

Judge Elizabeth L. Bradley
SUPERIOR COURT OF LOS ANGELES COUNTY

A judicial perspective on motions for summary judgment

BEST PRACTICES AND THE COMMON PROCEDURAL ERRORS THAT CAN BE FATAL

The summary-judgment procedure is one of the most complex and onerous pre-trial procedures in civil litigation. This is appropriately the case where summary judgment or summary adjudication can deprive a plaintiff of their Seventh Amendment right to a jury trial. Between Code of Civil Procedure section 437c ("§ 437c"), governing caselaw and California Rules of Court ("Rules") rules 3.1350-3.1354, there are several ways in which counsel may maximize the client's chances of prevailing, whether as a moving or opposing party. There are also numerous traps for those who fail to follow the required procedures.

This article assumes a fundamental knowledge of the summary judgment and summary adjudication procedure, instead focusing on a judicial perspective on best practices and common procedural errors that can be fatal for a party bringing or opposing summary judgment or summary adjudication. While many potential pitfalls may seem obvious or elementary, even sophisticated counsel commit unforced and avoidable errors, which can result in a loss which may have otherwise been a win.

Whether bringing or opposing a motion pursuant to §437c, strict adherence to the statutory framework and governing court rules is essential, along with diligence and focused attention to detail.

The motion is only as good as a timely and compliant Notice of Motion

Notice of a motion for summary judgment or summary adjudication and supporting papers shall be served on all other parties to the action at least 81 days before the time appointed for hearing, subject to exceptions for particular methods of service. (§437c, subd. (a)(2).) The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. (§437c, subd. (a)(3).)

If moving party requests the court to specially set a hearing due to the unavailability of a hearing date more than 30 days before trial, counsel should demonstrate that an attempt was made to obtain a hearing date prior to the last day to serve the motion. The court will likely look to see that counsel attempted to obtain a hearing date with sufficient time to timely serve the motion before specially setting a hearing on the motion or continuing the trial date.

Where a motion seeks summary adjudication, whether separately or as an alternative to a motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion. (Cal. Rules of Ct., rule 3.1350, subd. (b).) Due care should be exercised in drafting the notice of motion, particularly if moving for summary adjudication as an alternative to summary judgment. To ensure due process, the court's ability to rule on the motion is limited to the relief expressly sought in the notice of motion.

Otherwise meritorious motions for summary judgment and summary adjudication can be lost due to avoidable errors in the notice. Some examples include the failure to address all causes of action where summary judgment is requested, the failure to address all parties to the action or the cause of action at issue, inadvertently requesting summary judgment as to one of several causes of action instead of summary adjudication, or requesting summary judgment based upon a defense that applies to some but not all causes of action.

Counsel bringing the motion should cross-check the notice against the final draft of the memorandum to ensure all arguments are covered in the notice. Counsel opposing a motion should always confirm that the notice is proper and that movant does not seek relief in the motion that was not requested in the notice of motion.

The Memorandum of Points and Authorities and the governing standard

A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. (§ 437c, subd. (a)(1).) 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. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact. (§ 437c, subd. (c).)

A party may move for summary 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 the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in section 3294 of the Civil Code, 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. (§ 437c, subd. (f)(1).)

"Material facts" are facts that relate to the cause of action, claim for damages, issue of duty, or affirmative defense that

is the subject of the motion *and that could make a difference in the disposition of the motion.*" (Rule 3.1350, subd. (a)(2), emphasis added.)

A cause of action has no merit if either of the following exists: (1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded; (2) A defendant establishes an affirmative defense to that cause of action. (§ 437c, subd. (o).)

For purposes of motions for summary judgment and summary adjudication a plaintiff has met their 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 the cause of action.

Once plaintiff has met that burden, the burden shifts to defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.

Defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto. (§ 437c, subd. (p)(1).)

Defendant has met its burden of showing that a cause of action has no merit if it has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action.

Once defendant has met that burden, the burden shifts to plaintiff to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. Plaintiff shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto. (§ 437c, subd. (p)(2).)

The moving papers should set forth a concise statement of the governing standard under § 437c, subd. (p)(1) or (p)(2). The court typically does not require a treatise with respect to the statutory language or court rules governing summary judgment/summary adjudication. However, frequently the moving and opposing briefs merely state the foregoing governing standards without analyzing or applying them.

Too often, parties include a plethora of facts and evidence which are immaterial in that they make no difference in the disposition of the motion. Sometimes this is done in an attempt to condition or educate the judge; other times it is simply the result of overinclusion for no meaningful purpose. Resist the urge to include unnecessary facts, evidence and argument. They will distract from the actual material issues presented by the motion and will unnecessarily increase the burden on the court in ruling on the motion.

The briefs should present the issues in a logical and concise manner, setting forth the applicable law and applying the facts to the law. While there is no requirement that the moving or opposing memorandum track the language in the notice or repeat it verbatim, consider doing so, particularly where summary adjudication of multiple issues is requested.

This is typically the most straightforward and helpful way to present the issues for the court's consideration because the court will ultimately need to rule on each issue in the notice regardless of how the memorandum is sequenced.

Don't leave it to the court to decipher which arguments pertain to which issues in the notice. Instead, give the court a clear roadmap in the memorandum as to how each argument supports the correlating issue in the notice. Movants should weave the undisputed facts (with citations to the separate statement) with the applicable law and demonstrate that they have met their initial burden.

Take this into consideration when drafting the notice of motion so that the notice is structured with intention to list the issues in the order they will be discussed in the memorandum (i.e., Issue 1, Issue 2, Issue 3, etc.).

A memorandum that presents the issues in a haphazard fashion, rephrasing, recharacterizing or even disregarding the issues as presented in the notice and separate statement will be less impactful, will likely create confusion and will increase the burden on the court. It will also decrease the odds for success.

If the moving papers are unartfully drafted, the opposition need not follow the movant's outline as long as it addresses each argument. If the moving memorandum does not track the notice or presents a haphazard analysis of the issues, counsel may consider framing the opposition in alignment with the notice and separate statement to facilitate the court's review and determination of each issue.

An opponent should not assume that the burden under subdivision (p)(1) or (p)(2) has shifted if it arguably has not. Occasionally a party opposing a motion neglects to analyze this issue to their own detriment. If movant has arguably not met their initial burden, the opposition should address movant's failure to meet their initial burden before proceeding to establish the existence of one or more disputed material facts in order to satisfy opponent's burden. If movant relies on reasonable inferences deducible from the evidence to support summary judgment or summary adjudication, the opposition should argue the existence of contrary reasonable inferences precludes summary judgment or summary adjudication, where supported by the evidence.

Whether movant or opponent, be concise. Remember the 20-page limit is a maximum, not a requirement. Direct the court to the essential facts and law. Set forth concise and cogent argument and avoid redundancy. Do not obfuscate the issues or dilute the client's position with extraneous or irrelevant facts or argument.

The Separate Statement of Undisputed Facts

The Separate Statement of Undisputed Facts in support of a motion must separately identify: (A) Each cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion; and (B) Each supporting material fact claimed to be without dispute with respect to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion.

(Cal. Rules of Ct., rule 3.1350, subd. (d)(1).)

Where a motion seeks summary adjudication, whether separately or as an alternative to a motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be repeated, *verbatim*, in the separate statement of undisputed material facts. (Cal. Rules of Ct., rule 3.1350, subd. (b), emphasis added.)

The failure to repeat the issues stated in the notice of motion verbatim in the separate statement is a common error and a surefire way for the court to deny the motion on procedural grounds. It is an easy issue to miss after multiple rounds of revisions throughout the drafting process. Always ensure on the final proofread that the separate statement sets forth the issues exactly as stated in the notice. Counsel opposing the motion should always check for compliance and bring to the court's attention at the outset of the opposition any failure to comply.

The separate statement should include only material facts and not any facts that are not pertinent to the disposition of the motion. (*Id.*, at subd. (2).) The more material facts included in movant's separate statement, the more opportunity for the opponent to raise a triable issue.

If background facts are included in the memoranda but are not material or pertinent to the disposition of the motion, they should not be included in the separate statement. The memoranda may cite evidence supporting the background facts without inclusion in the separate statement. By the same token, do not include excessive evidence that is not cited in the separate statement and is unnecessary to the resolution of the motion. Now, more than ever, the court has limited resources.

Separate statements should be concise and should not be argumentative. Do not include inflammatory or emotionally charged facts that are not relevant to the disposition of the motion. Do not include multiple facts under one purported material fact. Do not take shortcuts under the guise of making things "easier" for the court. Instead, follow the required procedures. A common example is incorporating by reference the material facts supporting one cause of action or issue in a motion for summary adjudication into another cause of action or issue. This creates increased work for the court.

Parties commonly fail to adequately reference the supporting evidence. This applies equally to the opposition. Citation to the evidence in support of each material fact in the separate statement must include reference to the exhibit, title, *page and line numbers*. (Rule 3.1350, subd. (d)(3), emphasis added.)

All too often, counsel cite to a deposition transcript without complying with the requirement to cite to specific page and line numbers. The page and line to be cited is the discussion where the proffered fact can be verified. Citation to a large block of deposition pages without specifying the page and line numbers is not useful and noncompliant. Counsel should not expect the court to read through voluminous exhibits in search of testimony or evidence which should have been specifically cited to the court in the separate statement.

The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence.

Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion. (§ 437c, subd. (b)(3).)

Opponent's response to a fact proffered by movant should only respond to the purported material fact asserted. Additional evidence that does not directly contradict or disprove the purported fact should be included in opponent's separate statement of additional facts.

The opposing separate statement should not contain argument. If the proffered fact is undisputed but opposing party contends it is immaterial to the determination of the motion, it should be indicated that the fact is "undisputed but immaterial." Refrain from incorporating by reference responses to prior undisputed facts as it creates additional work for the court.

Also in the right column, reference should be made to corresponding separately filed evidentiary objections (i.e., "See objection 3 to the Smith Dec."), but objections must not be restated or reargued in the separate statement. (Rule 3.1354, subd. (b).)

Reply separate statements are prohibited effective January 1, 2025. "The reply shall not include any new evidentiary matter, additional material facts, or separate statement submitted with the reply and not presented in the moving papers or opposing papers." (§ 437c, subd. (b)(4).)

Any response to the opponent's separate statement should be set forth in movant's reply brief. Thus, if you represent movant, do not file a reply separate statement. It is unauthorized, the court will most likely disregard it, it will increase the cost of the motion and is likely to harm your credibility. If you represent the opponent, bring the procedural defect to the court's attention.

Supporting evidence

Supporting and opposing affidavits or declarations shall be made by the declarant on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. An objection based on the failure to comply with the requirements of this subdivision, if not made at the hearing, shall be deemed waived. (§437c, subd. (d).)

Be sure to include facts in any declaration submitted in support of or in opposition to a motion which demonstrate the basis for declarant's personal knowledge. A declaration that does not demonstrate how or why declarant has personal knowledge of the matters asserted is subject to objection on foundational grounds. If opposing the motion, look critically as to whether adequate foundation has been laid for each declarant's



knowledge of the matters asserted.

Be cautious of the self-serving declaration, particularly where it conflicts with the witness's deposition testimony, which will likely prevail. Summary judgment may be denied in the discretion of the court if the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or if a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof. (§ 437c, subd. (e).)

Do not rely on expert-witness declarations to establish foundational facts. (See *People v. Sanchez* (2019) 63 Cal.4th 665.) Similarly, do not rely on counsel's declaration to establish foundational facts. Use caution when submitting a declaration of counsel for issues other than routine issues such as authentication of deposition transcripts. Avoid injecting a declaration of counsel with hyperbole or legal argument, which will only draw objection and burden the court with arguments extraneous to the issues in dispute.

To facilitate the court's review, highlight or underline relevant portions of the evidence corresponding with the citations in the separate statement.

Refrain from submitting additional evidence on reply. Effective January 1, 2025, §437c prohibits new evidence with the reply. The court will likely not consider it.

Evidentiary objections

A party desiring to make evidentiary objections to evidence in the papers on a motion for summary judgment must either: (1) Submit objections in writing under rule 3.1354; or (2) Make arrangements for a court reporter to be present at the hearing. (Rule 3.1352.)

Unless otherwise excused by the court on a showing of good cause, all written objections to evidence in support of or in opposition to a motion for summary judgment or summary adjudication must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed. (Rule 3.1354, subd. (a).) Evidentiary objections not made at the hearing shall be deemed waived. (§ 437c, subd. (b)(5).)

Rule 3.1354, subd. (b) sets forth the two acceptable formats of objections and the required format of the proposed order. An opposing party should ensure compliance with the requirement that objections to specific evidence be referenced by the objection number in the right column of a separate statement in opposition to a motion. However, it bears repeating that objections must not be restated or reargued in the separate statement. (*Ibid.*) Note that although rule 3.1354, subd. (b) continues to require that objections be referenced in the right column of a separate statement in *reply* to a motion, reply separate statements are now prohibited effective January 1, 2025. (§ 437c, subd. (b)(4).)

Counsel should refrain from asserting frivolous objections or objecting to patently immaterial matter. The court is no longer required to rule on objections to immaterial evidence. The court need rule only on those objections to evidence that it deems material to its disposition of the motion. (§ 437c, subd. (q).) Counsel should also refrain from joining multiple pieces of evidence or lengthy passages of deposition testimony or declarations into one evidentiary objection. Combining lengthy passages into one evidentiary objection with multiple legal grounds makes it more difficult for the court to rule on the objections.

Request a continuance at the earliest opportunity

If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due. (§ 437c, subd. (h).)

If it becomes apparent that a request for continuance to obtain additional evidence to oppose the motion will be necessary, consider making the request by ex parte application at the earliest opportunity instead of making the request in the opposition, particularly if there is an impending trial date. An early request may relieve the client and the court from expending resources to file and review opposition prematurely.

Strict compliance with § 437c and the Rules will greatly increase the odds that the motion will be granted or denied on the merits instead of as the result of a procedural defect. Given the great expense to the parties and burden on the court's resources, a decision on the merits should always be the goal.

Elizabeth L. Bradley is a judge with the Superior Court of Los Angeles County, where she presides over a civil independent calendar courtroom in the Compton Courthouse. She was appointed by Governor Gavin Newsom in September 2024. She is a former trustee and the past vice president of Diversity Inclusion and Outreach for the Los Angeles County Bar Association, and serves on the Executive Committee of LACBA's Diversity in the Profession Section, as well as serving on the President's Advisory Committee on Women in the Profession. She is a former trustee of the Mexican American Bar Association, and founded MABA's Judicial Pipeline Program. She serves as a judicial advisor to the Los Angeles County Unity Bar, and served as its inaugural chair of Judicial Endorsements before her appointment to the bench. She previously chaired LACBA's Professional Responsibility and Ethics Committee, served on the State Bar's Committee on Professional Responsibility and Conduct, and was a founding member of the CLA Ethics Committee. She serves on the California Judges Association Elimination of Bias Committee, the SCLAC Anti Bias and Diversity and Inclusion Committees, and the California Women Judges Judicial Evaluation Committee.