

RESOLUTION 10-02-2002

DIGEST

Summary Judgment and Summary Adjudication: Elimination of Separate Statement

Amends Code of Civil Procedure section 437c to eliminate the separate statement of undisputed facts and counterstatement in motions for summary judgment or summary adjudication.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

Reasons:

This resolution amends Code of Civil Procedure section 437c to eliminate the separate statement of undisputed facts and counterstatement in motions for summary judgment or summary adjudication. This resolution should be disapproved because the separate statement serves an important function in the judge's determination of the merits of the motion.

The separate statement provides in an easy-to-read chart format the information at the heart of a motion for summary judgment or summary adjudication: the key facts and evidence showing whether or not these facts are disputed. Thus, the separate statement makes the court's job easier by eliminating the need to sift through the memorandum and supporting evidence to locate the material facts. The separate statement also ensures that the court can determine whether key facts are truly in dispute, even where the points and authorities are not well written. Contrary to the proponent's suggestion, it is likely that the court accords separate statements more consideration than memoranda of points and authorities.

Similar to Resolution 10-03-2002.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 437c to read as follows:

- 1 Code of Civil Procedure § 437c
- 2 (a) Any party may move for summary judgment in any action or proceeding if it
- 3 contended that the action has no merit or that there is no defense to the action or
- 4 proceeding. The motion may be made at any time after 60 days have elapsed since the
- 5 general appearance in the action or proceeding of each party against whom the motion
- 6 is directed or at any earlier time after the general appearance that the court, with or
- 7 without notice and upon good cause shown, may direct. Notice of the motion and
- 8 supporting papers shall be served on all other parties to the action at least 28 days
- 9 before the time appointed for hearing. However, if the notice is served by mail, the
- 10 required 28-day period of notice shall be increased by five days if the place of address
- 11 is within the State of California, 10 days if the place of address is outside the State of
- 12 California but within the United States, and 20 days if the place of address is outside the

13 United States, and if the notice is served by facsimile transmission, Express Mail, or
14 another method of delivery providing for overnight delivery, the required 28-day period
15 of notice shall be

16 increased by two court days. The motion shall be heard no later than 30 days before
17 the date of trial, unless the court for good cause orders otherwise. The filing of the
18 motion shall not extend the time within which a party must otherwise file a responsive
19 pleading.

20 (b) The motion shall be supported by affidavits, declarations, admissions, answers to
21 interrogatories, depositions, and matters of which judicial notice shall or may be taken.

22 ~~The supporting papers shall include a separate statement setting forth plainly and~~
23 ~~concisely all material facts which the moving party contends are~~
24 ~~undisputed. Each of the material facts stated shall be followed by a reference to the~~
25 ~~supporting evidence. The failure to comply with this requirement of a separate~~
26 ~~statement may in the court's discretion constitute a sufficient ground for denial of the~~
27 ~~motion.~~

28 Any opposition to the motion shall be served and filed not less than 14 days preceding
29 the noticed or continued date of hearing, unless the court for good cause orders
30 otherwise. The opposition, where appropriate, shall consist of affidavits, declarations,
31 admissions, answers to interrogatories, depositions, and matters of which judicial notice
32 shall or may be taken.

33 ~~The opposition papers shall include a separate statement which responds to each of the~~
34 ~~material facts contended by the moving party to be undisputed, indicating whether the~~
35 ~~opposing party agrees or disagrees that those facts are undisputed. The statement also~~
36 ~~shall set forth plainly and concisely any other material facts which the opposing party~~
37 ~~contends are disputed. Each material fact contended~~
38 ~~by the opposing party to be disputed shall be followed by a reference to the supporting~~
39 ~~evidence. Failure to comply with this requirement of a separate statement may~~
40 ~~constitute a sufficient ground, in the court's discretion, for granting the motion.~~

41 Any reply to the opposition shall be served and filed by the moving party not less than
42 five days preceding the noticed or continued date of hearing, unless the court for good
43 cause orders otherwise.

44 Evidentiary objections not made at the hearing shall be deemed waived.

45 Sections 1005 and 1013, extending the time within which a right may be exercised or an
46 act may be done, do not apply to this section.

47 Any incorporation by reference of matter in the court's file shall set forth with specificity
48 the exact matter to which reference is being made and shall not incorporate the entire
49 file.

50 [Subdivisions (c) through (r) remain unchanged.]

(Proposed new language is underlined; language to be deleted is stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Requires a party who moves for summary judgment or summary adjudication to file a separate statement of undisputed facts, and requires the party opposing the motion to file a counterstatement.

This Resolution: Would remove the requirement that a party who moves for summary judgment or summary adjudication file a separate statement of undisputed facts, and that the party opposing the motion file a counterstatement.

The Problem: Any litigator recognizes that in order to prevail on, or defeat, a motion for summary judgment or adjudication, he or she will have to submit a well-written memorandum of points and authorities that spells out in detail why the facts are or are not undisputed. The memorandum provides all the background and argument necessary for the determination of the motion. Also, in all reality, it is questionable whether courts actually give much consideration to the parties' separate statements. Preparation of a separate statement adds nothing to the motion except added busy work for the litigators and more papers for the court's file.

Parties who file a motion for summary judgment or for summary adjudication already have a multitude of papers to prepare. The requirement of preparing a separate statement imposes an additional and unnecessary burden upon both the moving party and the opposing party, and should be eliminated.

IMPACT STATEMENT

This proposed resolution would affect California Rule of Court 342 in that rule 342's provisions for the format of the separate statement would no longer be needed.

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COUNTERARGUMENT

BEVERLY HILLS BAR ASSOCIATION

The proposed amendment of Code of Civil Procedure § 437c should be opposed. While attempting to reduce the burden imposed on parties bringing a motion for summary judgment and/or summary adjudication, this resolution would result in an increased burden on the court in reviewing any motion brought pursuant to Code of Civil Procedure § 437c. The need for a "well-written memorandum of points and authorities that spells out in detail why the facts are or are not undisputed" does not eradicate the need for a concise separate statement that identifies the specific facts the moving party contends are

undisputed, and that further provides the specific evidence supporting said contentions. The separate statement pinpoints the factual issues to which the opposing party must respond. The separate statement also facilitates the court's review of the motion. The statement that "in all reality, it is questionable whether courts actually give much consideration to the parties' separate statements" is itself questionable. In some instances, the court's determination of the motion may rest solely on the separate statement, where the separate statement submitted in opposition to the motion clearly establishes the existence, or nonexistence, of a triable issue of fact. The separate statement provides the court with a road map to the facts and evidence, while the memorandum of points and authorities sets forth the applicable law, and argues the application of the law to the facts of the case. This amendment will also result in additional law and motion practice, because parties increasingly will seek leave to file memoranda that exceed the page limits imposed by Rule 313(d). Moreover, Rule 342 (as amended January 1, 2002) requires a party to serve an electronic version of its statement upon request of a party or the court, thereby significantly reducing the "busy work" inherent in summary judgment motions.

ORANGE COUNTY BAR ASSOCIATION

The Separate Statement of Undisputed Facts and Evidence, and its counter Statement of Disputed Facts and Evidence, are necessary evils in the process of motions under Code of Civil Procedure Section 437c. Yes, it is hard work to create these Separate Statements. Yes, it is time-consuming. Yes, it is an extra pleading to prepare in filing a summary judgment or adjudication motion. However, the assertion that the courts do not give consideration to the Separate Statement is a sad commentary on the proponents' view of our judiciary. These provisions of CCP Section 437c, creating the requirement for a separate statement, were added less than twenty years ago. Many judges, if not all judges, hearing motions for summary judgment rely heavily on the separate statements. In a recent case, the Court of Appeals for the Third Appellate District held that without a separate statement of undisputed facts with references to supporting evidence in the form of affidavits or declarations, it is impossible for plaintiff, in opposing a motion for summary judgment, to demonstrate the existence of disputed facts. **Lewis v. County of Sacramento** (App. 3 Dist. 2001) 113 Cal.Rptr.2d 90, 93 Cal.App.4th 107 (review denied).

As hard as it may be to create, the Separate Statement is a valuable tool to both the bench and the bar. It provides a breakdown of precisely what facts are or are not in dispute or at issue. Elimination of this requirement would permit creative drafting of points and authorities in which parties could hide or argue facts without setting forth the supporting evidence in a clear and concise manner. The Separate Statement forces each party to clearly state the facts which the party contends either are, or are not, in dispute, without hiding anything. It also requires a party to provide concrete proof, through competent admissible evidence, to support its contentions. It precludes creative writing or distortion of facts by either side.

Lest we forget, summary judgment allows trial on the law because the facts are purportedly not at issue. If granted, a party is deprived of a trial on the facts because a court has found that there are no facts to be tried. The Separate Statement preserves due process for the litigant attempting to reach trial on the merits. It provides a means by which clear, concise analysis of the facts, both disputed and undisputed,

can be performed. It also provides a clear, concise and uniform road map to the facts and the evidence supporting those facts to enable the parties and the court to thoroughly discuss and analyze the legal issues. To support removing this requirement is to support lazy lawyering. For all these reasons, the resolution should be defeated.

SANTA CLARA COUNTY BAR ASSOCIATION

The existing provisions of CCP §437c and CRC 342, which require that both moving and opposing parties in a motion for summary judgment file separate statements of material facts, are procedurally sound. Such separate statements are indispensable for the parties as well as the court, in that they clearly set forth and delineate the issues constituting the subject matter of the motion. These statements also provide citations to testimony supporting the respective positions of the parties as to the material facts at issue. Indeed, those very references make each separate statement inseparable from the memorandum of points and authorities. By citing specific numbered undisputed/disputed material facts in the memorandum, one can refer the reader to the citations set forth in the separate statement in a compact and efficient manner that avoids disrupting the flow of the text of the points and authorities.

Thus, separate statements are far more than mere “busy work.” They are, in fact, essential to a motion for summary judgment, which is, more often than not, the most important, as well as complex, motion that a party can bring in an action. The format set forth in existing statutes is rooted in logic and the need for systematic and well-organized law and motion procedure. This resolution should therefore be disapproved.