Opposing motions for summary judgment in medical malpractice cases

The best time to prepare for a motion for summary judgment is when you first accept the case

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Historically, motions for summary judgment have served a relatively simple purpose: they went behind the pleadings to weed out cases that lacked evidentiary support. Because the losing party was deprived of a trial on the merits, grant-ing such a motion was considered a drastic remedy.

The motion for summary judgment has evolved from its rather singular purpose to serve a multitude of functions. It has now become a major "billable" event, requiring a plethora of documents to support it. Some motions are made to force a plaintiff's attorney, who usually works on a contingency basis, into a significant expenditure of time and effort, and a possible settlement. The motion can also be used to ascertain the identity of plaintiff's expert in advance of the expert designation and learn what that expert has to say.

The trend of authorities in the last 15 years has lightened defendant's burden in pursuing these motions while increasing the plaintiff's burden. In medical malpractice cases, a plaintiff's attorney quite often received a motion that included a three-paragraph declaration from defendant's expert, stating his or her qualifications, what documents were reviewed, and in a single paragraph, an opinion that the health care provider did not violate the standard of care. This declaration was enough to put plaintiff's attorney in a quandary whether to respond with an equally lean declaration from plaintiff's expert, rebutting the conclusion of the defendant's expert, or whether the declaration should be beefed up a bit.

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The California Supreme Court attempted to clarify the parties' burdens in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826. The Court held that the moving defendant bears the burden of persuasion that no triable issue of fact exists. A triable issue exists if the evidence would allow a jury or trier of fact to find in the opposing party's favor pursuant to the applicable standard of proof. If this burden is satisfied, the burden shifts and the opposing party has the burden of production to make a prima facie showing of a triable issue. How these burdens are resolved depends on the burden each party bears at trial.

The court in *Aguilar* disapproved of decisions requiring the defendant to "conclusively negate" an element of plaintiff's cause of action. However, a defendant could not merely argue plaintiff lacked evidence; the defendant was required to present evidence that plaintiff could not obtain such evidence. This standard could be satisfied by showing plaintiff's factually devoid discovery responses were such that the defendant would be entitled to a directed verdict.

To prove a medical malpractice case, the plaintiff must establish "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.'" (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)

In *Hanson v. Grode, supra,* the court noted the standard for summary judgment motions in medical malpractice actions:

> California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (*Id.* at p. 607.)

Upon receipt of the motion, the plaintiff's attorney often assumes a defensive position and worries about how to *oppose* the motion, while ignoring the question of whether the defendant has met the moving party's initial burden of persuasion. Before that happens, the attorney should carefully scrutinize the motion to determine if it passes muster under Code of Civil Procedure section 437c. Here are a few considerations:

Timing

If the motion is made before 60 days has elapsed from the general appearance of the opposing party, it is premature. (Code Civ. Proc. § 437c(a).) Code of Civil Procedure section 437c(a) requires the notice and all supporting papers be served at least 75 days before the hearing date. This 75-day period only applies to motions that are personally served; all others are extended by the manner of service and location of service. The motion must be heard 30 days before trial unless the court "for good cause" orders otherwise. In *McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 115, the court held trial courts do not have the authority to shorten the minimum notice period for summary judgment hearings.

Undisputed material facts

• *Does the separate statement contain "facts"?* Sometimes the moving party will insert legal conclusions in the guise of "facts." Although some courts believe objections do not belong in this statement, you may want to include an objection, i.e., relevance, misstates the evidence, or the "fact" constitutes a legal conclusion.

All "facts" should be there. If there are facts located in the memorandum of declarations, but not in the separate statement, the court has the discretion to ignore that evidence. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 315.) (Note: The trial court also has the discretion to consider all of the evidence presented by the moving party, even if it does not appear in the separate statement. *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1480-1481; *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 437.)

• *Does the evidence produced match the "fact"?*

Compare the evidence produced with the fact, and you may find that the defendant has taken liberties in paraphrasing the facts or distorting what has been said. If so, include an objection that defendant's evidence does not support this fact.

• *Are there other "facts" that should be included in the separate statement?*

Don't be limited by the moving party's statement of facts. The moving party is required to submit a separate statement "setting forth plainly and concisely all material facts which the moving party contends are undisputed." (Code Civ. Proc. § 437c(b).) Your job, on the other hand, is to provide a separate statement that responds to those facts, but also sets forth "plainly and concisely any other material facts which the opposing party contends are *disputed.*" (Emphasis added.) List facts that create a triable issue and provide admissible evidence supporting those facts.

Declarations

• *Are the moving party's declarations based on personal knowledge?*

All declarations are required to be based on personal knowledge, must set forth admissible evidence, and shall show that the declarant is competent to testify to the matters stated therein. (Code Civ. Proc., § 437c(d); see also Code Civ. Proc., § 2015.5.) Some defects are obvious, such as where the declarant fails to indicate affirmatively that the declaration is based on such knowledge (although the declaration may show personal knowledge).

Do not overlook the possibility that the declarant lacks personal knowledge, despite claiming otherwise, such as where the declarant states he or she "learned," "discovered," or "was informed." Watch for language that reveals a lack of personal knowledge. For example, certain facts may reveal this defect, i.e., when a declarant, who states he or she joined a company in 1998, is describing conditions that existed in 1996.

In a medical malpractice case, expert testimony is required on the issue of whether the defendant performed according to the prevailing standard of care, except in those cases where the defendant's negligence is obvious to a layperson. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) The defendant may support the summary judgment motion with his or her own declaration. (*O'Connor v. Bloomer* (1981) 116 Cal.App.3d 385, 391.)

Since the expert usually will not have been personally involved in the incident, he or she is limited to the testimony given. For example, the expert's testimony is admissible if based on a "matter of a type that may reasonably be relied on by an expert in forming an opinion on the subject to which his testimony relates." (Evid. Code, § 801(b).) At trial, the expert will give the bases for his or her opinion; in fact, the court may require the expert to state the bases for the opinion before it is given. (Evid. Code, § 802.) "An expert's opinion, even if uncontradicted, may be rejected if the reasons given for it are unsound." (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.)

The reviewing court in *Kelley* held the expert's declaration was not admissible because it failed to disclose the matter relied on in forming the opinion. The declaration lacked the "required foundational showing that the opinion rests on matters of a type experts reasonably rely on is not made where, as here, the expert does not disclose what he relied on in forming his opinion." (*Id.* at p. 524.) The court then noted that this "*deficiency*

was waived by Kelley's failure to object, we point it out for the benefit of other litigants confronting these issues." (*Ibid.*) (Emphasis added).

The court found that an opinion that is unsupported by such reasons or explanations cannot establish the absence of a triable issue. The plaintiff also submitted an expert declaration giving an opinion that there was negligence, thus presenting a triable issue of material fact. The court concluded:

> It is not our intent to disparage either the summary judgment procedure, or its appropriate use in malpractice cases. The procedure is a long-established and important part of our civil system. Summary judgment is appropriate in every case where the statutory standard is met, and the absence of material issues for trial established. However, that standard is not satisfied by laconic expert declarations which provide only an ultimate opinion, unsupported by reasoned explanation.

(*Id.* at pp. 524-525.)

This case is not only instructive in giving suggestions in objecting to a defendant's declarations, but provides guidance as to what *your expert* should be stating in his or her declaration. While it should remain a strong weapon in your arsenal, *Kelley v. Trunk, supra,* has been cited numerous times. As noted below, the courts have ranged from acceptance of this higher standard to being critical of a strict application of the rules stated in *Kelley.*

• *Should you object to every statement made in a declaration?*

No judge wants to see objections to every paragraph of a declaration or a page after page of boilerplate objections. Be selective with your objections. Don't ask the judge to rule on objections that have little effect on the motion. Limit your objections to the ones that make a difference.

If appropriate, challenge the expert's qualifications. Consider not only the listed qualifications but what is omitted. If your client has not been examined by the expert, is there an advantage to this fact?

Finally, get a ruling. If you don't, you may waive the objection. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.) Chances of obtaining a ruling increase, the fewer your objections. Waiver will not be found if you requested a ruling and the court refused to comply. (*City of Long Beach v. Farmers & Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, 784-785.) There is also limited authority that since the summary judgment is decided on a de novo review, the court may consider the objections anew, (*Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, 149, fn. 2), but don't depend on this principle to save your opposition.

• *Are the statements made therein, particularly those of the expert, conclusory and lacking in foundation?*

In *Kelley v. Trunk, supra*, the expert's declaration was one and one-half pages, indicated the expert's credentials, the medical records he reviewed, summarized the case, and then stated the defendant "acted appropriately and within the standard of care under the circumstances presented." The expert did not explain the basis for his opinion. Neither side presented evidence of the nature of the disease or injury, or its symptoms.

An expert must be able to offer an opinion that causation is established to a "reasonable medical probability" (greater than 50 percent). Causation cannot be proved by an expert's opinion that is based on inferences, speculation and conjecture. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776.) Avoid statements that the defendant "should" have done something else. "To be sure, 'professional prudence is defined by actual or accepted practice within a profession, rather than theories about what 'should' have been done.'" (*Hanson v. Grode, supra,* at p. 607.)

The court in *Hanson* commented that in *Kelley v. Trunk, supra*, the court required the expert's declaration set forth the factual basis for the expert's opinion in "excruciating detail" and decline to apply the same standard. (*Id.* at p. 608.) While it may take more time, if your declaration passes the standard recommended in *Kelley,* then theoretically, it should pass muster in all courts.

Obtaining further discovery

• *If you believe you can obtain admissible evidence to oppose the motion, then ask for a continuance.*

If you believe you can provide "facts essential to justify opposition," then request a continuance or additional discovery. (Code Civ. Proc., § 437c(h).) Don't forget to also ask for a denial of the motion. The court can also grant a continuance or make any order that may be just. If your continuance depends on obtaining discovery under the defendant's control, make sure your application includes a request for a continuance as well as the discovery. You may need to seek an additional continuance if the moving party fails to cooperate in providing the requested discovery. (Code Civ. Proc., § 437c(i).)

When requesting a continuance, make sure your application is complete. To obtain a continuance, you must show that the facts to be obtained are essential to opposing the motion; there is reason to believe such facts may exist, and the reasons why additional time is needed to obtain these facts. (*Frazee v.* Seely (2002) 95 Cal.App.4th 627, 633.) If your opposition depends on deposing defendant or a third party witness, try to arrange for the deposition *now*.

Where a party presents evidence that raises an issue as to the foundation of an expert's opinion in the motion, a deposition limited to that subject should be allowed. (*St. Mary Medical Center v. Superior Court* (1996) 50 Cal.App.4th 1531, 1538-1539.) The obstacles you encounter in scheduling the discovery will become

part of your application, rather than simply insisting that such discovery is necessary. Do not depend on a blanket statement that you believe evidence exists (but you don't know what it is) to obtain a continuance.

Conclusion

One plaintiff's attorney stated that when he is served with a motion for summary judgment, he contacts the opposing attorney and asks him to participate in a conference call with his expert. At that time, the defendant's attorney is free to discuss with the expert his professional opinion that malpractice has indeed occurred. Another option would be to prepare your expert's declaration, detailing his opinion and setting forth triable issues that would defeat the motion for summary judgment. This declaration could be sent in advance of the motion with a letter requesting that the motion for summary judgment be withdrawn, possibly followed with the motion for sanctions.

The best time to prepare for a motion for summary judgment is when you first accept the case. After your expert reviews the case, he or she will tell you the specific acts of malpractice. If your expert's opinion is based on speculation and conjecture, you want to know early on rather than to discover later that your case is built on thin air.

These acts potentially give rise to triable issues and will find their way into your expert's declaration. Anticipating a future motion for summary judgment and preparing for it at this stage will allow you to meet the challenge immediately, knowing you have the evidence to support the existence of a triable issue.


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