Judge Randolph M. Hammock
LOS ANGELES SUPERIOR COURT

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More thoughts about separate statements and motions to seal

SPECIFIC STATEMENTS ARE REQUIRED IN MANY TYPES OF DISCOVERY DISPUTES AND IN MOTIONS FOR SUMMARY ADJUDICATION

In paying obscure homage to one of my all-time favorite bands, to wit, the Talking Heads, the goal of this article is to note common mistakes committed by attorneys which I often see as a judge in the I/C courts, as it relates to separate statements, as equally well as to motions to seal. As David Byrne yelped out in the beginning of the track of "Artist Only" (Talking Heads, *More Songs About Buildings and Food*, 1978): "Let's go!"

The wonderful world of separate statements

"I'm painting, I'm painting again
I'm painting, I'm painting again
I'm cleaning, I'm cleaning again
I'm cleaning, I'm cleaning my brain."

Suffice it to state, most civil litigators are familiar with the requirement of separate statements. Especially as applicable to motions to compel further responses to certain discovery, as well as to motions for summary judgment and/or adjudication.

However, many litigators are surprised to know that separate statements are also required in many other types of discovery disputes. California Rules of Court, rule 3.1345 lists each and every specific discovery motion to which a separate statement is mandatory. This would include motions to compel answers at a deposition (Cal. Rules of Court, rule 3.1345(a)(4)), and moreover, to a motion to *compel or to quash* the production of documents at a deposition. (Cal. Rules of Court, rule 3.1345(a)(5).) The most common attorney error exists as to the latter.

I often see motions to compel depositions of a party, in which the motion also seeks to compel the production of documents at the same time. In short, a party is refusing to attend a deposition (or failed to appear at a properly noticed deposition), and that party is also refusing to produce certain (or all) requested documents contained in the notice of deposition. As such, the moving party wants a court order compelling the other party to attend his or her deposition, and moreover, to produce the requested documents at that deposition.

However, it is somewhat rare that the moving party actually provides the required separate statement for the document request, which must also demonstrate "good cause" as to why each and every category of requested documents should be compelled. (See Code Civ. Proc., § 2025.450, subd. (b)(1) ["The motion shall set forth *specific facts showing good cause justifying* the production of documents . . . described in the deposition notice."] (Emphasis added).)

Although justification for the requested documents may seem self-evident, without the required separate statement, the court simply lacks the statutory power to order that production, pursuant to California Rules of Court, rule 3.1345(a)(5). Hence, a typical order issued by me in that situation is to grant the motion to compel the deposition, but to deny without prejudice the motion to compel the production of documents. I then remind the responding party that said party must still comply with any proper request to produce documents, per Code of Civil Procedure section 2025.280. I am just not ordering it at this time.

The most egregious errors

"Pretty soon now I will be bitter
Pretty soon now will be a quitter
Pretty soon now I will be bitter
You can't see it 'til it's finished."

The most egregious errors concerning separate statements, though, do not occur in discovery disputes. They appear in the realm of motions for summary judgment and/or summary adjudication.

The initial pleading crime is usually committed by the moving party. In short, their "Separate Statement of Undisputed Material Facts" typically contains dozens, if not hundreds, of alleged undisputed facts which are simply *immaterial* to the disposition of the motion. The moving party simply appears to ignore the word "material" in its separate statement. I have literally seen separate statements that contain several hundred alleged "undisputed" (as well as "disputed") material facts. One could reasonably contend that by including it in the initial separate statement, the moving party is essentially claiming that all of these undisputed facts are "material." Does that mean that if even *one* of those claimed "undisputed material facts" is properly disputed by the opposing party, that the motion must be denied? Not so fast…

In a ruling I issued a few years ago in a motion for summary judgment, I made the following observations:

> Most of all, the required separate statement is designed to be a simple mechanism for this Court to utilize in examining whether or not there are triable issues of *material* fact. It is absurd to submit in this case almost three hundred (300) alleged "undisputed *material* facts." The key word is *material*. What the Plaintiff stated in a deposition does not, in and of itself, create a "undisputed material fact." Typically, what the Plaintiff states is the "supporting evidence" for an alleged "undisputed material fact." It is not the responsibility of this Court to search the overblown separate statement for the proverbial "needle in the haystack."

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Indeed, a similar sentiment was subsequently observed in the recent case of *Stephanie Beltran v. Hard Rock Hotel Licensing, Inc.* (December 5, 2023) 2023 WL 843058, in which the court of appeal recognized these types of abuses. In that employment action, the separate statement for the underlying motion for summary judgment included over 600 paragraphs of alleged "material facts," contained in over 100 pages. The court aptly noted that "we can only conclude that a document that was intended to be helpful to the court and provide due process to the parties is, in many cases, no longer serving either purpose. We write on this issue to remind both litigants and trial courts about the appropriate scope of the separate statement."

The court then noted that California Rules of Court, rule 3.1350(d)(2) states that the separate statement should *not* include "any facts that are not pertinent to the disposition of the motion." It further observed that '[t]he point of the separate statement is not to craft a narrative, but to be a concise list of the material facts and the evidence that supports them." Moreover, "It notifies the parties which material facts are at issue, and it provides a convenient and expeditious vehicle permitting the trial court to home in on the truly disputed facts."

As to this latter observation, another common mistake is also made by the opposing party in its own response to the moving party's separate statement. Another typical ruling of mine, includes this missive:

> Plaintiff commits a common error in its opposition papers by labeling part of his response to the moving party's separate statement as "Plaintiff's Statement of Undisputed Facts ("PUMF"). He lists twenty (20) of these *additional* "undisputed" facts. It would seem that the Plaintiff may intend that some of these facts are actually "disputed," as opposed to "undisputed." Typically, parties who oppose summary judgment motions note that there are "additional disputed material facts" which defeat such a motion. See, CCP § 437c (b) (3) ["The opposition papers shall include a separate statement . . . The statement shall also set forth plainly and concisely any other material facts the opposing party contends are *disputed*."] (Emphasis added.) In this case, the court is unclear as to which of these 20 additional facts are disputed or not or are even actually "material." Be that as it may, the court will assume that several of these 20 additional facts are disputed. (Example: PUMF, Nos. 2-6). However, *as discussed herein*, to the extent they any of these 20 additional facts may be disputed, they are not "material" as to the issue of causation.

As I often orally inform the opposing party at the hearing on an MSJ/MSA: "Disputed material facts – *good*; undisputed material facts – *bad*."

The bottom line for separate statements in connection to an MSJ/MSA is to keep it simple. If you are the moving party, use only the minimal undisputed facts needed to prevail. If you are the opposing party, you only need one single material disputed fact to obtain a denial of the motion as to that particular issue or cause of action. Choose your best one(s). In either case, use nothing more and nothing less.

Motions to seal

" I don't have to prove... that I am creative!
I don't have to prove... that I am creative!
All my pictures are confused
And now I'm going to take me to you"

Most civil practitioners are generally familiar with motions to seal, which is codified in California Rules of Court, rules 2.550 et seq. These rules are somewhat self-explanatory. However, there is one common mistake I see quite often. When a party files a pleading "conditionally under seal," per rule 2.551, that party typically files it concurrently with the related motion or application and sets the hearing on the same date as that motion. Indeed, sometimes the party doesn't even set a hearing date at all for the application.

Here's the problem: Use your common sense and think logically. Before the court can read and determine the underlying motion, it must first decide whether to grant the motion or application to seal the requested items.

Once the motion or application to seal is ruled upon by the court, the moving party has 10 days to exercise its option to unilaterally withdraw the documents at issue in which the court denied the request for sealing. Alternatively, that party could simply allow those documents to be unsealed. (See Cal. Rules of Court, rule 2.551(b)(6).)

In other words, a party files a motion. As part of that motion, that party wants certain documents (or portions thereof) to be sealed, to wit, not to become part of the public record. As such, the party *lodges* those documents "conditionally under seal." At that time any party has 10 days to file an application to have those documents remain under seal. They do so by filing an application per rule 2.551(b). Although this is not discussed or even mentioned in these rules of court, that party *must set a hearing date prior to the hearing date* already set for the underlying motion, so that the court can determine whether any of those documents can remain sealed. If the court allows certain documents to remain sealed, nothing else needs to be done. The court will consider those documents as part of the record in its determination of the underlying motion, even though those documents are not part of the public record.

As to the documents which are determined by the court not to remain sealed, there is a subsequent 10-day period after that ruling for the moving party to withdraw those documents or not. If the documents are withdrawn, they are not part of the record, and as such, those withdrawn documents will not be considered by the court in the determination of the underlying motion. If they are allowed to be unsealed, then those documents will become part of the public record and may be considered by the court in its determination of the

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underlying motion. As such, by simple math and statutory scheme, the motion or application to have any documents to remain under seal *should be heard at least two weeks before the underlying motion*.

Last, but not least, please keep in mind that these foregoing procedures do not apply to discovery motions, as any such pleadings or supporting documents may always be filed under seal, without court order. (See Cal. Rules of Court, rule 2.550(a)(2). [Indeed, that bit of gold nugget was probably worth the time you have taken to read this article].)

Perhaps the members of the Talking Heads can reunite and release a new single entitled "Attorneys Only"? ["I don't have to prove... that I am innocent!"] We can all only hope so with bated breath. "Thank you very much!"

Randolph M. Hammock is a Superior Court Judge, currently sitting in an Independent Calendar ("IC") Court at the Stanley Mosk Courthouse, in which he presides over unlimited civil cases. He graduated from San Diego State University (1980) and the University of San Diego, School of Law (1983). During his almost 25 years of practicing law (primarily as a civil trial attorney), Judge Hammock was admitted to and actively practiced law in a total of 15 states, as well as over 20 federal district courts and courts of appeal. As such, he is likely to have had passed more bar exams than any other practicing lawyer in the United States. He was a member of LATLA/CAALA from the mid 1980s to his appointment as a Superior Court Referee in the juvenile dependency court in 2008, where he served until he was elected as a Judge of the Los Angeles Superior Court in 2010. He has been a member of the American Board of Trial Advocates (ABOTA) since 2000.