

## RESOLUTION 10-03-2002

### DIGEST

Summary Judgment and Summary Adjudication: Elimination of Separate Statement.

Amends California Rules of Court, rule 342, 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 California Rules of Court, rule 342, 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 10-02-2002.

### TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that the Judicial Council amend California Rules of Court, rule 342, to read as follows:

- 1 Rule 342
- 2 (a) [Motion] As used in this rule, "motion" refers to either a motion for summary
- 3 judgment or a motion for summary adjudication.
- 4 (b) [Motion for summary adjudication] If made in the alternative, a motion for summary
- 5 adjudication may make reference to and depend upon the same evidence submitted in
- 6 support of the summary judgment motion. If summary adjudication is sought, whether
- 7 separately or as an alternative to the motion for summary judgment, the specific cause of
- 8 action, affirmative defense, claims for damages, or issues of duty must be stated
- 9 specifically in the notice of motion ~~and be repeated, verbatim, in the separate statement~~
- 10 ~~of undisputed material facts.~~
- 11 (c) [Documents in support of motion] The motion must contain and be supported by the
- 12 following documents:

13 (1) Notice of motion by *[moving party]* for summary judgment or summary  
14 adjudication or both;

15 ~~(2) Separate statement of undisputed material facts in support of *[moving party's]*~~  
16 ~~motion for summary judgment or summary adjudication or both;~~

17 ~~(3)(2) Memorandum of points and authorities in support of *[moving party's]* motion~~  
18 ~~for summary judgment or summary adjudication or both;~~

19 ~~(4)(3) Evidence in support of *[moving party's]* motion for summary judgment or~~  
20 ~~summary adjudication or both; and~~

21 ~~(5)(4) Request for judicial notice in support of *[moving party's]* motion for summary~~  
22 ~~judgment or summary adjudication or both (if appropriate).~~

23 ~~(d) [Separate statement in support of motion] The Separate Statement of Undisputed~~  
24 ~~Material Facts in support of a motion must separately identify each cause of action,~~  
25 ~~claim, issue of duty or affirmative defense, and each supporting material fact claimed to~~  
26 ~~be without dispute with respect to the cause of action, claim, issue of duty, or affirmative~~  
27 ~~defense. In a two-column format, the statement must state in numerical sequence the~~  
28 ~~undisputed material facts in the first column and the evidence that establishes those~~  
29 ~~undisputed facts in the second column. Citation to the evidence in support of each~~  
30 ~~material fact must include reference to the exhibit, title, page, and line numbers.~~

31 ~~(e)(d) [Documents in opposition to motion] The opposition to a motion must consist of~~  
32 ~~the following documents, separately stapled and titled as shown:~~

33 ~~(1) *[Opposing party's]* memorandum of points and authorities in opposition to~~  
34 ~~*[moving party's]* motion for summary judgment or summary adjudication or both;~~

35 ~~(2) *[Opposing party's]* separate statement of undisputed material facts in opposition to~~  
36 ~~*[moving party's]* motion for summary judgment or summary adjudication or both;~~

37 ~~(3)(2) *[Opposing party's]* evidence in opposition to *[moving party's]* motion for~~  
38 ~~summary judgment or summary adjudication or both (if appropriate); and~~

39 ~~(4)(3) *[Opposing party's]* request for judicial notice in opposition to *[moving party's]*~~  
40 ~~motion for summary judgment or summary adjudication or both (if appropriate).~~

41 ~~(f) [Opposition to motion; content of separate statement] Each material fact claimed by~~  
42 ~~the moving party to be undisputed must be set out verbatim on the left side of the page,~~  
43 ~~below which must be set out the evidence said by the moving party to establish that fact,~~  
44 ~~complete with the moving party's references to exhibits. On the right side of the page,~~  
45 ~~directly opposite the recitation of the moving party's statement of material facts and~~  
46 ~~supporting evidence, the response must unequivocally state whether that fact is~~  
47 ~~"disputed" or "undisputed." An opposing party who contends that a fact is disputed must~~  
48 ~~state, on the right side of the page directly opposite the fact in dispute, the nature of the~~  
49 ~~dispute and describe the evidence that supports the position that the fact is~~  
50 ~~controverted. That evidence must be supported by citation to exhibit, title, page, and~~  
51 ~~line numbers in the evidence submitted.~~

52 ~~(g)(e) [Documentary evidence] If evidence in support of or in opposition to a motion~~  
53 ~~exceeds 25 pages, the evidence must be in a separately bound volume and must include~~  
54 ~~a table of contents.~~

55 (h) [Format for separate statements] Supporting and opposing separate statements in a  
56 motion for summary judgment must follow this format:

57

58 Supporting statement:

59 Undisputed Material Facts:

- 60 1. Plaintiff and defendant entered into a  
61 written contract for the sale of widgets.  
62 2. No widgets were ever received.

Supporting Evidence:

Jackson declaration, 2:17-21; contract,  
Ex. A to Jackson declaration.  
Jackson declaration, 3:7-21.

63 Opposing statement:

64 Undisputed Material Facts and Alleged

65 Supporting Evidence:

- 66 1. Plaintiff and defendant entered into a  
67 written contract for the sale of widgets.  
68 Jackson declaration, 2:17-21; contract,  
69 Ex. A to Jackson declaration.  
70 2. No widgets were ever received.  
71 Jackson declaration, 3:7-21.

Response and Evidence:

Undisputed.

Disputed. The widgets were received in  
New Zealand on August 31, 2001. Baygi  
declaration, 7:2-5.

72

73  
74 Supporting and opposing separate statements in a motion for summary adjudication  
75 must follow this format:

76

Supporting statement:

77 ~~ISSUE 1 THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED~~  
78 ~~BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY~~

79 Undisputed Material Facts:

- 80 1. Plaintiff was injured while mountain  
81 climbing on a trip with Any Company  
82 USA.

Supporting Evidence:

Plaintiff's deposition, 12:3-4.

- 83 2. Before leaving on the mountain climbing  
84 trip, plaintiff signed a complete waiver of  
85 liability.

Smith declaration, 5:4-5; waiver of liability,  
Ex. A to Smith declaration.

86 Opposing statement:

87 ~~ISSUE 1 THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED~~  
88 ~~BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY~~

89 Undisputed Material Facts and Alleged

90 Supporting Evidence:

- 91 1. Plaintiff was injured while mountain  
92 climbing on a trip with Any Company  
93 USA. Plaintiff's deposition, 12:3-4.

Response and Evidence:

Undisputed.

- 94 2. Before leaving on the mountain climbing  
95 trip, plaintiff signed a complete waiver of  
96 liability. Smith declaration, 5:4-5; waiver of  
97 liability, Ex. A to Smith declaration.

Disputed. Plaintiff did not sign the waiver of  
liability; the signature on the waiver is  
forged. Jones declaration, 3:6-7.

98

99 (i) ~~[Request for electronic version of separate statement] Upon request, a party must~~  
100 ~~within 3 days provide to any other party or the court an electronic version of its~~  
101 ~~separate statement. The electronic version may be provided in any form upon which the~~  
102 ~~parties agree. If the parties are unable to agree on the form, the responding party must~~  
103 ~~provide to the requesting party the electronic version of the separate statement which it~~  
104 ~~used to prepare the document filed with the court. Under this provision, a party is not~~  
105 ~~required to create an electronic version or any new version of any document for the~~  
106 ~~purpose of transmission to the requesting party.~~

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

PROPONENT: Bar Association of San Francisco

#### STATEMENT OF REASONS

Existing Law: Along with Code of Civil Procedure section 342, 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, and sets out the format for those statements.

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 does not affect any other law, statute, or rule.

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## COUNTERARGUMENT

### BEVERLY HILLS BAR ASSOCIATION

The proposed amendment of California Rule of Court 342 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, it is time-consuming and 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. The provisions of California Rule of Court 342 were added in 1997, merely five (5) years ago. The purpose, as may be recalled, for adding this Rule of Court, was to make uniform the appearance and form of the Separate Statement and remove all question as to what was required. Clearly the Judicial Council, a mere five years ago, felt that 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).

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. This Rule of Court provides the uniform format to achieve the goal of CCP Section 437c.

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.