

# **CIVIL LAW & MOTION PRACTICE**

*Orange County Bar Association  
Bridging the Gap  
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# **PROGRAM OUTLINE**

## **I. Judicial Perspective**

- A. What Law Is and How It Works.
- B. The Role of Motions in a Case.

## **II. Things to Consider Before Drafting Any Motion**

- A. Have a clear goal/purpose in mind.
  - 1. How does this motion advance my client's case?
  - 2. Cost/Benefit Analysis – what is the likely cost to my client and what can I expect to gain through the motion?
  - 3. Can the court grant me the relief I seek?
- B. Review practice guides, rules of court, and statutes regarding particular motion and motions in general.
  - 1. Practice Guides: The Rutter Group publishes a number of helpful practice guides covering a wide variety of topics, including alternative dispute resolution, civil trials and evidence, writs and appeals, enforcing judgments and debts, insurance litigation, employment litigation, professional responsibility, personal injury litigation, etc. Weil & Brown, California Practice Guide: Civil Procedure Before Trial is particularly helpful for law and motion practice.
  - 2. California Rules of Court (the following are just a few examples):
    - a. Rules 2.100 to 2.119 address the basic form of all papers filed with the court.
    - b. Rules 3.1100 to 3.1372 deal with law and motion, including general formatting rules and specific rules applicable to a wide variety of motions. For example, rules 3.1350 to 3.1354 address summary judgment and summary adjudication motions.
    - c. Rules 3.1700 to 3.1702 address claims for prejudgment costs and attorney fees.

3. Statutes:
  - a. Virtually every motion you bring will be authorized by a particular statute that can also establish procedures for that motion. For example, Code of Civil Procedure sections 425.16 to 425.18 address anti-SLAPP motions, Code of Civil Procedure sections 430.10 to 430.80 address demurrers, and Code of Civil Procedure section 437c addresses summary judgment and summary adjudication motions.
  - b. There also are numerous statutes dealing with motions more generally. For example, Code of Civil Procedure sections 1005 and 1010 address notices of motion.
  
- C. Consider your audience.
  1. You must convince the court the relief you seek is appropriate. You are not necessarily entitled to the requested relief merely because your motion is unopposed or your opponent agrees.
  2. Will the court be receptive to your request for relief or should you have made further efforts to resolve the issue with opposing counsel?
  3. Research attorneys and how they help judges decide motions.
  
- D. What can I do to make my motion as user friendly as possible?
  1. In preparing any motion, you should always ask yourself that question. The more time the judge or research attorney spend trying to find part of your motion or a particular exhibit, or simply trying to figure out what you are saying, the less time they have to analyze the merits of your motion.
  2. Use exhibit tabs, not colored paper to separate each exhibit. (Cal. Rules of Court, rule 3.1110(f).)
  3. Break large documents into volumes. For example, make your notice of motion and memorandum of points and authorities one volume, your declaration(s) a separate volume or volumes, your exhibits a separate volume or volumes, etc. One large stack bound together is very difficult and frustrating to work with.
  4. In breaking papers into volumes, be certain to clearly label the volumes that go together as part of the motion. For example, in the caption, identify each document submitted as part of the motion or, if you have multiple volumes of exhibits or evidence, number them.

5. Cut and paste pictures, tables, or charts into your motion if they are helpful. Do not use technology for the sake of using technology, but do not be afraid to use it if it makes your papers easier to understand. Sometimes a picture (or even a chart or graph) can be worth a thousand words. Make certain you support any facts with admissible evidence.

### **III. Notice of Motion**

- A. Tells the court and the parties who is seeking what against whom, when, where, and on what basis.
- B. Obtaining a hearing date.
  1. Most civil departments hear law and motion one day per week and your hearing must be set for that day unless the court specially sets a hearing date and time for your motion. Consult the court website or department information sheet for law and motion day and time in your assigned department.
  2. Most departments do not require a reservation, but a few do. Again, consult the court website or department information sheet.
  3. Many departments limit the number of motions heard on any given law and motion calendar so you must plan ahead. Contact the department well in advance to determine when motions are currently being set. The delay can be several weeks past the minimum amount of time required by statute.
  4. If the date on your notice of motion is unavailable, the clerk's office will often cross out your designated hearing date and write in the next available date. If this happens, promptly file and serve a notice of continuance for the new date and explain the date you sought was unavailable.
  5. Note that some statutes limit when a motion may be brought. For example, Code of Civil Procedure section 437c, subdivision (a), provides a summary judgment or summary adjudication motion cannot be filed and served until 60 days after the general appearance of the party against whom the motion is brought and the hearing on the motion must be conducted at least 30 days before the date of trial. The trial court can shorten both of these time periods for good cause shown.
- C. Amount of notice.
  1. Most motions must be filed and served at least 16 *court* days before the hearing. (Code Civ. Proc., § 1005, subd. (b).) There are exceptions, however. For example, a summary judgment or summary adjudication motion must be filed and served at least 75 *calendar* days before the hearing date (Code Civ. Proc., § 437c, subd. (a)) and a discretionary motion to dismiss for failure to

prosecute must be filed and served at least 45 *calendar* days before the hearing (Cal. Rules of Court, rule 3.1342(a)).

2. The method of service on the other parties can extend the amount of notice you must provide.
  - a. Personal Service: No extension of notice period.
  - b. Service by Mail: Notice period increased by 5 *calendar* days if mailed to and from address within California, 10 *calendar* days if mailed to or from an address outside California but within the U.S., and 20 *calendar* days if mailed to or from an address outside the U.S. (Code Civ. Proc., §§ 1005, subd. (b), 437c, subd. (a).)
  - c. Service by Fax or Overnight Delivery: Notice period increased by 2 *calendar* days for most motions (Code Civ. Proc., §§ 1005, subd. (b)), but 2 *court* days for summary judgment and summary adjudication motions (Code Civ. Proc., § 437c, subd. (a)).
    1. Service by fax may be made only on parties who have agreed to accept service by fax and where a written confirmation of that agreement is made. (Code Civ. Proc., § 1013, subd. (e), Cal. Rules of Court, rule 2.306(a)(1).)
  - d. Electronic Service: Notice period increased by 2 *court* days. (Code Civ. Proc., § 1010.6, subd. (a)(4); Cal. Rules of Court, rule 2.251(h)(2).)
    1. Electronic service allowed when (a) the recipient has agreed to accept service electronically or (b) local rules authorize electronic service in certain types of cases. (Code Civ. Proc., § 1010.6; Cal. Rules of Court, rules 2.250-2.261.) Review statutes and rules for specifics on when electronic service allowed and how it must be performed.
  - e. Code of Civil Procedure section 1013, which generally provides for extension of notice periods for service by mail, fax, or overnight delivery, does not apply to motions. (Code Civ. Proc., § 1005, subd. (b).)
  - f. Computation of Time: For purposes of law and motion, Code of Civil Procedure section 12c provides that the last date to serve a motion is determined by counting backwards from the hearing date, excluding the date of the hearing. From that date, you then count backwards again for any days that must be added due to the service method. You must be mindful of the difference between court days and calendar days.

1. The Legislature adopted this statute in 2010 to resolve an ambiguity regarding whether you count forward from the service date or backwards from the hearing date. The result could change depending on which direction you count.
  2. See also Code of Civil Procedure section 12 describing the computation of time more generally. Due to section 12c, it no longer applies to law and motion matters that specify serving or filing a document a specific number of days before a hearing.
- g. Opposition and Reply Papers: Code of Civil Procedure section 1005, subdivision (b) requires all opposition papers to be filed and served at least 9 *court* days before the hearing and all reply papers to be filed and served at least 5 *court* days before the hearing. Code of Civil Procedure section 1005, subdivision (c), states that all opposition and reply papers shall be served by personal delivery, fax, overnight delivery, or other method reasonably calculated to ensure delivery not later than the close of the next business day. This means opposition and reply papers should not be served by mail.
- h. Do not change the briefing scheduled without permission from the court. If you agree to less than 16 court days notice without notifying the court (and obtaining its approval), your motion may not be worked up on the merits by the research attorney or judge for lack of adequate notice. Similarly, think twice about agreeing to file a reply brief less than 5 court days before the hearing. The motion may already be worked up by the time the research attorney or judge receives your reply.

D. Proof of service.

1. Proof of service for the motion must be filed not later than 5 *court* days before the hearing. (Cal. Rules of Court, rule 3.1300(c).) Most often it is simply attached to the motion. You cannot just show up at the hearing with it. The earlier you file the proof of service the better. The research attorney may not work up the merits of your motion without a proof of service.
2. The proof must be signed by the person serving the document.
  - a. Proof of service by personal delivery must be signed by the person who actually delivered the documents. Signature by the person who gave the documents to the messenger is insufficient as is the statement “I caused the documents to be delivered.”
  - b. Proof of service by mail pursuant to the firm’s business practice for collection and processing of mail must include not only a statement that that the person signing the proof is readily familiar with the firm’s

practice for collection and processing of correspondence for mailing with the United States Postal Service, but also a statement that “the envelope was sealed and placed for collection and mailing on that date following ordinary business practices.” (CCP §1013a(3).) This latter statement is often omitted, including on some pre-printed forms.

3. Motion, opposition, and reply papers must be served on all parties who have appeared in the action. (Code Civ. Proc., § 1014; see also *Winikow v. Superior Court* (2000) 82 Cal.App.4th 719, 727.) Service on only the party against which relief is sought is not sufficient.

E. Content of notice of motion.

1. Must state the date, time, and location in the caption and that information is customarily repeated in the first paragraph. (Cal. Rules of Court, rule 3.1110(b).) Other identifying information regarding the action in general also must be included in the caption. (*Ibid.*)
2. The opening paragraph must state the nature of the order being sought and the grounds for issuance of the order. (Code Civ. Proc., § 1010; Cal. Rules of Court, rule 3.1110(a).)
  - a. The court cannot grant different relief, or relief on different grounds, than stated in the notice of motion. (See *People v. American Surety Ins. Co.* (1999) 75 Cal.App.4th 719, 726; *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1124.)
  - b. Do not leave the court guessing at what relief you are seeking, be specific. Many statutes and rules of court establish specific requirements for the notice on certain types of motions. The following are just a few examples:
    1. If you are demurring to a pleading, you must separately identify each cause of action and the ground upon which you are challenging that cause of action. (Code Civ. Proc., § 430.60; Cal. Rule of Court, rule 3.1320(a).)
    2. If you are seeking summary adjudication, you must specify each cause of action, affirmative defense, claim for damages, or issue of duty on which summary adjudication is sought. (Cal. Rules of Court, rule 3.1350(b).) Summary adjudication may not be granted if the notice of motion seeks only summary judgment. (*Homestead Savings v. Superior Court* (1986) 179 Cal.App.3d 494, 498.)

3. A motion to strike must quote the portions of the pleading to be stricken unless the motion seeks to strike an entire paragraph. (Cal. Rules of Court, rule 3.1322(a).)
  4. A request for discovery sanctions must appear in the notice of motion, must identify what sanction is being sought (monetary, evidentiary, issue, or terminating), and must identify against whom the sanction is being sought. (Code Civ. Proc. § 2023.040.) If sanctions are sought against counsel in addition to or in lieu of the party, the notice must identify the counsel and the sanction being sought. (*Jansen Association, Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166, 1170.)
3. The notice must describe the various declarations or other evidence, if any, on which the motion will be based. (Code Civ. Proc., § 1010.)
    - a. Identify every single document you are filing in support of the motion. For example, state this motion will be based on this notice, the memorandum of points and authorities, the declaration of Robert Smith, the declaration of Betty Jones, the declaration of John Doe, and the request for judicial notice. Not only is this information required it gives the court and research attorney a list of all supporting papers so that they can make sure they have everything.
- F. Joining in another party's motion.
1. Parties often file a simple notice a few days before a hearing stating they join in a motion previously filed by another party. This is not sufficient for the joining party to obtain any relief in his or her own name.
  2. Our Court of Appeal allows a party to join in the argument and even evidence of another party, but the joining party must file and serve a request for relief in their own name and such request must be timely filed and served. (See *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1390-91 (addressing anti-SLAPP motion under Code Civ. Proc. § 425.16); see also *Village Nurseries, L.P. v. Greenbaum* (2002) 101 Cal.App.4th 26, 46-47 (addressing motion for summary judgment); *Frazer v. Seely* (2002) 95 Cal.App.4th 627, 636-637 (same); compare *Barak v. Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 660-662 (2nd Appellate District case allowing joinder in anti-SLAPP motion when timely filed and specifically requested relief in naming of joining party).)
  3. A joinder also may require an explanation as to why the argument and evidence of the moving party entitles the joining party to relief. For example, a party seeking to join in another party's summary judgment motion will need his or her own separate statement to support the request for relief. (See *Village*

*Nurseries, L.P. v. Greenbaum* (2002) 101 Cal.App.4th 26, 46-47; *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 636-637.)

#### **IV. Memorandum of Points & Authorities**

- A. The memorandum “must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases and textbooks cited in support of the position advanced.” (Cal. Rules of Court, rule 3.1113(b).) The court may treat the failure to provide the memorandum as an admission that the motion is not meritorious and cause for its denial. (Cal. Rules of Court, rule 3.1113(a).)
- B. California Rules of Court, rule 3.1114 identifies a list of specific motions for which no memorandum of points and authorities is required, including applications for appointment of guardian ad litem in civil cases and motions to be relieved as counsel.
- C. The memorandum of points and authorities must accompany the notice of motion and may not exceed 15 pages in length, but the memorandum in support of a motion for summary judgment or summary adjudication may be 20 pages in length. (Cal. Rules of Court, rule 3.1113(a).) Any memorandum in support of an opposition is subject to the same page limitations, and any memorandum in support of a reply may not exceed 10 pages in length. (*Ibid.*) Any memorandum over 10 pages must include a table of contents and table of authorities. (Cal. Rules of Court, rule 3.1113(f).)
  - 1. The court has discretion to refuse to consider a memorandum of points and authorities that exceeds the page limits in the same way it has discretion to refuse to consider untimely motions and briefs. (Cal. Rules of Court, rules 3.1113(g), 3.1300(d).)
  - 2. Often judges will simply stop reading when they hit the page limit, but it is up to the individual judge how to handle a memorandum of points and authorities that exceeds the page limit.
  - 3. Do not risk it. Make sure your memorandum of points and authorities complies with the page limits. Do not try to play games with the margins, page numbering, etc. Research attorneys read briefs all day long every day. They have seen it all.
  - 4. You may apply to the court for permission to file a longer brief, but you must obtain permissions before filing the brief. (Cal. Rules of Court, rule 3.1113(e).) The parties cannot agree to longer briefs without the court’s approval.

- D. **Tone/Civility/Professionalism:** Keep your papers' tone professional and civil. Avoid insulting the opposing party or opposing counsel. Focus on the issues presented by the motion; do not just complain about your opponent or argue your entire case. The memorandum of points and authorities is used to explain why the court should grant the specific relief sought by the motion, not why you should win the case at trial. Hyperbole, disrespect, and arguments belittling your opponent do not advance your position and actually diminish your papers' persuasive force and your own credibility.
- E. **Introduction:** You should include an introduction that provides a statement of the relief being sought and a brief summary of the arguments why that relief should be granted. An introduction should provide the reader a roadmap of the issues and arguments to be addressed in the order they will be addressed.
- F. **Statement of Facts:** Provide a brief, *accurate* summary of the facts relevant to the motion being brought to help the court understand what the case and issues are about. Do not summarize your entire case if it is not relevant to the motion. For example, the court does not need a four-page summary of the claims and underlying facts to rule on a motion to compel a party to appear for his or her deposition. Although you may summarize facts in a light most favorable to your client, do not misstate or exaggerate the facts, as this will destroy your credibility.
1. But, do not assume the court is familiar with the facts of the case or remembers everything that occurred procedurally before the motion at issue was filed. Although, generally, a case will be assigned to the same legal research attorney each time a new motion is filed, the research attorneys read numerous motions every day. Provide enough facts so that the reader can place the issues in context. Identify any prior orders relevant to the present motion, and briefly explain the facts leading up to the filing of the motion or the context in which the motion arises.
  2. The facts set forth in your memorandum of points and authority are not evidence and cannot be considered in ruling on your motion unless supported by admissible evidence filed in support of the motion, such as declarations and exhibits. (See *Smith, Smith & King v. Superior Court* (1997) 60 Cal.App.4th 573, 578.)
  3. Consider using timelines, charts, photographs, etc., if they help tell the relevant story and are supported by admissible evidence. You can cut and paste these things into your motion.
- G. **Argument.**
1. Use headings to organize your argument and break it up into digestible parts the reader can easily understand. Your headings should provide a good outline of your argument. A good heading summarizes the point being made in that

section; it is not just a title. For example, on a demurrer, do not just have a heading saying “The First Cause of Action for Breach of Contract.” Instead, say “The Breach of Contract Cause of Action Fails Because It is Time Barred.”

2. Good organization is key. Make it easy for the reader. Consider creating an outline before actually drafting your memorandum. Papers that ramble, jumping from issue to issue, with no structure, are extremely difficult to follow, and there is a greater likelihood that issues will be missed by the reader.
3. Do not ignore facts or law contrary to your position. You have an ethical obligation to disclose any authority on point even if it is contrary to your client’s position. Moreover, you can minimize the negative impact if you raise the facts or authorities and address them first by explaining why they do not defeat your motion. Similarly, do not ignore your opponent’s arguments.
4. Check citations for accuracy and make sure the authority actually stands for the proposition you are arguing. Be careful not to take portions of a case out of context. Many times attorneys cite to a particular sentence or paragraph in a case for a particular proposition without actually reading the case and realizing that either it does not stand for the proposition, or it actually stands for the opposite. Failure to accurately cite authority negatively impacts one’s credibility with respect to the argument as a whole.
5. Lengthy string cites are not necessary and actually distract and confuse the reader. It is better to cite to one or two good cases on point and discuss those cases in a little detail. Do provide pinpoint cites to cases. Do not expect the court to search through a case for the proposition you are arguing.
6. Avoid lengthy block quotes. Keep quotes short and summarize a case’s holding or the governing rule of law. Discuss the law; do not just cut and paste it.
7. Do not cite unpublished cases.
  - a. Except as law of the case, an appellate opinion that was not certified for publication or ordered published “must not be cited or relied on by a court or a party in any other action.” (Cal. Rules of Court, rule 8.1115(a).)
  - b. It is likewise improper to cite to a trial court opinion in an unrelated case. (See *Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 831.)

- c. Violation of this rule may lead to sanctions (e.g., striking the brief as “defective” and/or monetary sanctions against counsel). (See *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 885-886.)
- d. Because rule 8.1115(a) expressly applies only to unpublished California cases, unpublished federal district court opinions are citable as persuasive, although not precedential authority. (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1301, fn. 11; *Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141 Cal.App.4th 969, 986, fn. 1.) This does not mean the court will be receptive to this authority.

H. Proofread before filing.

## V. Evidence

- A. Evidence is required for most motions, but prohibited for some. Know which is which and draft your motion accordingly. Here are some examples:
  - 1. A demurrer, motion to strike, or motion for judgment on the pleadings attacks the adequacy of a pleading’s allegations by assuming they are true. In some instances, a request for judicial notice may be made in support of a demurrer or motion to strike, but declarations and other forms of evidence are not permitted. Similarly, you may not use a request for judicial notice to disprove a party’s allegations on a demurrer or motion to strike.
  - 2. A summary judgment motion uses evidence to show a party cannot establish a claim or defense. Evidence is required and the motion will be denied without supporting evidence.
- B. Evidence on law and motion matters is almost always presented by declarations, requests for judicial notice, or other form of written evidence. (Cal. Rules of Court, rule 3.1306(a).)
  - 1. The court has discretion to receive oral testimony on a contested issue of fact in a motion hearing. (Cal. Rules of Court, rule 3.1306(a)&(b); *Mutual Mortgage Co. v. Avis* (1986) 176 Cal.App.3d 799, 805.)
  - 2. But the court also has discretion to refuse to allow oral testimony (and usually does so). Appellate courts will not interfere except for clear abuse of discretion. (*Eddy v. Temkin* (1985) 167 Cal.App.3d 1115, 1121.)
- C. Declarations.
  - 1. Declarations under penalty of perjury are the most common form of evidence on law and motion matters. Although declarations are hearsay, Code of Civil Procedure section 2009 creates an exception to the hearsay rule that permits

otherwise admissible evidence to be presented on law and motion matters through declarations. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1355; *North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 Cal.App.4th 762, 778-779.)

2. Declarations must be executed under penalty of perjury. (Code Civ. Proc., § 2015.5.)
  - a. If executed within California, the declaration must state the declarant certifies or declares under penalty of perjury that the foregoing is true and correct and also identify the place where the declaration is executed, e.g., Orange, California. (Code Civ. Proc., § 2015.5.)
  - b. If executed outside California, the declaration must state the declarant certifies or declares under penalty of perjury *under the laws of the State of California* that the foregoing is true and correct. (Code Civ. Proc., § 2015.5.) Simply stating under penalty of perjury or under penalty of perjury of the laws of the United States is not sufficient. A declaration executed outside of California that fails to include the words “under the laws of the State of California” is inadmissible hearsay. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 612.)
  - c. Although it would appear obvious, a declaration must be signed by the declarant personally, not by an attorney or anyone else on the declarant’s behalf. (*Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1222-1223.)
3. The declarant must be competent to testify and must have personal knowledge of the facts set forth in the declaration. It is not enough for the declaration simply to state the declarant has personal knowledge of the facts stated. Rather, the declaration itself must contain facts showing the declarant’s connection with the matters stated therein, establishing the source of his or her information. Otherwise, the declarant’s statement he or she has such knowledge is purely a conclusion. (Evid. Code, § 702; *Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 851.)
  - a. A declaration on information and belief is proper only where permitted by statute (e.g., to verify pleadings under Code of Civil Procedure section 446) or “where the facts to be established are incapable of positive averment.” (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 86.) “Information and belief” indicates the statement is not based on the declarant’s firsthand knowledge but that person nevertheless, in good faith, believes the statement to be true. (*Id.* at p. 93, fn. 9; *Thibaut v. Blue Cross of Indiana* (1986) 178 Cal.App.3d 1157, 1161.)



certified or otherwise authenticated through admissible evidence. (See, e.g., *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 746 [declining to take judicial notice of document from Nevada court because it was not a certified copy and was not otherwise properly authenticated].) Evidence of any other necessary foundational facts also must be provided. (See, e.g., *Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley* (1986) 180 Cal.App.3d 152, 162 [declining to take judicial notice because proponent failed to show that the subject was not reasonably subject to dispute].)

2. The specific grounds upon which judicial notice is requested should be specified. Do not simply request judicial notice pursuant to Evidence Code sections 452 and 453. Rather, for example, state judicial notice is requested pursuant to Evidence Code section 452(d) because the document is a record of another court.
  3. Judicial notice must be requested for a proper purpose. For example, the court may take judicial notice of the fact that a particular document was filed with the court. However, the court may not take judicial notice of the facts contained in most documents. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1569; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864-865 [court may take judicial notice of declaration filed in an action, but not of the truth of the statements made in the declaration].)
  4. Moreover, judicial notice of one fact does not establish other facts. For example, judicial notice that a grant deed was recorded vesting title in a person's name does not establish that such person still holds title several years later.
  5. "Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with rule 3.1306(c)." (Cal. Rules of Court, rule 3.1113(l).) Rule 3.1306(c) requires a party requesting judicial notice to provide the court and each party with a copy of the materials that are the subject of the request.
- H. Provide clear citations to your evidence to support the factual assertions in your points and authorities. Do not simply refer to the Jones declaration or the purchase agreement. Rather, provide a specific cite using page numbers or, when available, paragraph or section numbers. (Cal. Rules of Court, rule 3.1113(k).) If the court and research attorney cannot readily find the evidence you are citing, they may conclude you did not actually present any evidence to support the factual assertion.

## **VI. Separate Statements**

- A. A motion for summary judgment or adjudication requires a separate statement of undisputed material facts setting forth (1) each undisputed fact the moving party

contends entitles him or her to summary judgment or summary adjudication and (2) the evidence establishing each of those facts. (Code Civ. Proc., § 437c, subds. (b)(1) & (b)(3); Cal Rules of Court, rule 3.1350(c), (d), (e), (f), (h).)

- B. Many discovery motions require a separate statement setting forth the discovery requests and responses at issue, any information needed to understand the requests and responses, and a statement of the factual and legal reasons why a further response should be required. (Cal. Rules of Court, rule 3.1345.)

## **VII. Proposed Order/Pleading**

- A. Although not required, the moving party may submit a proposed order to the court prior to the hearing. If you choose to do so, California Rules of Court, rule 3.1113(m) requires that it be lodged and served with the moving papers, not attached to them.
  - 1. The more complicated the case, the less likely a proposed order will be helpful. Indeed, an order drafted before the court rules on the motion will often need to be revised to comply with the court's ruling.
  - 2. However, there is generally no harm in preparing a proposed order and lodging it with your moving papers.
  - 3. Indeed, if time is of the essence, lodging a proposed order is the only real way to have the court sign an order at the hearing.
  - 4. Moreover, some motions that can be made on Judicial Council forms, such as an application for writ of attachment and motion to be relieved as counsel, include form orders that can actually be completed at the time of the hearing if lodged with the moving papers.
- B. Proposed Pleadings.
  - 1. When bringing a motion for leave to file an amended pleading (e.g., complaint, answer, or cross-complaint) or a pleading in the first instance (e.g., a cross-complaint or a complaint-in-intervention), a copy of the proposed pleading must be included with the motion. (See, e.g., Cal. Rules of Court, rule 3.1324(a)(1).)
  - 2. However, if the motion is granted, the Court cannot properly take the motion apart to file any proposed pleading that is attached as an exhibit; the motion must be left intact.
  - 3. As such, the original of the proposed pleading should be lodged with the court or brought to the hearing for filing. Otherwise, the moving party will be required to incur the time and expense of filing the original at a later time.

## **VIII. Hearing**

### **A. Tentative Rulings.**

1. Most judges will provide a tentative ruling of some kind. Many post their tentative rulings online and/or outside the courtroom prior to the hearing. Sometimes a judge will provide tentative ruling from the bench.
2. In lieu of an actual ruling, a judge may post or present questions they have.
3. Once a tentative is posted, most judges will not accept any further papers regarding the motion.

### **B. Continuances/Off Calendar.**

1. If you intend to continue your motion or take it off calendar, notify the department as early as possible. Motions are often worked up by the research attorneys and reviewed by the judge a few days before the hearing. If you wait until the last minute, the research attorney or the judge may already have spent the time working up the motion.
2. Once a tentative ruling is posted, many judges will not allow a motion to be taken off calendar (or possibly even continued). For example, you cannot take a motion off calendar once the judge posts a tentative ruling denying your motion to avoid a ruling against your client.
3. Only the moving party can continue a motion or take it off calendar. The opposing party cannot.
4. If you continue a motion, file and serve a notice stating the motion is continued and providing the continued hearing date.

### **C. Failure to Appear at Hearing.**

1. If you so choose, you may elect not to appear at the hearing and submit on your papers. You must give the court and other parties notice of your intent not to appear. The court may nonetheless order you to appear if it would like to discuss the matter with you. (Cal. Rules of Court, rule 3.1304(c).)
2. If you fail to appear without providing notice the court may take the motion off calendar and not allow you to reset the hearing without first obtaining the court's permission. The court also may rule on the motion if it chooses. (Cal. Rules of Court, rule 3.1304(d).)

3. It is generally a good idea to appear at the hearing on any motion. You never know if there is a minor problem with your motion or question the court has that could be easily resolved, but results in your motion getting denied because you did not appear.
4. There are procedures for seeking to appear telephonically that can be explored as an alternative to personally appearing. (See Code Civ. Proc., § 367.5; Cal. Rules of Court, rule 3.670.) Do not wait until the last minute to explore this option.

D. Oral Argument.

1. Tailor your oral argument to the court's tentative ruling or any questions the court may pose.
2. Do not reargue your papers or give a canned speech.
3. If the tentative ruling is in your favor, and the opposition has not done anything to change the judge's mind, submit on the tentative. You do not have to argue just because you appeared. An attorney can turn a victory into a defeat by presenting argument that was not necessary.
4. If you intend to argue a new case or new facts that were not presented in your papers. Give your opponent as much advance notice as possible. The court's first question will often be whether you gave such notice and the court may not consider them without such notice and a good explanation why the authority or facts were not presented in your papers.
5. Do not be afraid to acknowledge weaknesses in your position or contrary authority. Instead, face them head on and explain why they do not defeat your position.
6. Speak slowly for the court reporter.
7. Do not interrupt the judge.
8. Direct argument and comments to the court, not opposing counsel.

## **IX. Post-Hearing Procedures**

A. Notice of Ruling.

1. At the conclusion of the hearing, the court typically will ask whether the parties waive notice or whether someone would like to give notice. Notice may not be waived unless all parties are present. To be effective, a waiver must be in open court and entered in the minutes. (Code Civ. Proc.,

§ 1019.5(a).) If someone is not present, advise the court and offer to give notice. If the court forgets to ask, raise the issue.

2. The notice of ruling is required to start the time running (a) to amend or answer after the court's ruling on demurrer (Code Civ. Proc., § 472b) or (b) to seek reconsideration (Code Civ. Proc., § 1008(a); see *Forrest v. State of Calif. Dept. of Corps.* (2007) 150 Cal.App.4th 183, 203).

B. Order.

1. Unless the court orders otherwise or notice is waived, the prevailing party must, within 5 days after the ruling, serve a proposed order on opposing counsel by means authorized by law and reasonably calculated to ensure delivery by the close of the next business day, without any extension of time based on the manner of service. (Cal. Rules of Court, rule 3.1312(a).)
2. Opposing counsel then has 5 days after service (again, without any extension of time based on the manner of service) to notify the prevailing party's counsel of any objections to the proposed order, stating the reasons for its objections. (Cal. Rules of Court, rule 3.1312(a).)
3. The prevailing party must then promptly transmit the proposed order to the court, together with a summary of any responses received from opposing counsel or a statement that no responses were received. (Cal. Rules of Court, rule 3.1312(b).)
4. The court will not follow up to inquire where an order is if you do not submit one.
5. Sometimes the lack of an order signed by the court is not an issue because the clerk prepares a minute order setting forth the outcome of the motion. Different clerks, however, provide different levels of detail and have different levels of understanding regarding the court's ruling.
6. A signed order, however, is essential for some purposes. For example, if you obtain monetary sanctions against the opposing party or opposing counsel, they are enforceable in the same manner as a money judgment. (See Code Civ. Proc., §§ 680.230, 680.270 & 699.510; *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 615.) That means you can obtain a writ of execution from the court and levy on the person's property. The court, however, typically will not issue a writ of execution without a signed order. An unsigned minute order is not enough.

C. Reconsideration.

1. Code of Civil Procedure section 1008 allows a party to request the court to reconsider a ruling. Section 1008, however, provides very strict time and other procedural requirements. The court may not grant a party's request to reconsider a prior ruling if the request fails to comply with all of section 1008's requirements. (Code Civ. Proc., § 1008(e); *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105-1107.)
2. On its own motion, however, the court may reconsider any of its rulings prior to the entry of judgment. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105-1107.)