



Litigation Practice Tip - August 2021

Declarations and Personal Knowledge: Do the people really know what they are talking about?

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We know that declarations are the principal way to introduce evidence in a case prior to trial. But how often have you thought about what the legal requirements for a declaration are. In this practice tip I will provide some tips to on the requirement of personal knowledge.

Declarations come from four categories of witnesses: (1) parties, (2) third parties, (3) attorneys and other legal advocates for the parties, and (4) experts. With the exception of experts, witnesses in both state and federal courts are required to prove that they have personal knowledge of the factual assertions in their declarations and that proof must be based on admissible evidence.^[1]

That boilerplate first line you frequently use? It doesn't do what you think it does.

Declarations often begin with an assertion along these lines – “I, Mona Lisa, have personal knowledge of the following statements and, if called as a witness, I could and would competently testify to the facts set forth in this declaration.”

But the above assertion of personal knowledge is a conclusory statement by a witness and does not prove anything by itself. To meet the state or federal requirements, the declarant must explain how the individual has firsthand knowledge of the facts in the declaration. You may want to include the above standard statement at the beginning of the declaration since some judges expect it and will take some measure of comfort from the explicit statement that the declaration is based on personal knowledge. On the other hand, you could omit the standard statement as the first sentence and use a more powerful introductory statement at the declaration's beginning (e.g., “I have gone hungry for the past three days”).

The show and tell of personal knowledge.

The first step is the easiest: use the word “I” followed by some action to establish personal knowledge. For example:

- “I went to the County office on March 10, 2021 to discuss my Medi-Cal benefits” (declarant has personal knowledge to describe what then happened during that office visit);
- “I spoke with my social worker over the telephone on March 10, 2021” (declarant has personal knowledge to describe what she and social worker then discussed during the phone call);
- “I watched the maintenance company work outside my apartment on March 10, 2021” (declarant has personal knowledge to describe what he actually observed was done in terms of maintenance work).

Choose accuracy over specificity.

The more details a declaration supplies as to the circumstances surrounding a particular event, the greater confidence the judge and others will have in the declarant's personal knowledge of that event. To use one of the above examples, a Medi-Cal recipient could provide additional details on her March 10, 2021 trip to the County office, such as the office's location, duration of the visit and person or persons with whom she spoke.

Be careful, however, to include facts in the declaration where you have some confidence in the truthfulness of the assertions. If, for example, the Medi-Cal recipient does not recall the exact date or even month of a visit, she should say that she went to the County office sometime in the spring of 2021.

Key giveaways that the declarant lacks personal knowledge.

Review declarations from our side and, perhaps more importantly, the other side to determine whether the declarant truly has personal knowledge of the facts asserted therein. For example, an individual's job or responsibilities may raise questions about their ability to give testimony. A police chief does not have personal knowledge of specific incidents involving front line officers unless the police chief was physically present and witnessed the actual incidents.

Some signs of a declarant's lack of personal knowledge are:

- recounting statements from others (e.g., "the social worker told me what happened on the March 10, 2021 visit"),
- speaking in the passive voice (e.g., "the application for Medi-Cal benefits was denied during that March 10 visit") or
- speaking in vague generalities about what is supposed to occur and not what actually happened in a particular incident (e.g., "during a visit to the County office to discuss her benefits, such as the March 10, 2021 visit, our policy is to ask the recipient about their ongoing eligibility for benefits").

Establishing personal knowledge of documents.

When a declaration refers to a letter, email or other document, the first step is to set forth the individual's personal knowledge relating to the document's creation, transmission or receipt in general and not its contents (e.g., "On March 10, 2021, I received an email from opposing counsel" or "On March 10, 2021, I downloaded a report from the County website whose website address is <https://dcfs.lacounty.gov/>").

The second step is then to make the document an exhibit to the declaration and authenticate what it is (e.g., "Attached hereto and marked as Exhibit 1 is a true copy of the March 10, 2021 email from opposing counsel").

For many attorneys, the third step is to repeat the critical contents of the document in the body of the declaration (e.g., "In the March 10, 2021 email, Defendant acknowledged that they had no evidence to prove the allegations of fraud"). Please note that this third step is optional; once you have completed the second step, you can refer to the contents of a documents in an accompanying memorandum or brief. In addition, if you are going to quote or paraphrase the contents of a particular document, make sure to give an accurate account of what was written.

Advocate declarations and questions of procedural history.

Declarations from attorneys and other advocates often begin with the following statement – "The information contained herein is based on my personal knowledge, or upon review of files and documents generated or received and regularly maintained by my office in connection with this case." Opposing counsel and judges will often allow an attorney or other advocate to recount the procedural history of a lawsuit regardless of whether they have personal knowledge of all the events (e.g., "On March 10, 2021, Plaintiff served her first set of document requests on Defendant"). They will allow this because the facts in question are not really disputed.

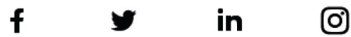
But the personal knowledge of attorneys and other advocates becomes important when the facts in question are significant and are disputed. If, for example, the exact date and time of service of a document becomes crucial, you should then have the person who

served the document complete the declaration.

Conclusion.

You should always consider an individual's personal knowledge in deciding who will submit a declaration in a lawsuit. If you have any questions about declarations, email Bob Newman at rnewman@wclp.org.

[1] See Cal. Evid. Code § 702; Cal. R. Ct. 5.111(b)(2); Fed. R. Evid. 602; see also Cal. Code of Civ. Proc. § 437c(d) (personal knowledge required for declarations in support of and opposition to summary judgment and summary adjudication motions in state court); Fed. R. Civ. P. 56(c)(4) (similar requirement of personal knowledge for declarations relating to summary judgment and partial summary judgment in federal court).



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