL OF MOTIONS FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

§12.52 A. Chart: Trial Court Procedures

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Order	Motion	Timing
Order Granting Summary Judgment	New Trial (CCP §659). See §§12.8-12.10.	The earliest of the following: (a) After the court's decision and before entry of judgment; OR (b) Within **15 days** of: Date of clerk's mailing of notice of entry of judgment; or Clerk's service on any party of written notice of entry of judgment; OR (c) Within **180 days** after entry of judgment.
Order Granting Summary Judgment or Summary Adjudication	Reconsideration (CCP §1008). See §§12.3-12.6, 12.34.	**10 days** after service of written notice of entry of order.
	Discretionary Relief (CCP §473(b)). See §§12.11-12.13, 12.35.	Reasonable time, not to exceed **6 months**.
	Mandatory Relief (CCP §473(b)). See §§12.14, 12.35.	Reasonable time, not to exceed **6 months**.
	Set Aside Judgment. See §§12.15-12.17.	Any time after the time for appeal or other direct attack has expired.
Order Denying	Reconsideration	**10 days** after

Summary Judgment or Summary Adjudication	(CCP §1008). See §§12.39-12.41.	service of written notice of entry of order.
	Renewal of Summary Judgment motion. See §§12.43-12.46.	No later than approximately **105 days** before trial.

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Source: Civil Litigation/California Summary Judgment/12 Challenging the Decision/§12.53 B. Chart: Appellate Court Review

§12.53 B. Chart: Appellate Court Review

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Order	Filing	Timing
Order Granting or Denying Summary Adjudication or Order Denying Summary Judgment	Peremptory Writ of Mandate (CCP §437c(m)(1)). See §§12.36, 12.47-12.49.	**20 days** after service on petitioning party of written notice of entry of order.
Judgment After Order Granting Summary Judgment	Appeal (CCP §437c(m)(1); Cal Rules of Ct 8.104). See §§12.18-12.31, 12.37, 12.50.	On or before the earliest of: (a) **60 days** after: Clerk serves Notice of Entry of Judgment to party filing notice of appeal; or Clerk serves file-stamped copy of judgment accompanied by proof of service; or Party filing notice of appeal serves or is served with Notice of entry of Judgment; or Party filing notice of appeal serves or is served with file-stamped copy of judgment; or (b) **180 days** after entry of judgment.

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13

Considerations in Particular Cases

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§13.1 I. INTRODUCTION

This chapter discusses summary judgment and summary adjudication in particular cases and highlights the differences in procedure or practice for those particular cases. Unlawful detainer cases are discussed in §§13.2-13.10. Employment cases are discussed in §§13.11-13.21.

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II. UNLAWFUL DETAINER CASES

§13.2 A. Nature and Purpose of Summary Judgment

Summary judgment is a useful procedure for either party in an unlawful detainer action to end the action before trial when the action has no merit or there is no defense. CCP §§437c(a), 1170.7. The purpose of the procedure is the same as in other civil actions: to determine whether a trial is necessary to resolve the dispute. *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 107 CR2d 841. See chaps 1-2. The motion should be granted if the papers show that the moving party is entitled to judgment as a matter of law because no triable issue of material fact exists. CCP §437c(c). Summary judgment is also appropriate when there are no disputed facts and the sole question before the court is one of law. See *Varni Bros. Corp. v Wine World, Inc.* (1995) 35 CA4th 880, 887, 41 CR2d 740.

PRACTICE TIP: To avoid the additional time and expense of trial, landlord attorneys may want to consider filing summary judgment motions when frivolous answers are filed by pro per defendants. Failure to respond to the summary judgment motion will likely result in judgment being entered in favor of the plaintiff.

An unlawful detainer action requires strict compliance with statutory prerequisites and procedures. *Greene v Municipal Court* (1975) 51 CA3d 446, 450, 124 CR 139. Tenants often seek summary judgment because landlords sometimes fail to comply with the statutes. For examples of situations in which a tenant might bring a motion for summary judgment, see California Eviction Defense Manual §22.3 (2d ed Cal CEB 1993).

PRACTICE TIP: If the defense is very technical (*e.g.,* a defect in the notice, or the tenant has not paid rent), a tenant might prefer to resolve the matter before the court rather than before a jury.

CAUTION: Summary judgment is not easily obtained in cases in which retaliatory motive or good cause for an eviction is an issue. See, *e.g., Rich v Schwab* (1984) 162 CA3d 739, 209 CR 417 (summary judgment improper when landlord's action in raising rent was arguably retaliation for tenant's political activities), and *Ernst Enters. v Sun Valley Gasoline, Inc.* (1983) 139 CA3d 355, 188 CR 641 (summary adjudication could not decide issues of fact such as whether landlord had good cause to terminate commercial lease and whether notice stated correct amount of rent due).

For additional resources on unlawful detainer, see Eviction Defense Man, chap 22, and California Landlord-Tenant Practice §§11.31-11.39 (2d ed Cal CEB 1997).

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Source: Civil Litigation/California Summary Judgment/13 Considerations in Particular Cases/§13.3 B. Summary Adjudication

§13.3 B. Summary Adjudication

A landlord or tenant may obtain summary adjudication of only some of the issues in the action. CCP §437c(f). The adjudicated cause of action would be severed and the action would proceed only as to the triable issues of fact remaining. No judgment may be entered before the action is terminated (CCP §437c(k)), but a landlord cannot execute the issues summarily adjudicated until after judgment on the other remaining issues in the unlawful detainer action. If, however, the other issues are raised in a separate, independent civil action instead, then the landlord is entitled to summary judgment.

EXAMPLE: A landlord was granted summary adjudication on the issue of possession in an unlawful detainer action, and was allowed to pursue unpaid rent and damages in a separate civil action. See *Northrop Corp. v Chaparral Energy, Inc.* (1985) 168 CA3d 725, 214 CR 173.

The unlawful detainer statute (CCP §1170.7) does not mention motions for summary adjudication; it uses the phrase "summary judgment." Because the amount of work to be performed by each side and by the court in evaluating a summary judgment motion is virtually the same as for summary adjudication of issues, judicial economy would favor allowing summary adjudication on one or more issues, at least if made in conjunction with and as an alternative to a motion for summary judgment. Summary adjudication may be useful to a landlord's attorney if a tenant has pleaded an affirmative defense that is inapplicable or irrelevant to the grounds for the eviction, depending on the benefit to be derived from the cost of such a motion.

PRACTICE TIP: In making or opposing a motion for summary adjudication of issues, counsel should be prepared to argue whether the policies in creating a **5-day** noticed motion for summary judgment, capable of completely ending an action, also justify a motion for summary adjudication, that could eliminate numerous time-consuming issues from trial but would not eliminate the trial.

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C. Timing Issues

§13.4 1. Filing and Service of Papers

The timing in filing a motion for summary judgment in an eviction case may be made any time after the answer is filed. CCP §1170.7. The **60-day** waiting period contained in CCP §437c(a) is inapplicable in unlawful detainer actions. CCP §437c(r).

Service of notice must be made at least **5 days** before the hearing, and more time is required if the notice is not served personally on the opposing parties. See CCP §1170.7; Cal Rules of Ct 3.1351(a).

CAUTION: The notice period for unlawful detainers is considerably shorter than that provided in CCP §437c(a) (**75 days** minimum notice; see chap 3). Code of Civil Procedure §437c(a) is specifically made inapplicable to unlawful detainer actions by CCP §437c(r).

Opposition to the motion and any reply to opposition may be made orally at the time of the hearing. Cal Rules of Ct 3.1351(b). Alternatively, if a party seeks to have the court consider its opposition before the hearing, written opposition must be filed and served **on or before the court day before the hearing**. In that event, service must be by personal delivery, facsimile transmission, express mail, or other means "reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing." Cal Rules of Ct 3.1351(c).

Written objections to evidence must be served and filed at the same time as the opposition to the summary judgment motion or reply papers are served and filed. Cal Rules of Ct 3.1354(a).

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2. Extensions of Time

§13.5 a. Available to Complete Discovery

When the party opposing a motion for summary judgment is unable to contact essential witnesses and obtain their declarations or has a discovery proceeding pending (*e.g.,* has served interrogatories that have not yet been answered or has served a notice of a deposition that has not yet been held), it may request that the hearing be rescheduled. To do so, that party submits an affidavit pursuant to CCP §437c(h) showing that facts essential to justify opposition to summary judgment may exist. The court must reschedule the hearing and grant an extension of time to file an opposition to the motion for summary judgment because the witness or discovery proceeding might reveal a triable issue of fact. See *Frazee v Seely* (2002) 95 CA4th 627, 115 CR2d 780.

PRACTICE TIP: This is one more reason why defendants to an unlawful detainer action should initiate discovery as soon as possible.

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Source: Civil Litigation/California Summary Judgment/13 Considerations in Particular Cases/§13.6 b. No Extension to Trial Setting Period

§13.6 b. No Extension to Trial Setting Period

Code of Civil Procedure §437c(q) provides that CCP §437c shall not be construed to extend the **20-day** period for trial setting specified in CCP §1170.5.

NOTE: Arguably, under CCP §437c(q), a landlord may assert that the filing of a summary judgment motion in an unlawful detainer action should not be the basis for continuing the trial date.

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Source: Civil Litigation/California Summary Judgment/13 Considerations in Particular Cases/§13.7 D. Uncertainty About §437c(r) Exceptions to Rule 3.150

§13.7 D. Uncertainty About §437c(r) Exceptions to Rule 3.150

Although CCP §437c(r) makes CCP §437c(a)-(b) inapplicable to unlawful detainer actions, no other statute or rule of court states what a moving party must file and serve as supporting documents besides the notice of motion required by Cal Rules of Ct 3.1351(a). Code of Civil Procedure §1170.7 (the unlawful detainer action summary judgment statute) simply refers to CCP §437c for the basis on which a summary judgment "shall be granted or denied." This lack of specificity in the governing statutes and court rules may simply be the result of an assumption that a notice of motion and a properly verified complaint will adequately support a summary judgment brought by the plaintiff in most unlawful detainer actions. If, however, the defendant brings the summary judgment motion, the statutes and rules are unclear. See §13.8.

CAUTION: Despite the 2009 amendment to Rule 3.1350(c), uncertainty continues about the scope of the exceptions in CCP §437c(r) for unlawful detainer suits. It seems likely that the legislature intended to make the exceptions in CCP §437c(r) apply only to the motion scheduling and timing provisions of subdivisions (a)-(b) because subdivisions (c)-(e), which remain applicable to unlawful detainer suits, all assume the requirements of (and directly refer to) the supporting evidence and papers originally described in subdivisions (a)-(b).

PRACTICE TIP: The best course of action is to act on the probability that CCP §437c(r) is directed only at the scheduling and timing provisions of subdivisions (a)-(b). At a minimum, always submit declarations of competent witnesses and a separate statement of undisputed facts with a summary judgment motion because it enables the court to review properly the merits of the motion. These papers are particularly crucial if the defendant is the moving party or if verification of the complaint is defective in any way and the plaintiff is the moving party.

Although §437c(b) does not apply to unlawful detainer actions (CCP §437c(r); Cal Rules of Ct 3.1351(a)), party admissions, answers to interrogatories, depositions, and judicially noticed matters would be relevant and admissible, and, presumably, the legislature did not intend that they be inadmissible when it enacted §437c(r).

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§13.8 E. Moving Papers

Ordinarily a party moving for summary judgment must file and serve a notice of motion, a supporting memorandum, supporting evidence, and a separate statement of undisputed material facts containing specific citations to the supporting evidence. See CCP §437c(b)(1); Cal Rules of Ct 3.1350(c)-(d). The Judicial Council amended Cal Rules of Ct 3.1350(c) in 2009 to provide that the supporting documents listed in the Rule are mandatory except as provided in CCP §437c(r) and Cal Rules of Ct 3.1351. Although CCP §437c(r) makes CCP §437c(a)-(b) inapplicable to unlawful detainer actions, no other statute or rule of court states what a moving party must file and serve as supporting documents besides the notice of motion required by Cal Rules of Ct 3.1351(a). Code of Civil Procedure §1170.7 (the unlawful detainer action summary judgment statute) simply refers to CCP §437c for the basis on which a summary judgment "shall be granted or denied." See §13.7.

PRACTICE TIP: Check with the trial court hearing a summary judgment motion in an unlawful detainer action to ascertain the requirements of that court. Because CCP §437c(b) discusses documents to be used in support of the motion, the requirement for a separate statement of facts, and the timing of filing opposition to the motion and a reply to the opposition, some judges take the position that CCP §437c(r) only eliminates the timing requirements under CCP §437c(b) for summary judgments in unlawful detainer cases. These judges expect and require a separate statement of facts. It is also wise to submit written evidentiary objections.

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Source: Civil Litigation/California Summary Judgment/13 Considerations in Particular Cases/§13.9 F. Opposing Papers

§13.9 F. Opposing Papers

Written opposition to a motion for summary judgment is not required in an unlawful detainer action. See Cal Rules of Ct 3.1351(b). When written opposition is filed, the documents that may be included in opposition are listed in Cal Rules of Ct 3.1350(e). If a party seeks to have the court consider its opposition before the hearing, written opposition must be filed and served on or before the court day before the hearing. Cal Rules of Ct 3.1351(c). The format for the opposing party's separate statement is set out in Cal Rules of Ct 3.1350(f) and (h). Written objections to the moving party's evidence may be served and filed at the same time as the opposition to the motion. Cal Rules of Ct 3.1351(c), 3.1354(a).

PRACTICE TIP: Although Rule 3.1351(b) allows an opposition and reply to the opposition to be made orally at the time of the hearing, this may not be enough to ensure a fair trial for unrepresented defendants who unsuccessfully oppose the motion. Late-entering counsel should file a prompt motion for relief from summary judgment under CCP §473, accompanied by declarations raising one or more triable issues of fact on some or all of the moving party's issues.

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§13.10 G. Attorney Fees

If the rental agreement or a statute provides for attorney fees to the prevailing party, that party may apply for the fees after entry of judgment. An order granting summary judgment, unlike entry of judgment following the order, is not an appealable order and, thus, does not trigger the attorney fees motion filing deadline under Cal Rules of Ct 3.1702(b)(1). *Saben, Earlix & Assocs. v Fillet* (2005) 134 CA4th 1024, 36 CR3d 610 (decided under former Cal Rules of Ct 870.2 (now 3.1702(b)(1))).

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III. EMPLOYMENT CASES

A. Litigation Goals

§13.11 1. Defendant Employer

The defendant's goals in employment litigation usually include resolving the matter as quickly and economically as possible. Taking the plaintiff's deposition early enables the defendant to ascertain whether summary judgment is possible or whether settlement is the best approach. An early deposition also locks the plaintiff into a story that cannot readily be changed as additional facts are disclosed. If summary judgment is unlikely, early settlement discussions can eliminate the need for some discovery, and some of the money saved can be used for settlement. Alternatively, early settlement discussions can establish whether settlement is likely, alerting the defendant if the case may be one that goes to trial. Settlement, summary judgment, and trial are not mutually exclusive options, but the defendant's goal should be to determine as early as possible which option is most likely to resolve the dispute in an acceptable manner and pursue that option. It is seldom cost-effective to pursue two or more options simultaneously.

PRACTICE TIP: Notice the motion in plenty of time to be heard before trial, but not so early that the plaintiff can claim necessary discovery is underway, but incomplete. The focal point for pretrial defense practice in employment cases is a well-timed motion for summary judgment.

CAUTION: The trial of employment discrimination cases is inherently dangerous for defendants. Confronted with unlimited tort damages and juries that identify with plaintiffs, companies often face the specter of a huge verdict when a discrimination case goes to trial. Dispositive motions, such as summary judgment or judgment on the pleadings, are therefore essential weapons in defense counsel's arsenal. From the inception of the case, defense counsel should look for ways to pare back the plaintiff's case—particularly by eliminating claims that can produce tort damages.

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Source: Civil Litigation/California Summary Judgment/13 Considerations in Particular Cases/§13.12 2. Plaintiff Employee

§13.12 2. Plaintiff Employee

Plaintiff's counsel's goals in conducting discovery are to find out the employer's side of the story and the defenses it is likely to assert, to corroborate the plaintiff's version of the facts, and to learn additional facts supporting the client's position. Because employers generally have better access to information than do former employees, plaintiff's counsel usually tries to find out as soon as possible what the defendant knows.

PRACTICE TIP: In forming a discovery plan, plaintiff's counsel should expect the defense to make a major effort to eliminate, or at least reduce, the plaintiff's claims through dispositive motions such as summary judgment. Establish a discovery plan that generates sufficient evidentiary proof on issues of material fact to defeat a motion for summary judgment or to support the plaintiff's own motion for summary adjudication aimed at eliminating an affirmative defense.

About **120 days** before trial, plaintiff's counsel should analyze the case and verify that all information necessary for trial, including depositions and documentary evidence, has been obtained or timely requested. Counsel should expect the defendant to bring a summary judgment motion to be heard **30 days** before trial. See CCP §437c(a). Several months before the close of discovery, counsel should cull the documents for those that are important, index them, and identify the necessary witnesses with an eye toward their inclusion in an opposition to any last-minute summary judgment motion. Discovery generally closes **30 days** before the initial trial date. CCP §2024.020(a).

CAUTION: Since the amendment of CCP §437c in 1992, a surprising number of court of appeal decisions have affirmed summary judgment in discrimination cases. Before the amendment, appellate courts routinely stated that discrimination issues must be resolved at trial; the trend since the amendment appears to be for the court to examine the plaintiff's evidence and throw out those cases that do not raise triable issues. See, *e.g., Addy v Bliss & Glennon* (1996) 44 CA4th 205, 51 CR2d 642; *Martin v Lockheed Missiles & Space Co.* (1994) 29 CA4th 1718, 35 CR2d 181; *University of S. Cal. v Superior Court* (1990) 222 CA3d 1028, 272 CR 264. But see *Nazir v United Airlines, Inc.* (2009) 178 CA4th 243, 286, 100 CR3d 296 (observing that many employment cases present issues of intent, motive, and hostile work environment, which are issues of fact not susceptible to resolution by way of summary judgment papers).

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§13.13 B. Discovery Plan

A thorough discovery plan is crucial for both the plaintiff and defendant in a discrimination lawsuit. The outcome depends very much on the credibility of each party's case. Few plaintiffs can prove a case with only their own testimony, and few defendants can make a credible defense only with witnesses from the company. It is therefore important for parties to gather facts in discovery that will bolster their own case and display weaknesses in their opponent's case.

Gathering evidence includes reviewing documents in the client's possession and obtaining the plaintiff's personnel file before bringing the action, deposing major defense witnesses (*e.g.,* the plaintiff's former supervisor), and obtaining documents from the employer that corroborate the plaintiff's side of the story. It may be appropriate to request admissions of fact and of the authenticity of documents. To develop evidence establishing the unlawful nature of the defendant's conduct, counsel should seek documentation and testimony suggesting, for instance, a lack of consistency in the defendant's reasons for termination to support an inference of pretext.

Both state and federal courts limit certain types of discovery, making it all the more important for counsel to have a discovery plan that will make the most effective use of the discovery that is available. For example, the number of interrogatories and requests for admissions that can be propounded are limited. In California, a party may propound no more than 35 specially prepared interrogatories and any number of official form interrogatories on another party. CCP §2030.030(a). In California, no more than 35 requests for admission may be made of another party unless they relate to the genuineness of documents. CCP §2033.030. Given that the defendant is in control of what is usually the most significant evidence, discovery limits can particularly hamper a plaintiff whose counsel has not thought through the discovery plan.

NOTE: Under the Trial Court Delay Reduction Act (Govt C §§68600-68620), parties must conduct discovery expeditiously. Check local rules for any time limits within which discovery must be completed after service of the complaint. Because of the speed with which discovery may need to be accomplished, plaintiff's counsel should prepare a discovery plan even before the defendant files a responsive pleading. If plaintiff's counsel determines that opposing counsel is providing inadequate responses to discovery, plaintiff's counsel must make reasonable and good faith efforts to resolve the issues before filing a motion to compel, or else risk the imposition of sanctions. See *Obregon v Superior Court* (1998) 67 CA4th 424, 428, 79 CR2d 62 (efforts of sexual harassment plaintiff to resolve discovery dispute held inadequate under circumstances).

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§13.14 1. Plaintiff

For the plaintiff, creating a discovery plan entails gathering documents from the company and examining the company's witnesses in detail. A thorough document request is particularly important because the plaintiff's personnel records may contain information that is not as strong as the defendant now contends, the company's personnel policies may not fully support the actions taken, and performance data or personnel records concerning other employees that the company considers comparable to the plaintiff may show that their treatment varied considerably from the plaintiff's. Also important are "critical self-analysis documents" that the employer prepares in order to analyze whether the company is meeting EEOC or DFEH orders, maintaining affirmative action plans, or, in the case of federal government contractors, complying with federal guidelines that the granting agency requires the contractor to meet. See, *e.g.,* 41 CFR §§60-1.40(a), 60-2.10—60-2.12. There is no privilege from discovery for such documents. *Cloud v Superior Court* (1996) 50 CA4th 1552, 58 CR2d 365. See also *Wellpoint Health Networks, Inc. v Superior Court* (1997) 59 CA4th 110, 68 CR2d 844 (law firm's prelitigation investigation of employee's claim of race discrimination loses attorney-client and work product protection if employer affirmatively defends lawsuit by claiming it investigated employee's complaint of discrimination and took appropriate action).

PRACTICE TIP: Depositions of company personnel are equally important: When placed under oath and confronted with plaintiff at the deposition, witnesses sometimes present weaker justifications than defendant's position in the case.

Courts have held that personnel records are protected by the privacy rights guaranteed by the California Constitution. The employees in question need not appear, because their privacy rights can be asserted by their employer. *Harding Lawson Assoc. v Superior Court* (1992) 10 CA4th 7, 10, 12 CR2d 538; *Board of Trustees v Superior Court* (1981) 119 CA3d 516, 525, 174 CR 160. These privacy rights do not end the inquiry, however. Courts have simply enjoined wholesale inquiry into co-worker files. Other means of producing relevant and narrowly defined information is nevertheless proper, such as interrogatory responses, compilations of data, and excerpts from personnel records. *Perez v County of Santa Clara* (2003) 111 CA4th 671, 3 CR3d 867.

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§13.15 2. Defendant

The defendant's discovery plan must be strategically developed. A document request can be revealing, as a surprising number of plaintiffs keep notes or records of their experiences at work. Other documents, such as memos prepared by the plaintiff during employment and records concerning the plaintiff's posttermination employment and earnings, can be equally valuable. The crucial discovery tool for the defendant is an effective deposition of the plaintiff and his or her key witnesses. This gives counsel a good preview of the plaintiff's performance at trial, and it is a prime opportunity to develop testimony that will support a summary judgment motion. Plaintiffs often give careless testimony that will directly support a summary judgment motion, especially when the deposition is taken early in the case.

Few discovery issues are unique to discrimination cases, but one that does occur with greater frequency in discrimination cases than in others is the discoverability of personnel records for co-workers. Because plaintiffs must prove disparate treatment or disparate impact, they often request production of the personnel files of co-workers who were allegedly treated similarly. Defendants often resist such discovery because employment records are ordinarily treated as confidential documents. In *American Airlines, Inc. v Superior Court* (2003) 114 CA4th 881, 8 CR3d 146, the court held that there was no privilege against discovery directed at a union representative who purportedly had investigative information supporting the plaintiff's claim.

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§13.16 C. Allocation of Burdens Between Parties

At the summary judgment stage, the courts use a burden-shifting analysis in intentional discrimination cases. Once the plaintiff has established a prima facie case, the employer must produce evidence of a nondiscriminatory reason for its action. To avoid summary judgment, an employee claiming discrimination must then offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action is untrue or pretextual, or evidence that the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination. *Horn v Cushman & Wakefield W., Inc.* (1999) 72 CA4th 798, 85 CR2d 459.

In many discrimination cases, it is relatively easy for the plaintiff to raise a triable issue of fact, particularly when statements and actions are at issue. See, *e.g., Colarossi v Coty US, Inc.* (2002) 97 CA4th 1142, 119 CR2d 131 (disputed statement regarding seeking revenge together with other evidence created sufficient triable issues of fact to defeat summary judgment). In some cases, the court might admit so-called "me too" evidence; see, *e.g., Johnson v United Cerebral Palsy/Spastic Children's Found.* (2009) 173 CA4th 740, 93 CR3d 198 (in pregnancy discrimination case, court admitted evidence that defendant had fired other women who disclosed they were pregnant).

PRACTICE TIP: Both counsel should keep in mind that the plaintiff has the legal burden of proof at all times. The effect of having the burden of proof differs depending on the stage of the litigation. At the summary judgment stage, the plaintiff must produce evidence of a prima facie case; the burden then shifts to the employer to show a legitimate, nondiscriminatory reason for the action; the plaintiff then has the burden of showing that the employer's articulated reason for its action is false or inadequate. See, *e.g., Mixon v FEHC* (1987) 192 CA3d 1306, 1318, 237 CR 884.

Once the case goes to trial, however, the burden-shifting ceases and the only issue before the trier of fact is whether the employer's action was motivated by discrimination. At trial, the plaintiff always has the burden of persuasion, and once the employer succeeds in carrying its burden of production, the *McDonnell Douglas* framework (*McDonnell Douglas Corp. v Green* (1973) 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817)—including the discrimination presumption—disappears. *Perez v County of Santa Clara* (2003) 111 CA4th 671, 3 CR3d 867. On appeal, therefore, the only issue is whether there was substantial evidence to support the trial court's decision on the factual issue of discriminatory intent. *Muzquiz v City of Emeryville* (2000) 79 CA4th 1106, 94 CR2d 579.

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§13.17 1. Employer Moving for Summary Judgment

An employer that moves for summary judgment in an employment action must show that there is no unlawful discrimination (see, *e.g., Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 354, 100 CR2d 352), or that the employer's action was taken for a nondiscriminatory and legitimate purpose, such as employee misconduct (see, *e.g., Moore v May Dep't Stores Co.* (1990) 222 CA3d 836, 839, 271 CR 841), or a valid reduction in work force (see, *e.g., Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 358, 100 CR2d 352).

Summary judgment for the employer may be appropriate when, "given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." 24 C4th at 362, citing *Reeves v Sanderson Plumbing Prods., Inc.* (2000) 530 US 133, 147 L Ed 2d 105, 120 S Ct 2097 (*McDonnell Douglas* evidentiary framework applies to ADEA cases).

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§13.18 2. Employee Opposing Summary Judgment

The California Supreme Court has not decided whether, on a motion for summary judgment, the plaintiff bears the initial burden of demonstrating a prima facie case of discrimination, *i.e.,* whether a defendant can prevail on summary judgment simply by alleging that the plaintiff failed to make out a prima facie case. See *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 360, 100 CR2d 352. When, however, a defendant moving for summary judgment introduces competent and admissible evidence of nondiscriminatory reasons to explain its actions, the plaintiff must rebut this showing by pointing to evidence that raises a rational inference that intentional discrimination occurred. 24 C4th at 357. The plaintiff may rebut the evidence by demonstrating that the defendant's nondiscriminatory reasons are pretextual.

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§13.19 a. Evidence of Pretext

California cases that have discussed how much pretext evidence the plaintiff must produce to avoid summary judgment include, *e.g., Deschene v Pinole Point Steel Co.* (1999) 76 CA4th 33, 46, 90 CR2d 15 (summary judgment reversed on FEHA claim because plaintiff produced "specific, substantial evidence of pretext," including evidence that employer failed to follow its own policies when terminating plaintiff); *Hanson v Lucky Stores, Inc.* (1999) 74 CA4th 215, 225, 87 CR2d 487 (to avert summary judgment, plaintiff must produce "substantial responsive evidence" that employer's explanation was "untrue or pretextual"); *Hersant v Department of Social Servs.* (1997) 57 CA4th 997, 1007, 67 CR2d 483 (although evidence showed that employer's actions were unreasonable, it did not show that employer's reasons were pretextual and discriminatorily motivated). See also *Horn v Cushman & Wakefield W., Inc.* (1999) 72 CA4th 798, 806, 85 CR2d 459 (following *Hersant,* requires substantial evidence of pretext); *Martin v Lockheed Missiles & Space Co.* (1994) 29 CA4th 1718, 35 CR2d 181 (requiring substantial responsive evidence that employer's reason was untrue or pretextual).

PRACTICE TIP: At a minimum, the plaintiff must take care to produce admissible evidence to establish that the defendant's asserted reason for the employment decision is pretextual. See *Villanueva v City of Colton* (2008) 160 CA4th 1188, 1195, 73 CR3d 343 (plaintiff's reliance on evidence excluded by trial court to show pretext compelled summary judgment for defendant).

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§13.20 b. Insufficient Evidence of Pretext

In *King v United Parcel Serv., Inc.* (2007) 152 CA4th 426, 60 CR3d 359, the court affirmed summary judgment for the employer when the plaintiff was terminated for violating the integrity policy. The court noted the employer's honest belief in the stated reasons for the action and the objective truth or falsity of the underlying facts, particularly the fact that the employer had, in the past, forgone several opportunities to discharge the plaintiff. Similarly, in *Loggins v Kaiser Permanente Int'l* (2007) 151 CA4th 1102, 60 CR3d 45, the plaintiff was unable to establish pretext. The court found that when the employer produced evidence of a legitimate reason for an adverse employment action, the burden shifted back to the employee to provide "substantial responsive evidence" that the employer's proffered reasons were untrue or pretextual. 151 CA4th at 1112. Temporal proximity, although sufficient to shift the burden to the employer, does not satisfy the secondary burden to show a triable issue of fact on the veracity of the employer's stated reason for the action. 151 CA4th at 1112.

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§13.21 c. Attacking Credibility of Employer's Declarations

An employee who has established a prima facie case of discrimination may be entitled to judgment simply by showing that the employer's explanations for the job action are not credible. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v Sanderson Plumbing Prods., Inc.* (2000) 530 US 133, 147, 147 L Ed 2d 105, 120, 120 S Ct 2097. Thus, a plaintiff's prima facie case, combined with sufficient evidence to show that the employer's asserted justification for its action is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. The burden of proving discrimination, however, always remains with the plaintiff. *St. Mary's Honor Ctr. v Hicks* (1993) 509 US 502, 519, 125 L Ed 2d 407, 424, 113 S Ct 2742 ("It is not enough … to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination").

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14

Forms

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Source: Civil Litigation/California Summary Judgment/14 Forms/§14.1 I. INTRODUCTION

§14.1 I. INTRODUCTION

This chapter gives a brief overview of the format requirements for papers in the course of a summary judgment or summary adjudication motion and identifies the applicable Rules of Court that govern them. See §§14.2-14.7. Sample forms of papers filed by a moving defendant and an opposing plaintiff are provided in §§14.8-14.17. Sample forms for orders and judgments are in §§14.18-14.20. Two sample forms for challenging an order granting summary judgment by way of a motion for reconsideration or a motion for new trial appear in §§14.21-14.22.

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§14.2 A. Format Requirements Generally

The format of papers filed in California trial courts are set out in minute detail, from the size of type that can be used to the weight of the paper, in Cal Rules of Ct 2.100-2.119. For discussion of these requirements, see California Civil Procedure Before Trial §§11.6-11.26 (4th ed Cal CEB 2004). The format of papers for noticed motions generally are found in Cal Rules of Ct 3.1100-3.1312. See Civ Proc Before Trial, chap 12.

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§14.3 B. Specific Format Requirements for Summary Judgment and Summary Adjudication Motions

Special rules applicable to summary judgment and summary adjudication motions are set out in Cal Rules of Ct 3.1350-3.1354. These rules list and describe the documents that must be filed (Cal Rules of Ct 3.1350) and the handling of objections to proffered evidence (Cal Rules of Ct 3.1352-3.1354). A special rule applies to summary judgment or summary adjudication proceedings involving possession of real property (*e.g.,* unlawful detainer actions). See Cal Rules of Ct 3.1351.

Some of the particular formatting rules specific to summary judgment and summary adjudication motions are noted below in §§14.4-14.7.

On the documents that accompany a motion for summary judgment or summary adjudication (listed in Cal Rules of Ct 3.1350(c)), see §§6.15-6.16. On the documents that accompany the opposition (listed in Cal Rules of Ct 3.1350(e)), see §§7.21-7.22. On the format of written objections to evidence (set out in Cal Rules of Ct 3.1354), see §9.13.

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§14.4 1. Length of Memorandum

In a summary judgment or summary adjudication motion, the supporting memorandum must not exceed 20 pages, apart from exhibits, declarations, attachments, a table of contents, a table of authorities, or the proof of service. Cal Rules of Ct 3.1113(d). This is in contrast to other noticed motions, which must not exceed 15 pages. A party may apply to the court for permission to file a longer memorandum. See Cal Rules of Ct 3.1113(e). If the memorandum is over 10 pages, it must include tables of contents and authorities, and if over 15 pages, it must include an opening summary of argument. Cal Rules of Ct 3.1113(f). See §§6.60-6.64.

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§14.5 2. Separate Statement

The supporting and opposing separate statements must follow the precise, two-column format described in Cal Rules of Ct 3.1350(d) and (f) and illustrated in Cal Rules of Ct 3.1350(h). See §§6.33, 7.27. For samples, see §§14.11, 14.16.

Note that in a motion for summary adjudication (whether separately or in the alternative), the particular cause of action, affirmative defense, damage claim, or issue of duty must be stated specifically in the notice of motion, and "must be repeated, verbatim, in the separate statement." Cal Rules of Ct 3.1350(b). See Cal Rules of Ct 3.1350(h). On the contents of the moving party's separate statement, see §6.24. On the notice of motion, see §§6.52-6.56.

The opposition separate statement must respond to each of the material facts that the moving party contends are undisputed, and must also "set forth plainly and concisely any other material facts that the opposing party contends are disputed." CCP §437c(b)(3). For examples of an opposition separate statement, see §§7.27, 14.11.

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§14.6 3. Documentary Evidence

If the evidence in support or opposition to the motion for summary judgment or summary adjudication exceeds 25 pages, it must be bound separately and include a table of contents. Cal Rules of Ct 3.1350(g). On the format of evidence in support of the motion, see §§6.47-6.50; in opposition, see §7.35.

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Source: Civil Litigation/California Summary Judgment/14 Forms/§14.7 4. Written Objections to Evidence

§14.7 4. Written Objections to Evidence

The format of written objections to evidence is governed by Cal Rules of Ct 3.1354(b). Two permissible formats for written objections are set out in the rule. See §9.13.

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Source: Civil Litigation/California Summary Judgment/14 Forms/ II. SAMPLE FORMS/ A. Moving Party/§14.8 1. Form: Sample Defendant's Notice of Motion for Summary Judgment or Summary Adjudication

II. SAMPLE FORMS

A. Moving Party

§14.8 1. Form: Sample Defendant's Notice of Motion for Summary Judgment or Summary Adjudication

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	**DEFENDANT** _ _[*NAME*]_ _**'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION; SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS; SUPPORTING MEMORANDUM; DECLARATION(S); PROPOSED ORDER**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, in _ _[*department*]_ _ of the _ _[*court*]_ _ located at _ _[*full address*]_ _, defendant _ _[*name*]_ _ will and hereby does move the Court under Code of Civil Procedure §437c for an order that summary judgment be entered in favor of this defendant and against plaintiff, _ _[*name*]_ _. The grounds for issuance of this order are that no triable issue exists for any material fact in this case, and defendant is entitled to a judgment as a matter of law.

If for any reason summary judgment cannot be granted, defendant moves in the alternative for summary adjudication and requests that the Court:

1. Order that the following causes of action and claims have no merit and are eliminated from this case:

a. Plaintiff's first cause of action for medical malpractice, which is barred by the statute of limitations as set forth in Code of Civil Procedure §340.5 (see separate statement of undisputed facts, fact nos. 1-3).

b. Plaintiff's claims for punitive damages asserted in the fourth count of the second cause of action and in the fifth cause of action (see separate statement of undisputed facts, fact nos. 4-7).

2. Find that the defendant did not owe a duty to the plaintiff with respect to matters alleged in plaintiff's second and fourth causes of action (see separate statement of undisputed facts, fact no. 8).

These alternative motions are based on the attached documents and exhibits, including the separate statement of undisputed material facts; the signed transcript of plaintiff's deposition taken on _ _[*date*]_ _; the declarations of _ _[*name*]_ _ and _ _[*name*]_ _; specified contents of the file in this case, of which the Court is requested to take judicial notice, as shown in the notice of request to take judicial notice; the supporting memorandum; and any evidence received at the hearing.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: On the notice of motion, see §§6.52-6.56.

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§14.9 2. Form: Sample Defendant's Memorandum in Support of Motion for Summary Judgment or Summary Adjudication

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**MEMORANDUM IN SUPPORT OF MOTION OF** _ _[*NAME*]_ _ **FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION**
_ _[*Name(s)*]_ _, **Defendant(s)**	
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _
	Action filed: _ _[*date*]_ _
	Trial date: _ _[*if set*]_ _

FACTS: _ _[*Succinctly state facts underlying motion.*]_ _

I. STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE ACTIONS IS THREE YEARS AFTER DATE OF INJURY OR ONE YEAR AFTER PLAINTIFF DISCOVERS, OR THROUGH USE OF REASONABLE DILIGENCE SHOULD HAVE DISCOVERED, INJURY.

Code of Civil Procedure §340.5. See also *Knowles v Superior Court (Labo)* (2004) 118 CA4th 1290 [13 CR3d 700].

Plaintiff _ _[*name*]_ _'s medical malpractice claim is barred by Code of Civil Procedure §340.5 because the alleged acts of so-called medical malpractice occurred on or before March 3, 2004, the date of surgery (plaintiff's amended complaint at p 3; defendant's declaration, Exhibit E). In addition, plaintiff became aware of defendant _ _[*name*]_ _'s alleged medical malpractice and all injuries allegedly sustained as a result on or before March 12, 2004 (defendant's declaration, Exhibit E; plaintiff's deposition at p 13, lines 5-8). This action was not filed until April 1, 2007 (plaintiff's original complaint). Accordingly, plaintiff's action is barred by the statute of limitations.

II. AN EMPLOYER IS NOT LIABLE FOR PUNITIVE DAMAGES BASED ON ACTS OF AN EMPLOYEE ABSENT ADVANCE KNOWLEDGE OF THE EMPLOYEE'S UNFITNESS.

Civil Code §3294(b); *College Hospital v Superior Court* (1994) 8 C4th 704 [34 CR2d 898].

Even if defendant _ _[*name*]_ _ acted with malice, it is conceded that defendant _ _[*name*]_ _ neither had, nor could have had, any knowledge of _ _[*name*]_ _'s alleged unfitness to act as a physician and surgeon. (See defendant's declaration at p 3; plaintiff's deposition at p 7, lines 13-16.)

III. PLAINTIFF WAS FULLY INFORMED ABOUT THE POTENTIAL CONSEQUENCES AND COMPLICATIONS THAT COULD RESULT FROM THE SURGICAL PROCEDURE.

Plaintiff read, dated, and executed a form titled "Consent to Surgery—Binding Waiver of Liability," which

included the following language: "I have discussed with my doctor in considerable detail the nature, extent, and dangers of the surgery to be performed, as well as the possible consequences, complications, and side effects of that surgery, all of which I fully understand. I still want the surgery. I do NOT want a second opinion."

(Defendant's declaration, Exhibit F; defendant's declaration at p 10; Exhibit E of defendant's declaration.)

Plaintiff read, dated, and executed this form after having been fully informed of the consequences and complications that could result from the surgical procedures (defendant's declaration at p 5; Exhibit E of defendant's declaration).

IV. NO PHYSICIAN-PATIENT RELATIONSHIP EXISTED BETWEEN PLAINTIFF AND DEFENDANT _ _[*NAME*]_ _.

***Felton v Schaeffer* (1991) 229 CA3d 229, 235 [279 CR 713].**

Plaintiff was the patient of Dr. _ _[*name*]_ _. He had no relationship with Dr. _ _[*name*]_ _, who was merely an observer at the surgery. (Exhibit E of defendant's declaration.)

V. _ _[*Continue stating points, citing authorities, and arguing position advanced.*]**_ _**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]**_ _**

Comment: On the moving party's supporting memorandum, see §§6.57-6.65.

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§14.10 3. Form: Sample Declaration Supporting Defendant's Motion for Summary Judgment or Summary Adjudication

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**DECLARATION OF**
vs	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**MOTION OF** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FOR SUMMARY JUDGMENT OR SUMMARY**
	)	**ADJUDICATION**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _ **declares:**

1. I am a licensed, practicing physician specialized in _ _[*state specialty*]_ _**.**

2. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could and would testify to those facts.

3. On _ _[*date*]_ _**, I verbally informed plaintiff,** _ _[*name*]_ _**, regarding the consequences and complications that could result from the surgical procedure.**

4. I asked plaintiff if he understood the consequences and complications that could result from the surgical procedure, and plaintiff verbally expressed his understanding of the consequences and complications.

5. On _ _[*date*]_ _**, plaintiff read, dated, and executed a form titled "Consent to Surgery—Binding Waiver of Liability," which included the following language: "I have discussed with my doctor in considerable detail the nature, extent, and dangers of the surgery to be performed, as well as the possible consequences, complications, and side effects of that surgery, all of which I fully understand. I still want the surgery. I do NOT want a second opinion."**

6. Plaintiff read, dated, and executed this form after I fully informed him of the consequences and complications that could result from the surgical procedure.

7. _ _[*Continue declarant's statements*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

_ _[*Title if relevant*]_ _

Comment: On declarations and affidavits, see §§5.8-5.31.

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Source: Civil Litigation/California Summary Judgment/14 Forms/ 4. Defendant's Separate Statement of Undisputed Material Facts/§14.11 a. Form: Sample Defendant's Separate Statement for Summary Judgment or Summary Adjudication in the Alternative

4. Defendant's Separate Statement of Undisputed Material Facts

§14.11 a. Form: Sample Defendant's Separate Statement for Summary Judgment or Summary Adjudication in the Alternative

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS SUPPORTING**
vs	)	
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**_ _[*NAME*]_ _'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION**
	)	
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Defendant, _ _[*name*]_ _, in support of his motion for summary judgment or summary adjudication of issues, submits that the following material facts are undisputed in this action:

ISSUE NO. 1—THE FIRST CAUSE OF ACTION FOR MEDICAL MALPRACTICE IS BARRED BY THE STATUTE OF LIMITATIONS OF CODE OF CIVIL PROCEDURE §340.5, WHICH PROVIDES THAT MEDICAL MALPRACTICE ACTIONS MUST BE BROUGHT THREE YEARS AFTER DATE OF INJURY OR ONE YEAR AFTER PLAINTIFF DISCOVERS, OR THROUGH USE OF REASONABLE DILIGENCE SHOULD HAVE DISCOVERED, INJURY.

Moving Party's Undisputed Material Facts and Supporting Evidence	Opposing Party's Response and Supporting Evidence
1. The alleged acts of medical malpractice on which plaintiff _ _[*name*]_ _'s first cause of action is based occurred on or before March 3, 2004. **Plaintiff's second amended complaint, 3:15-23; plaintiff's answers to requests for admissions, answer no. 8, p 3 (copy attached as Exhibit E to defendant's declaration).**	
2. Plaintiff became aware of defendant's alleged medical	

malpractice, and of all injuries allegedly sustained as a result, on or before March 12, 2004. **Plaintiff's answers to requests for admissions, answer no. 14, p 3 (copy attached as Exhibit E to defendant's declaration); plaintiff's deposition, 13:5-8.**	
3. This action was commenced on the filing of plaintiff's original complaint on April 1, 2007. **Filing stamp on plaintiff's original complaint in this action, of which the Court is requested to take judicial notice.**	

ISSUE NO. 2—THE FIRST CAUSE OF ACTION FOR MEDICAL MALPRACTICE IS BARRED BECAUSE PLAINTIFF WAS FULLY INFORMED OF THE CONSEQUENCES AND COMPLICATIONS THAT COULD RESULT FROM THE SURGICAL PROCEDURE.

4. Plaintiff verbally expressed his understanding of the consequences and complications that could result from the surgical procedure. **Defendant's declaration, 3:13-16; plaintiff's deposition, 8:3-8.**	
5. Plaintiff read, dated, and executed a form titled "Consent to Surgery—Binding Waiver of Liability," which included the following language: "I have discussed with my doctor in considerable detail the nature, extent, and dangers of the surgery to be performed, as well as the possible consequences, complications, and side effects of that surgery, all of which I fully understand. I still want the surgery. I do NOT want a second opinion." **Defendant's declaration, 3:14-18; copy of form, attached as Exhibit F to defendant's declaration; plaintiff's answers to requests for admission, answer no. 13, p 4 (copy attached as Exhibit E to defendant's declaration).**	
6. Plaintiff read, dated, and executed this form after having been fully informed regarding the consequences and complication that could result from the surgical procedure. **Defendant's declaration, 3:1-3; plaintiff's answers to requests for admissions, answer no. 14, p 4 (copy attached as Exhibit E to defendant's declaration).**	

ISSUE NO. 3

[*Continue as above*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: The moving party's separate statement in support of a motion for summary judgment or summary adjudication is governed by Cal Rules of Ct 3.1350(d) and must follow the format set out in the sample in Cal Rules of Ct 3.1350(h). On preparation and format of the moving party's separate statement, see §§6.21-6.35.

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Source: Civil Litigation/California Summary Judgment/14 Forms/§14.12 b. Form: Sample Defendant's Separate Statement for Summary Judgment

§14.12 b. Form: Sample Defendant's Separate Statement for Summary Judgment

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Jane Doe [State Bar No. 038775]
DOE, DOE & DOE
123 Main Street, Suite 4
Anytown, CA 12345
Telephone: (555) 555-6666
Fax: (555) 555-6667
E-mail: jdoe@ceb.com
Attorneys for Defendant, JOHN ROE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF PROVINCE

ROBERT THOMAS,	)	**No. 1234567**
Plaintiff,	)	
	)	**SEPARATE STATEMENT**
vs	)	**OF UNDISPUTED FACTS**
	)	**IN SUPPORT OF**
JOHN ROE, et al.,	)	**SUMMARY JUDGMENT**
Defendant	)	**MOTION OF DEFENDANT**
	)	**JOHN ROE**
	)	
	)	**Hearing: April 15, 2010,**
	)	**10:00 a.m.**
	)	**Dep't: 10**
	)	**Hearing judge: Honorable**
	)	**Stephen Owens**
_____	)	**Action filed: October 4, 2009**
		Trial date: None assigned.

Defendant, JOHN ROE, asserts that the following material facts are established by the evidence referred to and it is shown that plaintiff cannot prevail on any causes of action:

Moving Party's Undisputed Material Facts and Supporting Evidence:	**Opposing Party's Response and Supporting Evidence:**
<u>Affirmative Defense to First Cause of Action: Nonexistence of Contract</u>	
1. The written contract that plaintiff relies on for the First Cause of Action is not signed by defendant. **Admitted by plaintiff in his deposition, Exhibit 1 to Declaration of Attorney Doe, 31:4-14; contract attached as Exhibit A to the deposition, and as Exhibit 3 to Declaration of Defendant Roe.**	
2. Plaintiff and defendant conducted oral negotiations. **Plaintiff's deposition, 28:15-29:5**	

(Exhibit 1 to Declaration of Attorney Doe).	
3. Both plaintiff and defendant anticipated that the contract would be reduced to writing when they reached an agreement. **Plaintiff's deposition, 30:7-12 (Exhibit 1 to Declaration of Attorney Doe); Defendant Roe's Declaration, 2:3-15.**	
4. Defendant did not sign the contract prepared by plaintiff because no agreement was reached. **Defendant Roe's Declaration, 2:16-23.**	
Affirmative Defense to the Second Cause of Action: Breach of Oral Contract	
5. Plaintiff and defendant did not reach an oral agreement. **Defendant Roe's Declaration, 2:16-23.**	
6. Both plaintiff and defendant anticipated that the contract would be reduced to writing when they reached an agreement. **Plaintiff's deposition, 30:7-12 (Exhibit 1 to Declaration of Attorney Doe); Defendant Roe's Declaration, 2:3-15.**	
7. Defendant notified plaintiff that the written contract did not accurately reflect the oral negotiations, and was premature. **Plaintiff's deposition, 30:12-24 (Exhibit 1 to Declaration of Attorney Doe); Defendant Roe's Declaration, 2:16-25.**	

Dated: March 3, 2010

DOE, DOE & DOE

By_____

Jane Doe
Attorneys for Defendant
JOHN ROE

Comment: The moving party's separate statement in support of a motion for summary judgment or summary adjudication is governed by Cal Rules of Ct 3.1350(d) and must follow the format set out in the sample in Cal Rules of Ct 3.1350(h). On preparation and format of the moving party's separate statement, see §§6.21-6.35.

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Source: Civil Litigation/California Summary Judgment/14 Forms/§14.13 c. Form: Sample Defendant's Separate Statement for Summary Adjudication

§14.13 c. Form: Sample Defendant's Separate Statement for Summary Adjudication

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R.S. ROECA [State Bar No. 058776]
JANE C. PETERSON
999 California Street, Suite 888
San Francisco, CA 94000
Telephone: (415) 555-4444
Fax: (415) 555-4445
E-mail: roeca@ceb.com
Attorneys for Defendant, BRUCE SMITH

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

JOHN F. JONES **Plaintiff,**	)	**No. 2345678**
vs	)	**SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANT BRUCE SMITH'S MOTION FOR SUMMARY ADJUDICATION**
BRUCE SMITH, **Defendant**	)	**Hearing: May 12, 2010, 10:00 a.m.** **Dep't: 10** **Hearing judge: Honorable Stephen Owens** **Action filed: December 3, 2009** **Trial date: August 25, 2010**

Defendant Smith submits the following statement of undisputed material facts with references to supporting evidence pursuant to Code of Civil Procedure §437c(b)(1). These facts establish that defendant Bruce Smith did not owe any duty to plaintiff John F. Jones and that plaintiff's first cause of action against Smith for premises liability has no merit.

ISSUE NUMBER 1: BECAUSE DEFENDANT SMITH DID NOT OWN THE PREMISES UPON WHICH PLAINTIFF JONES WAS INJURED, DEFENDANT DID NOT OWE PLAINTIFF ANY DUTY TO MAINTAIN THE PREMISES, AND PLAINTIFF CANNOT RECOVER AGAINST DEFENDANT SMITH ON HIS FIRST CAUSE OF ACTION FOR PREMISES LIABILITY.

Moving Party's Undisputed Material Facts and Supporting Evidence:	Opposing Party's Response and Supporting Evidence:
1. Defendant Bruce Smith owned the house at 123 Tenth St., Anytown, California, from January 10, 1988, until March 13, 2009. **Declaration of Smith, Exhibit 1, 1:5-8. Certified copy of original deed attached to Smith declaration as Exhibit 1(a).**	

2. On March 13, 2009, defendant Bruce Smith sold his entire interest in the house at 123 Tenth St., Anytown, California, to Steve Smart. **Declaration of Smith, Exhibit 1, 1:12-16. Certified copy of grant deed attached to Smith declaration as Exhibit 1(b). Deposition of Steve Smart, Exhibit 2(a), 3:5-10, attached to Peterson declaration, Exhibit 2.**	
3. Since March 13, 2009, defendant Bruce Smith has held no interest in the property, received no income from the property, and paid no taxes on the property. **Declaration of Smith, Exhibit 1 at 2:11-18. Deposition of Steve Smart, Exhibit 2(a), 4:2-20, attached to Peterson declaration, Exhibit 2. Tax records of Smart, exhibit 2(b), attached to Peterson declaration, Exhibit 2.**	
4. Plaintiff John Jones slipped and fell on the steps of the property at 123 Tenth St., Anytown, California, on August 31, 2009, more than 5 months after defendant Smith sold the property. **Plaintiff Jones's complaint, paragraph 5. Deposition of Jones, Exhibit 2(c), 4:8-15, attached to Peterson declaration, Exhibit 2.**	

Dated: April 30, 2010 **By _____**

Jane C. Peterson
Attorney for Defendant
BRUCE SMITH

Comment: The moving party's separate statement in support of a motion for summary judgment or summary adjudication is governed by Cal Rules of Ct 3.1350(d) and must follow the format set out in the sample in Cal Rules of Ct 3.1350(h). On preparation and format of the moving party's separate statement, see §§6.21-6.35.

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§14.14 5. Form: Sample Defendant's Proposed Order Granting Summary Judgment

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER GRANTING**
vs	)	**SUMMARY JUDGMENT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of defendant, _ _[*name*]_ _, for summary judgment or summary adjudication of issues was heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After considering the papers filed in support of and in opposition to the motion, the Court finds that defendant is entitled to judgment as a matter of law under Code of Civil Procedure §437c.

IT IS ORDERED that:

1. Motion for summary judgment be granted.

2. Judgment be entered in favor of defendant _ _[*name*]_ _ and against plaintiff _ _[*name*]_ _.

3. _ _[*State any additional orders.*]_ _

[*It can be useful, in a proposed order, to formulate for the judge specifications of reasons, with references to supporting and opposing evidence, for determinations that there is no triable issue of material fact. See CCP §437c(g), discussed in §§11.21-11.25. For example:*]

There is no triable issue of material fact with respect to the following matters for the reasons indicated:

1. Defendant _ _[*name*]_ _ owed no duty to plaintiff _ _[*name*]_ _ with respect to obtaining the latter's informed consent to the surgery performed on March 12, 2004, because they had no contractual or physician-patient relationship as shown by _ _[*name*]_ _'s uncontradicted declaration.

2. Defendant _ _[*name*]_ _ cannot be liable to pay punitive damages to plaintiff _ _[*name*]_ _, because this defendant had no knowledge of any unfitness on the part of its employee, Dr. _ _[*name*]_ _, as is shown by the declaration of _ _[*name*]_ _. The declaration of _ _[*name*]_ _, stating that there was such knowledge, is insufficient to raise a triable issue of fact because it contains no factual statements showing that the declarant had personal knowledge of what this defendant knew or could have known.

[*Continue with other formulations*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Comment: On the moving party's proposed order granting a motion for summary judgment, see §§6.66, 11.19-11.20; on the contents of the court's order, see §§11.21-11.25.

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§14.15 6. Form: Sample Defendant's Proposed Order Granting Summary Adjudication

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER GRANTING**
vs	)	**SUMMARY ADJUDICATION**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of defendant, _ _[*name*]_ _, for summary judgment or summary adjudication was heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After considering the papers filed in support of and in opposition to the motion, the Court finds that the following causes of action and claims have no merit and are eliminated from this action:

1. Plaintiff _ _[*name*]_ _'s first cause of action for alleged medical malpractice, which is barred by the statute of limitations as set forth under Code of Civil Procedure §340.5 (see separate statement of undisputed facts, fact nos. 1-3).

2. Plaintiff _ _[*name*]_ _'s claims for punitive damages asserted in the fourth count of the second cause of action and in the fifth cause of action.

The Court also finds that defendant _ _[*name*]_ _ owed no duty to plaintiff _ _[*name*]_ _ with respect to plaintiff's second and fourth causes of action.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Comment: On the moving party's proposed order granting a motion for summary adjudication, see §§6.66, 11.19-11.20; on the contents of the court's order, see 11.30-11.33.

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Source: Civil Litigation/California Summary Judgment/14 Forms/ B. Opposing Party/§14.16 1. Form: Sample Plaintiff's Response to Separate Statement of Disputed and Undisputed Facts

B. Opposing Party

§14.16 1. Form: Sample Plaintiff's Response to Separate Statement of Disputed and Undisputed Facts

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**RESPONSE OF PLAINTIFF** _ _[*NAME*]_ _ **TO SEPARATE STATEMENT OF DISPUTED AND UNDISPUTED MATERIAL FACTS**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Plaintiff, _ _[*name*]_ _, submits this separate statement of disputed and undisputed facts in opposition to the motion of defendant, _ _[*name*]_ _, for summary judgment or summary adjudication and in response to defendant's separate statement of undisputed material facts:

ISSUE NO. 1—THE FIRST CAUSE OF ACTION FOR MEDICAL MALPRACTICE IS NOT BARRED BY THE STATUTE OF LIMITATIONS OF CODE OF CIVIL PROCEDURE §340.5 BECAUSE PLAINTIFF DID NOT DISCOVER THE INJURY UNTIL APRIL 3, 2006, LESS THAN ONE YEAR PRIOR TO FILING THE ACTION.

Moving Party's Undisputed Material Facts and Supporting Evidence:	Opposing Party's Response and Supporting Evidence:
1. The alleged acts of "medical malpractice" on which plaintiff _ _[*name*]_ _'s first cause of action is based occurred on or before March 3, 2004. **Plaintiff's second amended complaint, 3:15-23; plaintiff's answers to requests for admissions, answer no. 8, p 3 (copy attached as Exhibit E to defendant's declaration).**	Undisputed
2. Plaintiff became aware of defendant's alleged medical malpractice, and of all injuries allegedly sustained as a result, on	Disputed. The date on which plaintiff became aware of defendant's medical malpractice was April 3, 2006.

or before March 12, 2004.	**Plaintiff's declaration, 3:12-14.**
3. This action was commenced on the filing of plaintiff's original complaint on April 1, 2007. **Filing stamp on plaintiff's original complaint in this action, of which the Court is requested to take judicial notice.**	Undisputed
4. Plaintiff was fully informed of the consequences and complications that could result from the surgical procedure. **Defendant's declaration, 3:20; plaintiff's deposition, 13:5-8.**	Undisputed
5. Plaintiff verbally expressed his understanding of the consequences and complications that could result from the surgical procedure. **Defendant's declaration, 3:13-16; plaintiff's deposition, 8:3-8.**	Undisputed
6. Plaintiff read, dated, and executed a form titled "Consent to Surgery—Binding Waiver of Liability," which included the following language: "I have discussed with my doctor in considerable detail the nature, extent, and dangers of the surgery to be performed, as well as the possible consequences, complications, and side effects of that surgery, all of which I fully understand. I still want the surgery. I do NOT want a second opinion." **Defendant's declaration, 3:14-18; copy of form, attached as Exhibit F to defendant's declaration; plaintiff's answers to requests for admission, answer no. 13, p 4 (copy attached as Exhibit E to defendant's declaration).**	Undisputed
7. Plaintiff read, dated, and executed a form titled "Consent to Surgery—Binding Waiver of Liability" after having been fully informed regarding the consequences and complications that could result from the surgical procedure. **Defendant's declaration, 3:1-3; plaintiff's answers to requests for admissions, answer no. 14, p 4 (copy attached as Exhibit E to defendant's declaration).**	Undisputed

PLAINTIFF SUBMITS THAT THE FOLLOWING ADDITIONAL FACTS ARE BOTH MATERIAL AND DISPUTED IN THIS CASE:

Disputed Facts	**Supporting Evidence**
1. Plaintiff was not informed of the	**Plaintiff's declaration, 2:23.**

possible consequences and complications of the surgery until March 15, 2004, after it had been completed.	
2. Plaintiff signed the form titled "Consent to Surgery—Binding Waiver of Liability" on March 15, 2004, after the surgery had been completed.	**Plaintiff's declaration, 2:25; copy of form, attached as Exhibit B to defendant's declaration supporting this motion.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: The separate statement filed in opposition is governed by Cal Rules of Ct 3.1350(f) and must follow the two-column format set out in the sample in Cal Rules of Ct 3.1350(h). See §§7.23-7.29.

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§14.17 2. Form: Sample Plaintiff's Proposed Order Denying Summary Judgment and Summary Adjudication

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**PROPOSED ORDER**
vs	)	
	)	**Hearing:** _ _[*date; time*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

The motion of defendant, _ _[*name*]_ _, for summary judgment or summary adjudication was heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After considering the papers filed in support of and in opposition to the motion, the Court finds that defendant is not entitled to either summary judgment or summary adjudication.

The Court finds that there is a triable issue as to each of the following material facts:

1. Whether the date that plaintiff became aware of defendant's alleged medical malpractice was March 12, 2004.

CONFLICTING EVIDENCE: Plaintiff's answers to requests for admissions, answer no. 4 at p 3; transcript of defendant's deposition at p 27, lines 3-5.

2. Whether plaintiff was not informed of the possible consequences and complications of surgery until March 15, 2004, after the surgery had been completed.

CONFLICTING EVIDENCE: Plaintiff's declaration at p 2; defendant's declaration at p 3.

3. Whether plaintiff did not sign the form titled "Consent to Surgery—Binding Waiver of Liability" until March 15, 2004, after the surgery had been completed.

CONFLICTING EVIDENCE: Plaintiff's declaration at p 2; defendant's declaration at p 3.

4. Whether plaintiff sustained loss of wages as a result of defendant's acts.

CONFLICTING EVIDENCE: Plaintiff's answers to requests for admissions, answer no. 3; plaintiff's declaration at p 1, lines 12-14.

IT IS ORDERED that defendant's motion for summary judgment or for summary adjudication be denied.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Comment: On the opposing party's proposed order denying a motion for summary judgment or summary adjudication, see §7.44. On the contents of the order, see §§11.26-11.29 (summary judgment), 11.34-11.36 (summary adjudication).

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Source: Civil Litigation/California Summary Judgment/14 Forms/ C. Orders and Judgments/§14.18 1. Form: Order for Entry of Summary Judgment

C. Orders and Judgments

§14.18 1. Form: Order for Entry of Summary Judgment

▶ To download **Word** version, right click and choose *Save Target As*

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER FOR ENTRY OF**
vs	)	**SUMMARY JUDGMENT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, for summary judgment was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After considering (1) the papers filed in support of and in opposition to the motion and (2) the oral argument of counsel, the Court finds that _ _[*e.g., defendant*]_ _ is entitled to judgment as a matter of law under Code of Civil Procedure §437c.

The reasons for this determination are _ _[*stated in an oral order recorded in the minutes of this proceeding/ as follows: _ _ _ _ _ _*]_ _.

[*If not done by oral order or in a separate written order, list reasons for court's determination, with specific reference to the evidence that supports (and, if applicable, that opposes) the determination that no triable issue of material fact exists.*]

IT IS ORDERED that:

1. Motion for summary judgment be granted.

2. Judgment be entered in favor of _ _[*e.g., defendant*]_ _ and against _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _.

3. _ _[*State any additional orders.*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Comment: On the preparation and timing of the court's order, see §§11.19-11.20; on the contents of the order, see §§11.21-11.36.

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§14.19 2. Form: Judgment by Court Under CCP §437c

▶ To download **Word** version, right click and choose *Save Target As*

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Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**JUDGMENT BY COURT UNDER CCP §437c**
_ _[*Name(s)*]_ _, **Defendant(s)**	

On _ _[*date*]_ _, this Court granted the motion for summary judgment of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _.

IT IS ORDERED that:

1. _ _[*E.g., Plaintiff*]_ _, _ _[*name*]_ _, take nothing by the complaint.

2. _ _[*E.g., Defendant*]_ _ recover from _ _[*e.g., plaintiff*]_ _ costs in the amount of $_ _ _ _ _ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Comment: The court's order (see samples in §§14.14, §14.18) should include a direction that judgment be entered; see §11.25.

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§14.20 3. Form: Order Denying Motion for Summary Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER DENYING MOTION**
vs	)	**FOR SUMMARY JUDGMENT**
	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Trial date:** _ _[*if set*]_ _

The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, for summary judgment was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

After considering (1) the papers filed in support of and in opposition to the motion and (2) the oral argument of counsel, the Court denies _ _[*e.g., defendant's*]_ _ **motion.**

In accordance with Code of Civil Procedure §437c(g), the Court finds that a triable controversy exists as to the following material facts: _ _[*List*]_ _**.**

The evidence indicating that a triable issue exists follows: _ _[*Describe evidence*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge

Comment: On the contents of an order denying a motion for summary judgment, see §§11.26-11.29; for summary adjudication, see §§11.34-11.36.

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D. Postjudgment Forms

§14.21 1. Form: Notice of Motion for Reconsideration of Order Granting Motion for Summary Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION FOR SUMMARY JUDGMENT;** _ _[*SUPPORTING MEMORANDUM;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _, _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §1008(a) for reconsideration of the order made on** _ _[*date*]_ _**, granting** _ _[*e.g., defendant*]_ _ _ _[*name*]_ _**'s motion for summary judgment and for an order vacating and setting aside the order made and entered on that date. The grounds for issuance of this order are that a different state of facts exists.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _, _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: On motions for reconsideration of order granting summary judgment, see §§12.3-12.7. The motion must be accompanied by a supporting memorandum. See Cal Rules of Ct 3.1112(a); 3.1113. Declarations of counsel should be prepared and attached to the moving papers as appropriate.

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Source: Civil Litigation/California Summary Judgment/14 Forms/§14.22 2. Form: Notice of Intention to Move for New Trial

§14.22 2. Form: Notice of Intention to Move for New Trial

To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court, County of _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF INTENTION TO MOVE FOR NEW TRIAL;** _ _[*SUPPORTING MEMORANDUM;*]_ _ _ _[*DECLARATION(S);*]_ _ _ _[*PROPOSED ORDER*]_ _
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _
_____	)	

PLEASE TAKE NOTICE that _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _**, moves the Court under Code of Civil Procedure §657 for an order to vacate and set aside the order of the Court made and entered on** _ _[*date*]_ _**, and to grant** _ _[*e.g., plaintiff*]_ _ **a new trial of the action. The grounds for issuance of this order are that there is newly discovered evidence material to** _ _[*e.g., plaintiff*]_ _**'s case, which** _ _[*he/she/it*]_ _ **could not with reasonable diligence have discovered and produced at trial, and because of which** _ _[*he/she/it*]_ _ **was denied a fair trial.**

The hearing will take place on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**.**

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of* _ _[*name*]_ _*, dated* _ _ _ _]_ _**,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: On motions for a new trial made after grant of summary judgment, see §§12.8-12.10. A memorandum and declarations of counsel should be attached. For further discussion, see California Trial Practice: Civil Procedure During Trial §§25.22-25.71 (3d ed Cal CEB 1995).

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